THE "NATURE" OF LEGAL DISPUTE BARGAINING

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The longstanding debate over the relative merits of adversarial and communitarian theories of legal dispute bargaining has been in somewhat of a holding pattern for several years, but recent research in the field of cognitive neuroscience may break this logjam. Laboratory experiments and case studies in that field have shown how dispositions and capacities for social cooperation inherited from natural selection and evolution predispose humans to configure disputing as a mixture of argument over factual reality, disagreement over the interpretation of normative standards, and a search for impartial resolutions that protect the interests of everyone involved equally. This neurobiological inheritance can be difficult to appreciate, resist, and control, but it is something all dispute bargaining theory, adversarial and communitarian alike, must take into account. Theories that ignore it are limited to telling only part of the dispute bargaining story.

I. Introduction

I have argued for years[1] that self-interested, adversarial behavior is an inescapable feature of legal dispute bargaining practice,[2] but many scholars disagree. They see adversarial

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[1] *See, e.g.*, Robert J. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985); Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992) [hereinafter *Bargaining in the Dark*]; Robert J. Condlin, *"Every Day and in Every Way, We are Becoming Meta and Meta," or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. ON DISP. RESOL. 231 (2008) [hereinafter *Every Day and in Every Way*]; Robert J. Condlin, *Bargaining With a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1 (2007) [hereinafter *Bargaining with a Hugger*]; Robert J. Condlin, *Legal Bargaining Theory's New "Prospecting" Agenda: It May Be Social Science, But is it News?*, 10 PEPP. DISP. RESOL. L.J. 215 (2010) [hereinafter *New "Prospecting" Agenda*]; Robert J. Condlin, *Bargaining Without Law*, 56 N.Y.L. SCH. L. REV. 281 (2011–12).

[2] I restrict my discussion to the resolution of disputes serious enough to warrant face-to-face bargaining, and make few if any claims about the ritualized disposition of routine disputes, dealmaking, negotiated rulemaking, or any of the other sub-categories of transactional bargaining in general. A legal dispute, as I use the term, is a disagreement between parties about the nature of their law-governed obligations to one another, over which a court would have jurisdiction should any of the parties choose to file their claims in a lawsuit. Dispute bargaining differs from transactional bargaining principally in the fact that the parties to a dispute are locked together in a relationship whether they want to be or not (i.e., they must deal with one another in court if they do not deal with one another in private). Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 37 (1996) ("[T]he legal system constitutes a metaphorical vessel which holds the protagonist and antagonist together in the same vessel in a forced relationship with each other until they resolve their conflict or it is resolved for them."). Transactional bargaining can involve disputes, but its principal concern is configuring relationships and ventures to promote joint economic returns in the future. The most important effect of the enforced pairing in disputes is that no one needs to make a special effort to be nice to hold the relationship together. They need only to avoid being more unpleasant than the experience of litigating in court. This permits parties to use strategies and maneuvers they might avoid if either side was free to walk away from the relationship and deal with someone else. As a consequence, dispute bargaining is the most boisterous of the various types of legal bargaining. For more detailed descriptions of the differences between dispute bargaining and transactional bargaining, see *Bargaining in the Dark*, *supra* note 1, at 3–

bargaining as misguided, counterproductive, and sometimes even pathological, and argue instead for an exclusively communitarian view—one that privileges collective interests over individual ones; avoids or minimizes argument over differences; encourages the full and frank disclosure of interests, objectives, and values; and treats the bargaining conversation as a form of joint problem-solving by colleagues.[3] I do not doubt that communitarian values, strategies, and outcomes play an important role in sustaining an effective system of legal dispute resolution.[4] Over time, in bargaining, everyone must do well for anyone to do well—it is not possible for there to be only one successful bargainer in town.[5] But, legal dispute bargaining is a complex social phenomenon in which the need to cooperate co-exists with the need to compete ("create" and "claim" in Lax and Sebennius's felicitous terms),[6] and an approach that ignores the role of adversarial strategies in that process will not protect all of the interests at play all of the time.

The debate over the relative merits of adversarial and communitarian bargaining theories has been in somewhat of a holding pattern for several years, but I will argue here that recent work in cognitive neuroscience breaks this impasse.[7] Extensive laboratory experiments and case studies in that field have shown that social cooperation strategies formed by natural selection and evolution predispose humans to understand disagreements with others in both individualistic and collective terms, and to pursue their own interests as well as those of their social group in resolving such disagreements. Among other things, this neurobiological inheritance causes legal bargainers to configure disputes as a mixture of argument over factual reality, disagreement over the meaning of normative standards, and a search for outcomes that protect the interests of everyone involved equally. Humans are programmed by nature to act both selfishly and selflessly when cooperating with others, in other words, and ignoring this programming, on the assumptions that bargainers are either apes or angels,[8] will confound everyone involved in the process. The foregoing argument, even if correct, will not end the bargaining theory debate, of

11; Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 385 n.9 (2010); Frank E.A. Sander & Jeffrey Z. Rubin, *The Janus Quality of Negotiation: Dealmaking and Dispute Settlement*, 4 NEGOT. J. 109 (1988).

[3] *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter *The Structure of Problem Solving*] (describing problem solving negotiation).

[4] I will use the terms dispute bargaining and dispute resolution (along with their attendant adjectives legal and lawyer), to mean the same thing. Some scholars prefer one term over the other and I have tried to respect those choices when discussing their works.

[5] ROBERT AXELROD, THE EVOLUTION OF COOPERATION 112 (1984) (in bargaining "the other's success is virtually a prerequisite of your doing well for yourself."); JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 22 (2013) ("[N]early all human relationships involve give-and-take, and all such relationships break down when one or both parties do too much taking and not enough giving.").

[6] DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 45 (1986) (describing "The Negotiator's Dilemma: Creating and Claiming Value").

[7] *See, e.g.*, JONATHAN HAIDT, THE RIGHTEOUS MIND (2012); GREENE, *supra* note 5; PAUL BLOOM, JUST BABIES: THE ORIGINS OF GOOD AND EVIL (2013); MATTHEW D. LIEBERMAN, SOCIAL: WHY OUR BRAINS ARE WIRED TO CONNECT (2013).

[8] Robert Ardrey explains the mistake in thinking of humans as exclusively angels or apes. *See* ROBERT ARDREY, AFRICAN GENESIS: A PERSONAL INVESTIGATION INTO THE ANIMAL ORIGINS AND NATURE OF MAN 47–48 (1961) ("[W]e were born of risen apes, not fallen angels, and the apes were armed killers besides. And so what shall we wonder at? Our murders and massacres and missiles, and our irreconcilable regiments? Or our treaties whatever they may be worth; our symphonies however seldom they may be played; our peaceful acres, however frequently they may be converted into battlefields; our dreams however rarely they may be accomplished. The miracle of man is not how far he has sunk but how magnificently he has risen. We are known among the stars by our poems, not our corpses."). To paraphrase James Madison "If men were angels no . . . [dispute bargaining] would be necessary." THE FEDERALIST NO. 51 (Jacob E. Cooke ed., 1961) (James Madison).

course, because the choice of a bargaining theory is as often ideological as reasoned, and ideology does not yield readily, even in the face of science.[9] That is both its greatest strength and its greatest weakness.[10] Still, it may be possible to raise doubts about, weaken support for, and add nuance to some of these ideological commitments, and those are my limited objectives here.

I will develop my argument in the following manner. Part II will describe the communitarian and adversarial conceptions of legal dispute bargaining that dominate in the scholarly literature and explain how they differ. Part III will summarize the research describing the predispositions and capacities for cooperation that humans inherit from natural selection and evolution, and Part IV will describe the implications of this research for legal dispute bargaining scholarship, showing how it provides a resolution to the debate over the relative merits of adversarial and communitarian theories of bargaining. This discussion is preliminary in every sense. The research in question is too voluminous and complex to be examined completely in a single article,[11] and its full implications for dispute bargaining theory and practice are not yet clear. But, a discussion of nature's influences on legal dispute bargaining must begin somewhere, and this seems as good a place as any.

II.   The Legal Dispute Bargaining Debate

Notwithstanding the recent proliferation of hybrid theories, the world of legal dispute bargaining scholarship[12] still divides, in many ways, into two principal views: those of adversarial and communitarian bargaining.[13] While both views share values, strategies,

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[9] GREENE, *supra* note 5, at 94 ("false beliefs, once they've become culturally entrenched—once they've become tribal badges of honor—are very difficult to change, and changing them is no longer simply a matter of educating people."); HAIDT, *supra* note 7, at 58 ("you can't change people's minds by utterly refuting their arguments."). Though ideology sometimes yields in the face of power. *See, e.g.*, B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 130 (1992) (describing the fortuitous "discovery" by Wilford Woodruff, President of the Church of Jesus Christ of Latter-day Saints, that the Lord approved of the Church's compliance with the Morrill Anti-Polygamy Act.).

[10] *See* DAVID SLOAN WILSON, DARWIN'S CATHEDRAL: EVOLUTION, RELIGION, AND THE NATURE OF SOCIETY 122–60 (2002) (describing the adaptive properties of the factually false belief systems of several different religions); HAIDT, *supra* note 7, at 299 ("irrational beliefs can sometimes help the group function more rationally").

[11] For an example of this complexity, see Greene's discussion of the neurobiological bases of, and cognitive processes involved in, acting in accordance with familiar utilitarian distinctions and principles such as ends/means, act/omission, violent/non-violent, and double effect, based principally on data collected from laboratory experiments based on variations of the Trolley problem. GREENE, *supra* note 5, at 211–53. *See also* BLOOM, *supra* note 7, at 167 ("Greene's [work on the Trolley Problem] was the tipping point, inspiring a wave of trolley problem research by psychologists, neuroscientists, and anthropologists."); *id.* at 165–70, 181–85 (describing Trolley Problem research).

[12] I include both scholars and practitioners in the "world" of dispute bargaining. Theory and practice inevitably are intertwined in discussions of dispute bargaining. Save for aesthetics and elegance issues, it is not possible to make suggestions for dispute bargaining theory without simultaneously making suggestions for dispute bargaining practice, and vice versa. One inevitably includes the other.

[13] Kenneth Kressel and his colleagues discovered something similar in studying mediation styles. In the first "large sample, systematic, and multiple observer" empirical study of mediator behavior, they found that despite the claims in the mediation literature that mediation styles break down into five conceptually distinct categories (i.e., Integrative, Evaluative, Transformative, Facilitative, and Latent Cause), in actual practice they reduce to just two (i.e., settlement-oriented and relationship oriented). Kenneth Kressel, Tiffany Henderson, Warren Reich, and Claudia Cohen, *Multidimensional Analysis of Conflict Mediator Styles*, 30 CONFLICT RESOL. Q. 135, 144, 156–59 (2012). The Facilitative Style was the most widely used and "a good fit for a majority of . . . mediators." *Id.* at 159. The Integrative style was the "most popular mediator self-endorsed style," *id.* at 157, though mediators in the study

objectives, and foundational principles in common, each also is based on a fundamentally different conception of social conflict, and committed to different beliefs about how best to resolve it, and each has a distinctive history and constituency all its own. Adversarial dispute bargaining is the older of the two views, the one more popular with lawyers,[14] and the view communitarian bargaining defines itself in opposition to, so I will begin with it.

Adversarial dispute bargaining, as communitarians describe it, is a "stylized, linear, and ritualized struggle"[15] that begins with a set of inflated opening demands and ends somewhere near the middle of a range of grudging, reciprocal concessions.[16] Adversarial bargainers[17] use position-taking, bluff, threat, and argument to outlast, intimidate, and coerce opposing parties into making unfavorable concessions and agreements.[18] They choose strategies based on what will produce the largest monetary gains, and take considerations of fairness, efficiency, and durability into account only to the extent that they affect immediate returns.[19] As one commentator put it, adversarial bargainers are like military generals excited about the prospect of achieving "victory over opponents on the field of battle," and less interested in "resolving the underlying disagreements between [the] parties."[20] Mixing metaphors, he continued, "[they] savor the . . . challenge of the negotiation chase as if it were only a game, like baseball, chess or poker."[21]

"endorsed in significant numbers all five of the stylistic vignettes." *Id.* at 148. Almost a quarter of the mediators described themselves as transformative, though not everyone in this group used transformative methods consistently. *Id.* at 158. Most of the research methods used to collect data on dispute bargaining also have this bipolar quality. Bargaining exit surveys, for example, typically ask lawyers to characterize their bargaining experiences in terms of adjective sets that divide bargaining behavior into mutually exclusive adversarial and communitarian categories, without providing the opportunity to report back mixed, qualified, contingent, or hybrid forms of bargaining behavior. *See, e.g.*, Leonard Greenhalgh, *Relationships in Negotiations*, 3 NEGOT. J. 235, 237 (1987) (describing bipolar and mutually exclusive metaphors for doing research on bargaining relationships); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 163–65 (2002).

[14] With the exception of lawyers in ideologically defined fields like collaborative law and transformative dispute resolution, most lawyers recognize the need for both adversarial and communitarian strategies in settling disputes. It's not that they prefer conflict to peace, but that they understand how cooperating with others committed to different values, beliefs, and objectives inevitably will involve conflict, and ignoring that conflict will not make it go away. There are competing conceptions of the good in life, and sometimes one has to fight to be treated fairly.

[15] Menkel-Meadow, *supra* note 3, at 770.

[16] *Id.* at 769 (describing adversarial bargaining as a "ritual of offer and demand").

[17] I use the term "bargainer" throughout the article to refer a person who conducts face-to-face bargaining with an adversary, and not to the party (i.e., client) that bargainer represents. Because the article is limited to a discussion of legal disputes, bargainer in this context also invariably will mean lawyer bargainer. Clients sometimes bargain for themselves, and sometimes work jointly with their lawyers in bargaining, but my focus will be exclusively on lawyers who bargain for clients. The cognitive neuroscience literature discussed in the next section may have implications for other types of bargaining, but I will not take them up here.

[18] Menkel-Meadow, *supra* note 3, at 778–80 (describing the techniques of adversarial bargaining as including "bullying, manipulating, deceiving, overpowering, and taking advantage of the other side").

[19] John S. Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOT. J. 179, 183 (1986) (adversarial bargainers choose strategies based on what will yield the biggest gain, not matter the cost and ignore concerns of "fairness, wisdom, durability, and efficiency"). *See also* Menkel-Meadow, *supra* note 3, at 765 (describing adversarial bargainers as parties who "want as much as they can get.").

[20] Murray, *supra* note 19, at 183; Menkel-Meadow, *supra* note 3, at 764.

[21] Murray, *supra* note 19, at 183. These are pretty low intensity games. Adversarial bargainers should be thankful that Murray did not include Mixed Martial Arts. For a less tendentious description of adversarial dispute bargaining, see Condlin, *Bargaining Without Law*, *supra* note 1, at 287–89.

Communitarians criticize this conception of dispute bargaining for being belligerent, wasteful, insulting, inefficient, polarizing, and lots of other things that would make a parent ashamed.[22] The criticisms usually are about form more than substance, finding fault with adversarial practices in their own right more than the circumstances in, or purposes for, which they are used. For example, communitarians criticize "take-it-or-leave-it" offers irrespective of whether there are legitimate reasons for drawing a line in the sand;[23] object to legal argument irrespective of whether it is used to pick a fight or defend against an attack;[24] and reject inflated demands irrespective of whether they are used to exploit misunderstanding, or test an adversary's representations about limits.[25] When possible, communitarians believe, it is better to avoid conflict than to work through it.[26]

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[22] Most of these criticisms were expressed first by Professor Menkel-Meadow in her early article describing a problem-solving alternative to adversarial bargaining, Menkel-Meadow, *supra* note 3, at 765–94 (criticizing the "structure and process of adversarial negotiation"), but many other commentators have added to the critique since then. *See, e.g.*, JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 75–85 (2008) [hereinafter MACFARLANE, THE NEW LAWYER] (describing the "norms of legal negotiation"); Murray, *supra* note 19, at 183 (describing adversarial bargaining as "aimed at persuading, coercing, deceiving or otherwise manipulating the opponent to an acceptable agreement"); Schneider, *supra* note 13, at 163–67 (describing adversarial bargainers as "stubborn," "headstrong, arrogant, and egotistical," "irritating, argumentative, quarrelsome, [and] hostile", focused on winning rather than resolving disputes.). I discuss these criticisms in more detail in Condlin, *Every Way and in Every Way*, *supra* note 1, at 238–45, and in Condlin, *Bargaining with a Hugger*, *supra* note 1, at 8–16. The criticisms resemble Professors Hoffman and Mehra's list of "over thirty distinct ways to irritate . . . Wikipedia users . . . ." David A. Hoffman & Salil K. Mehra, *Wikitruth Through Wikiorder*, 59 EMORY L.J. 151, 179–82 (2009).

[23] A party might have made several unreciprocated concessions and decided that it made no sense to continue to bargain against himself.

[24] Menkel-Meadow, *supra* note 3, at 826 ("Proposals justified by the legal merits can be problematic. Given a dispute where the parties have widely divergent views of the merits and how they will be determined by a fact finder, negotiators may find themselves involved in precisely the sort of unproductive argumentation inherent in adversarial negotiation.").

[25] Communitarians do not deny that, in theory, these and other such moves could be made for noble as well as base reasons, but they think that, as a practical matter, the moves almost always are made for base reasons.

[26] In the words of a friend who wishes to remain anonymous: "Conflict [is] dangerous, all our trade-flapdoodle notwithstanding. It can be very costly, and given its interactive essence none of us can safely assume that we can handle it well enough to avoid those costs. Time, money, emotional wear, frayed relationships into the future, diminished self esteem, the impact of the self perception that one has lost, the fear that the other's self perception of having lost will result in retaliation [are just] a few [of the] costs. Thus, minimizing [conflict], whether through reframing or avoidance, has a great deal to recommend it much of the time. Selecting when to confront . . . is an art form unexplored in our trade. . . . [T]he raw material with which we work—us . . .— is very poorly fitted to the purpose of sensibly resolving conflict." E-mail from *****, Professor, **** of ****, to author (Nov. 1, 2009). *See also* Julie Macfarlane, *The New Advocacy*, *in* AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, THE NEGOTIATOR'S FIELDBOOK 513 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (reporting the account of one lawyer as: "My nature, my personality has always been much more collaborative. I struggled to get that adversarial model to begin with. It never felt right."); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 560 (2006) ("In the back of my legal services office was one woman lawyer, who, instead of bringing dramatic class action lawsuits, quietly cultivated relationships and negotiated good outcomes for her clients."); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) ("I have trouble with polarized argument, debate, and the adversarialism that characterizes much of our work."); Scott Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 516, 531 (2005) (describing how some lawyers do not "relish" the adversarial aspect of lawyer bargaining). That lawyers are conflict averse would be ironic, of course, but perhaps not surprising. Just as sociopaths are drawn to psychiatry, litigants to American courts, and moths to flames, wusses may be drawn disproportionately to law. Professor McClurg explores one of the possible causes. Andrew Jay McClurg, *Neurotic,*

In the late 1970s, as a result of a growing dissatisfaction with the adversarial model, a small number of scholars began to develop a communitarian alternative.[27] That view, now probably the most popular one in the legal academy,[28] presupposes a world in which people always are at their best, self-interested behavior is rare, and argument over entitlement claims is avoided whenever possible. Parties share information about themselves and their situations fully and candidly, and always act in the interest of the common good.[29] Behaving in this way, communitarians argue, takes the hard edge off dispute bargaining, and makes it less antagonistic, less competitive, less deceptive, less manipulative, and less mean-spirited (and thus more effective) than it otherwise would be.[30]

Paranoid Wimps—Nothing Has Changed, 78 UMKC L. REV. 1049, 1052 (2010) (describing "the neurotic, paranoid wimpiness" of first-year law students).

[27] Gerald Williams usually is given credit for being the first to articulate a communitarian conception of bargaining but several others had started the movement before Williams' published his popular synthesis. *See Every Day and in Every Way*, *supra* note 1, at 278 nn.190–95 (describing the bargaining scholarship predating Williams's work).

[28] *Every Day and in Every Way*, *supra* note 1, at 298 (explaining how the communitarian view became the most popular one with law professors).

[29] *See, e.g.*, Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 909 (2004) ("[S]tudies suggest there is often less ideological and practical distance between opposing moral communities than individuals on each side of a dispute realize."). *See also* Condlin, *Bargaining Without Law*, *supra* note 1, at 291–96 (describing communitarian bargaining generally). In some of its grander manifestations, communitarian dispute bargaining is committed to "fairness, equality, reduction of human pain and suffering, care for all human beings, tolerance . . . peaceful coexistence wherever possible, and justice." *See* Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 554 n.5 (2006); *see also* Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 492 (2006) (describing how communitarian theory "turned negotiation into a deontological Kantian project of treating all people as ends, not means, for mutual benefit, not self-interested Hobbesian coexistence").

[30] Communitarian dispute bargaining theory developed in stages. In its earliest formulation it was described as a form of cordial bargaining. *See, e.g.*, GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983). Professor Williams did not adopt a cordiality view in so many words, but he laid the groundwork for it by arguing that effective bargainers are six times more likely to be cooperative than competitive and distinguishing the two styles principally in terms of social skill. Cooperative bargainers were "courteous, personable, friendly, tactful [and] sincere," while competitive bargainers were "tough, dominant, forceful, aggressive, attacking, ambitious, [egotistical, and] arrogant." *Id*. at 21–23. He acknowledged that the two styles have properties in common, *id.* at 27–30, and that one can bargain effectively in either style, but concluded that "the higher proportion of cooperative attorneys who were rated effective does suggest that it is more difficult to be an effective competitive negotiator than an effective cooperative." *Id.* at 19. Williams also recognized the importance of "legal astuteness" (the ability to make convincing legal arguments) to effective bargaining, however, and the seeming disconnect between argumentativeness and cordiality pressured communitarians to refine their theory. The first response was principled bargaining, a formulation that combined legal astuteness and cordiality into four core principles: "separate the people from the problem," "focus on interests, not positions," "invent options for mutual gain," and "base agreement on objective criteria." The first three of these principles remain a part of most communitarian theories to the present day, but the fourth added an adjudicatory element to the mix that some feared would cause bargainers to become sidetracked in well-intended but destructive disagreements over the meaning of "objective criteria." To avoid this, they developed a "problem-solving" version of communitarian theory, an approach that seeks to satisfy the "real," "underlying," "basic," and "actual," needs of the parties, rather than their legal needs. Problem solvers "consider multiple proposals for resolving disagreements rather than argue for or against single demands; articulate reasons for proposed solutions rather than make and reject proposals and concessions; seek out shared interests and third-party contributions; aggregate and disaggregate resources; look for substitute goods; and reconfigure draft agreements until they are Pareto optimal." They assume that party interests inevitably are compatible, and that reconciling them is simply a matter of being sufficiently imaginative, candid, and clever. While problem-solving bargaining remains the most popular of the communitarian dispute bargaining theories, there are a number of non-problem solving variations with small but loyal constituencies. Noteworthy among them are: Professor Riskin's pairing of communitarian theory with mindfulness meditation to create a bargaining method that enables the "thoughtful

In the beginning, communitarian theory developed reactively, more as an alter ego to the adversarial model than as a positive view in its own right, and that approach has carried down to the present day.[31] For example, communitarians reject the factual assumptions and normative principles that underlie (as communitarians see it) the adversarial model, as well as the strategies and techniques by which it is implemented. They assume, for example, that genuine social conflict is rare, that individual self-interests almost always are compatible, and that candor and trust are better default qualities of a bargaining strategy than secrecy and skepticism. They believe that most disagreements in life are based on mistaken or poorly understood perceptions of interest rather than incompatible objectives and beliefs, and that these misperceptions can be corrected if bargainers act from a group perspective rather than an individual one.[32] Communitarians ask bargainers to combine, incorporate, share, and join, rather than divide, destroy, conceal, and control; to build bridges rather than barriers; to cooperate rather than compete; to disclose rather than conceal; to coordinate rather than manipulate; and to be candid, generous, respectful, and kind in dealing with others, rather than secretive, selfish, disdainful, and mean-spirited. For communitarians, dispute bargaining is about building relationships for mutual gain, not scoring debater's points, extracting favorable concessions, or reaching one-sided victories. It is a process in which nominal antagonists come to discover that they are on the same side after all.[33]

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negotiator" to escape the "egocentric cravings" that dominate the lawyer's "Standard Philosophical Map;" Professors Korobkin and Guthrie's "positive" theory of dispute bargaining which incorporates the insights of behavioral economics into the communitarian model; Professor Gifford's context-dependent version which fuses communitarian and adversarial methods into a single, hybrid view; and Professors Baruch Bush and Folger's transformative view which combines the lessons of ego psychology and existential philosophy into a "transform the world" method. I describe all of the above developments in greater detail and with all of the relevant footnotes, in Condlin, *Bargaining Without Law*, *supra* note 1, at 291–98; Robert J. Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, 14 CARDOZO J. CONFLICT RESOL. 621, 623–30, 645–50 (2013).

[31] To the extent that the communitarian view contributes a positive dimension to legal dispute bargaining theory, it is psychological rather than legal. *See, e.g.*, Condlin, *New "Prospecting" Agenda*, *supra* note 1, at 243–52 (describing the use of behavioral economics concepts in bargaining); Hollander-Blumoff, *supra* note 2, at 406 n.134 ("One might characterize legal negotiation, relative to other dispute resolution processes, as 'less law, more people,' that is, less susceptible to a legal analysis and more susceptible to an analysis based on principles of human behavior."); Deepak Malhotra & Max H. Bazerman, *Psychological Influence in Negotiation: An Introduction Long Overdue*, 34 J. MGMT. 509, 509 (2008) (describing "real world negotiation" as the business of influencing others and "social scientists" as knowing "a great deal about how to influence the decisions of others"); CHARLES B. WIGGINS & L. RANDOLPH LOWRY, NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS 363–79 (2d ed. 2005) (describing the "Principles of [Bargaining] Persuasion" in terms of social-psychological and behavioral economics concepts rather than substantive legal ones). I do not suggest that psychology has nothing to teach lawyers about dispute bargaining. Just the opposite, as I point out later, the social sciences generally have a great deal to contribute. But legal dispute bargaining is not principally a socio-psychological phenomenon. The background presence of a body of controlling law gives it a distinctive legal character that limits the extent to which social science can say something complete about it. *See also infra* note 38.

[32] *See generally Bargaining Without Law*, *supra* note 1, at 291–98; *Every Day and in Every Way*, *supra* note 1, at 236–37.

[33] If communitarian bargaining had a theme song, it probably would be "It's a Small World After All." *See It's a Small World After All*, YOUTUBE, https://www.youtube.com/watch?v=EgQejd14wKs. For the adversarial bargaining version of the same song, see *Welcome To Lard Land (It's A Small World Parody)*, YOUTUBE, https://www.youtube.com/watch?v=PVzt_0xPOms; Mad TV, *It's A Small World/Revenge of Satan's Undead Dolls*, YOUTUBE, https://www.youtube.com/watch?v=ctl2-W2EnSY (begin at 1:05). For the Legal Realist version, see *It's A Real World After All Parody it's A Small World*, YOUTUBE, https://www.youtube.com/watch?v=2lqh8G6HKmA.

There is some tendentiousness and hyperbole in the communitarian critique of adversarial dispute bargaining, but also more than a grain of truth. Over the years, adversarial bargaining practices sometimes has become corrupted, relying less on reasoned argument from consensus norms[34] and more on rhetorical force, threat, deception, intransigence, and the discourse practices of anonymous blogging,[35] or at least more so than was thought to have been the case in the halcyon days of our civic republican past.[36] This did not have to happen, of course, and it need not continue. "Adversarial" is not a synonym for belligerent, disrespectful, or insulting. It means simply expressing a belief in opposition (i.e., "adverse") to the belief of another. This can be done rudely (i.e., telling someone that her view is wrong and refusing to discuss it), or respectfully (i.e., describing the reasons and evidence that cause one to see things differently, and reconsidering one's views when told something new). When respectful, adversarial argument is a learning experience,[37] expanding perspectives, provoking insights, and informing decision-making; when rude, it is a polarizing one, insulting, and demeaning others, destroying relationships, and making cooperative action less likely.[38]

While there is a lot to like in the communitarian critique of adversarial bargaining, therefore, there is not as much in the positive communitarian theory of bargaining itself. Ironically, given their commitment to collaboration, communitarians take an unusually

[34] *See* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 669 (1976) (describing argument as "that area of rational discourse . . . where men seek to trace out and articulate the implications of shared purposes . . . [that] serve as 'premises' or starting points"). In legal dispute bargaining these starting points consist of "norms of general applicability derived from sources outside the immediate dispute." *Id.* In Fisher, Ury and Patton's well-known phrase, the norms are described as part of the category of "objective criteria." ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 81–93 (2d ed. 1991).

[35] *See, e.g.*, *Internet Argument Techniques*, CRACKED.COM, http://www.cracked.com/funny-3809-internet-argument-techniques/.

[36] As for the halcyon days of our civic republican past, *compare* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14–30 (1988) (describing the civic republican view of lawyer responsibility arguably underlying legal practice in this country in the early nineteenth century), *with* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1397, 1410–24 (2003) (arguing "that the morally activist concept of lawyering so often said to prevail among nineteenth-century civic republican legal elites is more mythical than real").

[37] HAIDT, *supra* note 7, at 55 ("friends can do for us what we cannot do for ourselves: they can challenge us, giving us reasons and arguments that sometimes trigger new intuitions, thereby making is possible for us to change our minds.").

[38] All learning begins in some form of disagreement—until there is a conflicting view on the table there is nothing to learn—and disagreement is resolved by argument. *See* André Bächtiger, *On Perfecting the Deliberative Process: Agonistic Inquiry as a Key Deliberative Technique* 3–4 (Sept. 2–5, 2010) (unpublished manuscript, presented at the 2010 Annual Meeting of the Am. Political Sci. Ass'n), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642280 ("Sustained questioning and argumentative challenges can unravel new dimensions of the topic under discussion, elicit reasons from other participants, and set in motion a process of reflection that leads to preference change."); James T. Kloppenberg, *A Nation Arguing with Its Conscience*, HARV. MAG., Nov.–Dec. 2010, at 34 ("The process of deliberation, particularly when it [brings] together people with diverse backgrounds, convictions, and aspirations, [makes] possible a metamorphosis unavailable through any other form of decision making. People who [see] the world through very different lenses [can] help each other see more clearly. Just as Madison defended the value of delegates' willingness to change their minds and yield to the force of the better argument . . . ."). In a sense, a shift from adversarial dispute bargaining to communitarian dispute bargaining is a shift from belligerent adversarialism to collegial adversarialism. There is no non-adversarial option. Communitarians may be coming around to that view. *See, e.g.*, Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What Are We Bargaining For?*, *in* 7 LAW AND POPULAR CULTURE 583, 600 (Michael Freeman ed., 2005) (acknowledging that a discussion of the substantive merits of the parties' claims can advance dispute bargaining).

adversarial approach to the legal bargaining debate, proposing a complete alternative to the adversarial model, rather than an improved version of it, and rejecting adversarial practices altogether rather than supplementing them, or reining them in.[39] As if a conquering army marching to the sea, communitarians first laid waste to the domain of dispute bargaining theory and practice,[40] and then filled the void with their own idealized alternative. The difficulty with idealized versions of anything, however, is that they tend to ignore the practical constraints of real life settings and the psychological limitations of real life people, and communitarian dispute bargaining has not avoided these problems.[41] The social cooperation strategies humans inherit

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[39] Most of the problems with adversarial dispute bargaining are traceable to ineffective substantive argument practices, but communitarians offer mostly psychological tricks and mood altering techniques as antidotes. Psychological tricks do not substitute for argument skills, however, since tricks work against only people who do not know the tricks to begin with, and thus requires "fishing for suckers." *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 321–23 (2000) (explaining the concept of "fishing for suckers"). *See also Every Day and in Every Way*, *supra* note 1, at 231, 243–44 (explaining how the use of substantive argument in bargaining does not depend upon fishing for suckers). A trick also can be played only once because, as Alex Stein points out, "the play uncovers and destroys the trick." *See* Alex Stein, *A Liberal Challenge to Behavioral Economics: The Case of Probability*, 2 N.Y.U. J.L. & LIBERTY 531, 538 (2007) (calling a psychological trick a "conjurer's sleight of hand: [because it] can be played only once . . . . [T]he play uncovers and thereby destroys the trick."). One can counter a "framing" move, for example, by pointing out that framing is being done, but responding to a legal argument by pointing out that one is "playing the law card" would provoke only laughter (and agreement). *See* Condlin, *New "Prospecting" Agenda*, *supra* note 1, at 261–64 (describing how behavioral economics techniques can be overcome by debiasing). *See also* LIEBERMAN, *supra* note 7, at 219–21 ("affect labeling . . . [the ability to put] feelings into words [and] . . . label them can regulate . . . emotions and promote . . . mental . . . well-being without our realizing it at all."). Argument educates rather than manipulates and because of that, it can be used over and over again in bargaining, both in individual cases and during the course of a career, without offending others or making it more difficult to bargain with them in the future. Substantive argument is just a form of sticking up for oneself and no reasonable bargainer can resent someone sticking up for himself. *See* William P. Bottom & Paul W. Paese, *Judgment Accuracy and the Asymmetric Cost of Errors in Distributive Bargaining*, 8 GROUP DECISION & NEGOT. 349, 362 (1999) (finding that bargainers "were just as willing to do business in the future with . . . tougher, optimistic [bargainers] . . . as they were with the softer, pessimistic ones"). Bargainers must act on the assumption that adversaries are reasonable; making any other assumption would be a form of bargaining against oneself. For a description of mood altering and other non-traditional bargaining methods, see *Every Day and in Every Way*, *supra* note 1, at 245–69 (describing the use of algorithms, folkloric rules of thumb, parables, and the like in bargaining); Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOC. PSYCHOL. 565, 574 (1998) (describing how negotiators in an experimentally induced good mood have a kind of "emotional contagion" that induces cooperative behavior in others); Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 14–17 (describing how a positive mood produces significantly larger joint gains in bargaining); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002) (describing the role of meditative "mindfulness" in mediation); Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289 (2010) (extending "mindfulness" analysis to negotiation). *See also supra* note 31.

[40] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 3 (2004) (describing the first step in constructing the transformative theory of dispute resolution as creating a "clearing in the field.").

[41] Perhaps that is why practicing lawyers have been slow to abandon the adversarial model, something communitarians regularly lament. *See, e.g.*, Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, *supra* note 29, at 491 (2006). That lawyers would be suspicious of academic conceptions of bargaining is not surprising. Most academic views are based on data taken from studies of simulated bargaining behavior by college and law students, lawyer responses to bargaining exit surveys, and other secondary sources of evidence several times removed from direct, observational data of actual bargaining practice. *See, e.g.*,

from evolution and natural selection are among the most important of these constraints and limitations, so it is to them that we now turn.

III. The Neurobiological Bases of Social Cooperation

New research, principally in the field of cognitive neuroscience,[42] has shown that the capacity to cooperate is an innate human trait, a legacy of evolution and natural selection, and not just a culturally acquired social practice.[43] In some ways, this is a little surprising. Evolution itself is inherently competitive,[44] —rewarding the ruthless advancement of narrow self-interest— and working cooperatively with others may seem an unexpected legacy of that process. But to thrive in the evolutionary game—for themselves, their genetic kin, and their social groups (as well as to co-exist with strangers)—humans must accomplish tasks that are beyond the capacity of single individuals to carry out, and to do this, they must work together in groups.[45] Working in groups provides a survival advantage in the race of life; in other words, not just a warm and fuzzy feeling of bonding with others.[46] To realize this advantage, humans from the earliest times

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Condlin, *New "Prospecting" Agenda*, *supra* note 1, at 240–43 (describing the data base for academic theories of bargaining).

[42] Greene describes the work as part of "the new field of moral cognition, which applies the methods of experimental psychology and cognitive neuroscience to illuminate the structure of moral thinking." GREENE, *supra* note 5, at 5. Lieberman refers to the field as "social cognitive neuroscience." LIEBERMAN, *supra* note 7, at ix. This research (which includes work from the fields of evolutionary biology, moral philosophy, linguistics, and neurobiology, among others), and the theoretical work growing out of it, clarifies the neurobiological link between emotion and reason, and shows the ways in which psychology and philosophy can be combined to produce a more complete explanation of human morality than either discipline standing alone. *See also* BLOOM, *supra* note 7, at 19–30 (describing the psychological research methods used to study the development of morality in humans, with a particular emphasis on babies); *id.* at 162 ("psychologists are interested in people's beliefs about what's right and wrong, while philosophers are interested in what's *really* right and wrong."). *See infra* note 55, for a description of the relationship between moral psychology and moral philosophy.

[43] GREENE, *supra* note 5, at 23–24 ("Cooperation evolves, not because it's 'nice' but because it confers a survival advantage."); BLOOM, *supra* note 7, at 18 ("we possess an innate and universal morality"); *id.* at 218 ("we are born with . . . empathy and compassion, the capacity to judge the actions of others, and even some rudimentary sense of justice and fairness."); LIEBERMAN, *supra* note 7, at 5 (describing how the need for social connection is neurobiological); *id.* at 7 ("our ability to think socially [is] . . . responsible for *Homo Sapiens'* dominating the planet"); *id.* at 9 ("our brains were wired for reaching out to and interacting with others"); *id.* at 22 ("evolution has made a major bet on the value of our becoming social experts, and in our being prepared in any given moment to think and behave socially."); *id.* at 86 ("Mutual cooperation [is] an end in itself."); *id.* at 241 ("The message is clear: our brain is profoundly social, with some of the oldest social wiring dating back more than 100 million years. Our wiring motivates us to stay connected. . . . we have this center to our being, what we call our self, which among its many jobs serves to ensure that we harmonize with those around us by lining up our beliefs with theirs and nudging us to control our impulses for the good of the group.").

[44] GREENE, *supra* note 5, at 23–24 ("[U]niversal cooperation is inconsistent with the principles governing evolution by natural selection . . . . Evolution is an inherently competitive process.); HAIDT, *supra* note 7, at xxii ("Individuals compete with individuals within every group, and we are the descendants of primates who excelled at that competition.").

[45] GREENE, *supra* note 5, at 20, 44 (humans "have innate tribalistic tendencies"); *id.* at 69 (humans "appear to be tribalistic by nature"); BLOOM, *supra* note 7, at 126–29 ("My bet is that a hundred years from now, we are likely to still reason in terms of human groups . . . this is in part because group differences really do exist . . . . it's not clear whether there is any alternative to dividing humanity into groups."); HAIDT, *supra* note 7, at 162–63 ("the male mind appears to be innately tribal . . . [and] we are the descendants of successful tribalists, not their more individualistic cousins").

[46] GREENE, *supra* note 5, at 24, 186 ("[M]orality evolved (biologically) to promote cooperation *within groups* for the sake of *competition between groups*. The only reasons that natural selection would favor genes that promote

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have used a set of neurobiologically based markers (linguistic patterns, cultural practices, race, sex, and age)[47] to identify individuals with whom to collaborate.[48] In effect, they have learned to sort the world into the tribes of Us and Them, and favor Us over Them.[49]

Banding together with others does not automatically produce cooperation, of course. All collective action presents the opportunity to free ride at the expense of the group,[50] and this creates two distinct kinds of problems. The first, the problem of "Me versus Us,"[51] requires reconciling individual self-interest with the interests of other members of the same group (the selfishness problem),[52] and the second, the problem of "Us versus Them,"[53] requires reconciling

cooperation is that cooperative individuals are better able to outcompete others."); HAIDT, *supra* note 7, at 159 ("If we play our cards right, we can work with others to enlarge the pie that we ultimately share."); LIEBERMAN, *supra* note 7, at 33–35 (describing the benefits of "living in larger groups"). For the definition of innate, *see* HAIDT, *supra* note 7, at 152–53 ("traits can be innate without being either hardwired or universal," . . . "nature bestows upon the newborn a considerably complex brain, but one that is best seen as prewired—flexible and subject to change—rather than hardwired, fixed, and immutable."). Haidt revives the theory of group selection to argue that the advantage of working in groups exists at both the individual and group level. HAIDT, *supra* note 7, at 220–52.

[47] GREENE, *supra* note 5, at 50–55 ("humans are predisposed from an early age to use the original shibboleths— linguistic clues—as markers of group identity and as a basis for social preference"); BLOOM, *supra* note 7, 104–09 ("Laboratory studies find that adults automatically encode three pieces of information when we meet a new person: age, sex, and race.").

[48] Recent experiments explore the role the neuropeptide and hormone oxytocin plays in inducing humans to cooperate with in-group members but not out-group members. Carsten K.W. DeReu & Lindred L. Greer et al., *The Neuropeptide Oxytocin Regulates Parochial Altruism in Intergroup Conflicts Among Humans*, 328 SCIENCE 1408– 11 (2010); Carsten K.W. DeReu & Lindred L. Greer et al., *Oxytocin Promotes Human Ethnocentrism* 108 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 1262 (2011). *But see* BLOOM, *supra* note 7, at 174 ("There is a lot more to morality, of course, than warm feelings. Oxytocin can't explain why we send money to distant strangers or get outraged at those who harm others. Indeed, the response that oxytocin generates is itself morally complex: it makes us nicer to those close to us but might increase our parochial biases; one study found that snorting oxytocin makes you more positive toward your own group but also more willing to derogate members of other groups."); HAIDT, *supra* note 7, at 270–72 ("Oxytocin makes people love their in-group more. It makes them parochial altruists."); LIEBERMAN, *supra* note 7, at 95 ("While oxytocin can promote ingroup favoritism . . . and hostility toward those who are not part of one's ingroup, the dividing line between friend or foe differ in a crucial way between primates and other mammals."); *id.* at 92–95 (explaining how oxytocin modifies "the dopaminergic processes that promote approach behavior . . . we gravitate toward things the brain has learned to associate with dopaminergic release").

[49] BLOOM, *supra* note 7, at 101–06 (explaining how "For much of human history and for many societies now . . . the natural reaction when meeting a stranger is not compassion. Strangers inspire fear and disgust and hatred . . . . Any adequate theory of moral psychology has to explain both our antipathy toward strangers and how we sometimes manage to over come it."); *id.* at 127 ("We favor our own groups."); *id.* at 176–78 (describing the "cartography of moral lives" in kin-tribe-stranger categories and explaining that "the force that drives the evolution of morality toward kin is genetic overlap, the force that drives morality toward the in-group is the logic of mutual benefit, and the force that drives morality toward strangers is . . . nothing. We are capable of judging the actions of strangers as good or bad, but we have no natural altruism toward them, no innate desire to be kind to them . . . . Coming to see strangers as falling into the moral domain is as much a human accomplishment as coming to appreciate that zero is a number.").

[50] GREENE, *supra* note 5, at 21 ("it's rare to find a cooperative enterprise in which individuals have no opportunity to favor themselves at the expense of the group. In other words, nearly all cooperative enterprises involve at least some tension between self-interest and collective interest"); BLOOM, *supra* note 7, at 17 ("for society to flourish . . . individuals have to refrain from taking advantage of others.").

[51] According to Greene, this "is the problem that our moral brains were designed to solve." GREENE, *supra* note 5, at 14.

[52] GREENE, *supra* note 5, at 14–22 (describing variations of the Selfishness Problem). The most well known illustration of the selfishness problem is Garrett Hardin's "tragedy of the commons." *See* Garrett Hardin, *The*

the interests of one's own group with those of groups organized around conflicting values and beliefs (the tribalism problem).[54] As social psychologists see it, the system of human morality developed as nature's instrument for dealing with these two types of problems.[55] Morality equips humans with a two-part mechanism[56] for determining when and how to cooperate with

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Tragedy of the Commons, 162 SCIENCE 1243 (1968). *See also* HAIDT, *supra* note 7, at 32-58 (defending the social intuitionist view of morality underlying the selfishness problem).

[53] GREENE, *supra* note 5, at 14 (describing this problem as "distinctively modern").

[54] GREENE, *supra* note 5, at 14 ("While tribes often share principles, traits, and beliefs in common, not all tribes are constituted alike. Some are based on individualist and libertarian principles . . . Others are collectivists . . . and still others are organized around a blend of individualist and collectivist views arranged in distinctively hybrid combinations, . . . "); and at 69 ("there's little doubt that humans have tribalistic tendencies that promote conflict"); HAIDT, *supra* note 7, at 16–21 (describing the different moral systems used to organize societies); *id.* at 330–43 (describing "The Grand Narratives of Liberalism and Conservatism" as the conflicting ideological systems around which our present day society is organized). Different and often conflicting conceptions of social organization are a feature of tribal identity, brute facts of social existence, and they color group member perceptions of social facts. GREENE, *supra* note 5, at 89–95 (describing the process of "biased perception"). Haidt argues that natural selection operates on the group level as well as the individual one. *See* HAIDT, *supra* note 7, at 258–83 ("My hypothesis in this chapter is that *human beings are conditional hive creatures. . . .* The hive switch . . . is a group-related adaptation that can only be explained by a theory of between-group selection."). Haidt uses the present-day political ideologies of liberalism, libertarianism, and conservatism to illustrate the idea of groups organized around conflicting beliefs, values, and principles. *See id.* at 345–61.

[55] GREENE, *supra* note 5, at 59–65 ("morality is the human brain's answer to the challenge" of maintaining cooperation with others); BLOOM, *supra* note 7, at 161–85 (describing the relationship between moral psychology and moral philosophy). Morality deals with more than cooperation issues, of course, but for present purposes it is enough that the cooperation issue is a moral issue. The relationship between moral psychology and moral philosophy is complicated, but outside the scope of the present discussion. Greene argues that "morality is not what generations of philosophers and theologians have thought it to be . . . a set of freestanding abstract truths that we can somehow access with our limited human minds. [Instead], moral philosophy is a manifestation of moral psychology. Moral philosophies are . . . just the intellectual tips of much bigger and deeper psychological and biological icebergs . . . . Competing moral philosophies [are not] just points in an abstract philosophical space but the predictable products of our dual-process brain."). As a moral philosopher, he is a "deep pragmatist." *See* GREENE, *supra* note 5, at 189–202, 346. Bloom, on the other hand, has a slightly different take on the subject. *See* BLOOM, *supra* note 7, at 159–85 (describing the differences between the way psychology and philosophy conceive of and study the subject of morality). He sees many traditional "moral" dilemmas as math problems, and moral sentiments as adaptive preferences. BLOOM, *supra* note 7, at 181–85. *Compare* LIEBERMAN, *supra* note 7, at 23 ("our ability and tendency to think about the social world [involves more than seeing] . . . other people . . . as a series of hard problems to be solved because they stand between us and our reptilian desires"). Jonathan Haidt has yet a third, social intuitionist perspective on the nature of morality. *See* HAIDT, *supra* note 7, at 270 (morality consists of "interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible."). At the level of individual moral behavior Haidt paints a portrait of human nature that is "somewhat cynical," arguing that people "care more about *looking* good than about truly *being* good. . . . We lie, cheat, and cut ethical corners quite often when we think we can get away with it, and then we use our moral thinking to manage our reputations and justify ourselves to others." HAIDT, *supra* note 7, at 220. It is only at the group level, as Haidt sees it, that we can transcend self-interest and lose ourselves in something larger than ourselves. *Id.* at 220–26.

[56] GREENE, *supra* note 5, at 113–31, 137–41 (describing the brain's "Two Moral Minds" and the laboratory research on which that conception is based). Two-part, complementary systems seem to be in fashion in psychology. *See also* HAIDT, *supra* note 7, at 50–52 (describing a "seeing that" and "reasoning why" two-part cognitive process for making judgments); *id.* at 254 (describing how two part "multilevel selection would go a long way toward explaining why people are simultaneously so selfish and so groupish."); LIEBERMAN, *supra* note 7, at 100 ("[E]volution has given us not one but two brain networks that help us to understand those around us and to work more cohesively with them."); *id.* at 105–50 (describing the mentalizing and mirror neuron systems for understanding the minds of other people—explaining that "the mirror system provides the premises that the mentalizing system can then logically operate in order to answer the *why* question."). These systems are reminiscent

others: a set of automatic emotional responses that permit fast and unselfconscious resolutions of the selfishness problem,[57] and a complementary set of cognitive capacities that enable the development of meta norms that permit reasoned resolutions of the tribalism problem.[58]

The automatic emotional responses produced by the so-called "moral emotions" include a sense of empathy, compassion, capacity to judge, and a rudimentary sense of fairness, and justice[59] that promote altruism, unselfishness, and a willingness to pay a personal cost in order to benefit other members of one's own group.[60] Within that group, as Josh Greene puts it, "cooperation is typically intuitive," because "humans have feelings that do the thinking for [them]."[61] These emotions—a collection of psychological capacities and dispositions[62]—are

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of Kahneman and Tversky's System 1 (fast) and System 2 (slow) description of human decision-making. *See also* Condlin, *New "Prospecting" Agenda*, *supra* note 1, at 228–32 (describing Kahneman and Tversky's System 1 and System 2 model of human decision making). Greene even uses the Kahneman and Tversky terminology. GREENE, *supra* note 5, at 103 ("Part II | Morality Fast and Slow").

[57] GREENE, *supra* note 5, at 134–35 (describing the concept of moral emotion); BLOOM, *supra* note 7, at 9 ("a moral violation . . . connects to certain emotions and desires"); *id.* at 31 (describing the "moral sense"); HAIDT, *supra* note 7, at 75 ("the moral intuitions emerge very early and are necessary for moral development. The ability to reason emerges much later, and when moral reasoning is not accompanied by moral intuitions, the results are ugly.").

[58] GREENE, *supra* note 5, at 25–27 (describing the nature of a meta-morality). Greene explains that "a metamorality's job is to make trade-offs among competing tribal values, and making trade-offs requires a common currency, a unified system for weighing values." *Id.* at 15. *See also* BLOOM, *supra* note 7, at 100 ("[A]dult morality is influenced by rational deliberation. This is what separates humans from chimpanzees and separates adults from babies. These other creatures just have sentiments; we have sentiments plus reason. This wouldn't be so important if our evolved sentiments were perfectly attuned to right and wrong. If our hearts were pure, we wouldn't need our heads. Unfortunately, our evolved system can be bigoted and parochial and sometimes savagely irrational . . . "); and at 157 ("Evolution brought our species partway toward a solution [of the problems faced by self-interested individuals who have to get along with other self-interested individuals], giving rise to sentiments such as compassion for those who suffer, anger at cheaters and free riders, and gratitude to those who are kind. These are inspired solutions, evolve over millennia, to the problems that faced us as humans living in small groups. As individuals who now live in a much different world, we can build from this, stepping away from our own specific circumstances and developing and endorsing moral principles of broad applicability . . . *This* deserves to be called wisdom."). *But see* HAIDT, *supra* note 7, at 29 ("moral reasoning is often a servant of moral emotions"); and at 103 ("the worship of reason is itself an illustration of one of the most long-lived delusions in Western history: the rationalist delusion . . . that reasoning is our most noble attribute . . . ").

[59] GREENE, *supra* note 5, at 61–62 ("Empathy, familiar love, anger, social disgust, friendship, minimal decency, gratitude, vengefulness, romantic love, honor, shame, guilt, loyalty, humility, awe, judgmentalism, gossip, self-consciousness, embarrassment, tribalism, and righteous indignation. These are all familiar features of human nature."); BLOOM, *supra* note 7, at 5 ("Our natural endowments include: a moral sense . . . empathy and compassion . . . a rudimentary sense of fairness . . . a rudimentary sense of justice"); *id.* at 218 ("we are born with . . . empathy and compassion, the capacity to judge the actions of others, and even some rudimentary sense of justice and fairness."); LIEBERMAN, *supra* note 7, at 152–61 (describing the role of mentalizing, mirror neurons, and affect matching in producing empathy).

[60] GREENE, *supra* note 5, at 23 ("The essence of morality is altruism, unselfishness, a willingness to pay a personal cost to benefit others.").

[61] GREENE, *supra* note 5, at 62. Even babies as young as three months distinguish between kin and strangers, well before they can express the feelings associated with those choices, or the reasons for making them. *See* BLOOM, *supra* note 7, at 104–06 ("Babies make distinctions between familiar and strange people almost immediately."); LIEBERMAN, *supra* note 7, at 11 ("In the toddler years, forms of social thinking develop that outstrip those seen in the adults of any other species."). *See also* HAIDT, *supra* note 7, at 52–56 ("Moral judgment is a cognitive process . . . . The crucial distinction is really between *two different kinds of cognition:* intuition and reasoning. . . . *Intuition* is the best way to describe the dozens or hundreds of rapid, effortless moral judgments and decisions that we all make every day.").

innate qualities, inculcated at birth as part of the human neurobiological inheritance,[63] and if they were the entirety of the human neurobiological inheritance, the story of social cooperation would be a lot simpler.[64]

As useful as they are for resolving selfishness problems, however, the moral emotions do not tell one how to cooperate with members of groups organized around conflicting values and beliefs.[65] For that, one needs a meta-morality, a set of standards for making fair trade-offs among the values and beliefs of the different groups,[66] and to make these trade-offs, humans

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[62] GREENE, *supra* note 5, at 28 ("morality is a collection of devices, a suite of psychological capacities and dispositions that together promote and stabilize cooperative behavior"); HAIDT, *supra* note 7, at 314 ("Moral systems are interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible.").

[63] GREENE, *supra* note 5, at 47 ("long before they can walk or talk, human infants are making value judgments about actions and agents, reaching out to individuals who show signs of being cooperative (caring about others) and passing over individuals who do the opposite . . . . And given how this early machinery comes online, it is almost certainly part of our genetic inheritance."); BLOOM, *supra* note 7, at 99 (the "capacities for judgment and feeling . . . are a legacy of our evolutionary history, not cultural inventions."); HAIDT, *supra* note 7, at 153–79 (describing how the brains of newborns are organized in advance of experience with five innate moral foundations); *id.* at 152–53 ("[T]raits can be innate without being either hardwired or universal," . . . . "nature bestows upon the newborn a considerably complex brain, but one that is best seen as prewired—flexible and subject to change—rather than hardwired, fixed, and immutable."); LIEBERMAN, *supra* note 7, at 5 ("the neural overlap between social and physical pain is [one of the] . . . . three major adaptations in our brain that lead us to be more connected to the social world and better able to take advantage of . . . social connections to build more cohesive groups and organizations."). *But see* BLOOM, *supra* note 7, at 119–20 ("Many of the generalizations that we make about social groups have some basis in reality . . . but . . . a generalization is not an absolute rule [and] the origins of these generalizations are [sometimes] better understood through history and sociology than through psychology, neuroscience, or evolutionary biology.").

[64] GREENE, *supra* note 5, at 102 ("Like all animals, we have selfish impulses. But more than any other animal, we also have social impulses, automated moral machinery that pushes us into . . . solving the problem of Me versus Us." . . . Unfortunately, this moral machinery . . . recreates the fundamental moral problem at a higher level, at the level of groups—Us versus Them."); HAIDT, *supra* note 7, at 222 ("groups [are] real entities that compete with each other"); BLOOM, *supra* note 7, at 172–74 (describing how humans both favor family and friends and include strangers within their moral universe); *id.* at 195 ("personal contact—when people are of equal status, working toward a common goal . . . often reduces prejudice" and allows us to expand our moral circle beyond self-interest).

[65] GREENE, *supra* note 5, at 23, 26 (there may not be "universal moral principles that *feel right*"); *id.* at 70–91 (describing how "different human groups have strikingly different ideas about the appropriate terms of cooperation, about what people should and should not expect from one another."). *See also* BLOOM, *supra* note 7, at 103 ("Strangers inspire fear and disgust and hatred."); *id.* at 212–13, 216–17 (describing how reason, rather than moral emotions, tell humans how to cooperate with others).

[66] GREENE, *supra* note 5, at 15, 198–99 (describing how the meta-moral norms permit impartial trade offs among the conflicting norms of different social groups); *id.* at 174–188 (describing possible "common currencies" which can be used to make trade-offs among the values and interests of different tribes); *id.* at 194-204 (describing "currency found"); *id.* at 290 ("[A] metamorality's job is to help us make tough choices, to make *trade-offs* among competing tribal values."); LIEBERMAN, *supra* note 7, at 74 (fMRI studies show that "Being treated fairly turned on the brain's reward machinery regardless of whether it led to a little money or a lot. . . . In other words, fairness trumped selfishness."); *id.* at 72–75 (describing how being treated fairly is intrinsically satisfying because it "implies that others value us and that when there are resources to be shared in the future, we are likely to get our fair share."). *But see* HAIDT, *supra* note 7, at 87–89 (humans cooperate beyond kinship "by creating systems of formal and informal accountability . . . the explicit expectation that one will be called upon to justify one's beliefs, feelings, or actions to others, coupled with an expectation that people will reward or punish us based on how well we justify ourselves . . . Appearance is usually far more important than reality."); *id.* at 210 (a concern for fairness "evolved in response to the adaptive challenge of reaping the rewards of cooperation without getting exploited by free riders.").

have developed a set of meta-moral norms grounded in the ideas of impartiality[67] and equal treatment,[68] which they use to create hierarchies, defend rights, and protect status in interactions with strangers. [69] These norms also developed over the course of human evolution as an outgrowth of increased personal contact with members of different social groups (mostly in market transactions),[70] exposure to different stories and beliefs,[71] and the reasoned creation of collectivist principles and norms.[72] As a result of these developments, the human brain has come to function like a dual-mode camera, with automatic and manual settings.[73] The automatic mode contains the moral emotions and gut-level instincts that enable humans to cooperate with

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[67] BLOOM, *supra* note 7, at 211 ("impartial moral principles . . . are at the foundation of systems of law and justice."); *id.* at 213 ("impartiality is a reasoned solution to the problem of coordinating actions of rational and self-interested beings."). *See also* GREENE, *supra* note 5, at 200–02 (describing how humans come to develop a genuine preference for impartiality in interactions with strangers); *id.* at 204 (happiness and impartiality are the "two universally accessible moral values," and together "they yield a complete moral system that is accessible to members of all tribes. They give us a pathway out of the morass, a system for transcending our incompatible visions of the moral truth."); *id.* at 291 (a personal value is turned into a moral value by "valuing it *impartially*, thus injecting the essence of the Golden Rule.").

[68] BLOOM, *supra* note 7, at 61–70 ("an equality bias emerges long before schools and day cares have a chance to shape children's preferences . . . we are natural-born egalitarians." When it comes to the interests of other individuals "Humanity's deepest wish is to spread the wealth."); *id.* at 73 (the annoying thing about unequal treatment is that it assumes one is inferior); HAIDT, *supra* note 7, at 209 ("concerns about political equality [are] related to a dislike of oppression and a concern for victims, not a desire for reciprocity."); and LIEBERMAN, *supra* note 7, at 72 ("Even three year olds sharing cookies become upset when they are treated unfairly.").

[69] GREENE, *supra* note 5, at 83 (in interacting with strangers "one's sense of fairness is easily tainted by self-interest. This is biased fairness, rather than simple bias, because people are genuinely motivated to be fair. . . . We genuinely want to be fair, but in most disputes there is a range of options that might be seen as fair, and we tend to favor the ones that suit us best."); BLOOM, *supra* note 7, at 65 (when our own interests are involved "we seek relative advantage; we are motivated not by a desire for equality but by selfish concerns about our own wealth and status."); *id.* at 68 (the only way to "ensure that [one] doesn't get less than anyone else . . . [is to] defend [one's] rights and protect [one's] status."); *id.* at 69 ("The egalitarian lifestyle . . . emerges from people jockeying for position . . . egalitarianism is in effect a bizarre type of political hierarchy . . . "); *id.* at 170 ("some selfish preference makes sense, since the most efficient system is often one in which everyone takes care of himself and those close to him first."); HAIDT, *supra* note 7, at 146 (describing the "universal cognitive modules upon which cultures construct moral matrices").

[70] BLOOM, *supra* note 7, at 114 (studies provide "some support for what social psychologists call the 'social contact' hypothesis—the notion that under the right circumstances, social contact diminishes prejudice"), at 191 ("our enhanced morality is the product of human interaction and ingenuity"), and at 194–96 ("One force that can expand the [moral] circle is personal contact."); GREENE, *supra* note 5, at 13 ("participation in modern market economies . . . far from turning us into selfish bean counters, has expanded the scope of human kindness."); HAIDT, *supra* note 7, at 79 ("The main way we change our mind on moral issues is by interacting with other people.").

[71] BLOOM, *supra* note 7, at 196–200 ("Another important factor in expanding the [moral] circle is exposure to stories.").

[72] Reasoned to principles are the most important of these factors because, as Paul Bloom puts it, "reasoned deliberation is the stuff of life." BLOOM, *supra* note 7, at 210. *See also* GREENE, *supra* note 5, at 136 (describing the reasoning process involved in applying the meta-moral norms.); BLOOM, *supra* note 7, at 218 ("A critical part of our morality . . . emerges over the course of human history and individual development. It is the product of . . . our magnificent capacity for reason."). *But see* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) ("moral reasoning does not cause moral judgment; rather, moral reasoning is usually a post hoc construction, generated after a judgment has been reached"). *But see* HAIDT, *supra* note 7, at 29 ("moral reasoning is often a servant of moral emotions"); *id.* at 103 ("the worship of reason is itself an illustration of one of the most long-lived delusions in Western history: the rationalist delusion . . . that reasoning is our most noble attribute . . . . ").

[73] GREENE, *supra* note 5, at 15, 133 ("The human brain is like a dual-mode camera with *automatic settings* and a *manual mode*.").

members of the same group, and the manual mode contains the meta-moral norms that enable humans to cooperate with members of social groups organized around conflicting values and beliefs.[74]

The meta-moral norms are sprinkled throughout the structuring devices of social life, in customs, laws, promises, formal and informal agreements, religious, moral, and cultural beliefs and the like,[75] but their presence does not end intergroup conflict as long as it is possible to interpret them in more than one way when applied in particular disputes. In such situations, humans must resolve disagreements about who is entitled to what by arguing for their different interpretations of the governing norms and their different perceptions of the relevant facts, until they come to some kind of psychological "reflective equilibrium," an understanding of what should be done that is supported by the best reasons and evidence, and that accommodates the interests of everyone involved equally. Arguments of this sort can be jumbled, confusing, opaque, repetitive, disorganized, extended, competitive, slow, piecemeal, and heated, particularly when the stakes involved are great and the parties' convictions are deeply held (and even when they are not), but there is no alternative to pushing through these obstacles and seeing the arguments to a conclusion. Humans do this automatically, in fact, often without knowing it, because they are programmed to do so.[76] Even people who disagree with this view tacitly confirm it when they criticize the view and provide reasons and evidence to support their criticisms. Whether conscious of it or not, humans are programmed to settle disagreements with strangers by arguing over the meaning of norms and the existence of facts, even when they deny that they do this, both to themselves and others.[77]

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[74] GREENE, *supra* note 5, at 148 ("Like a dual mode camera, our brains have *automatic settings*, emotional responses that allow us to make decisions *efficiently,* drawing on the precompiled lessons of past genetic, cultural, and individual experience. And our brains have a *manual mode*, a general capacity for conscious, explicit, practical reasoning that makes human decisions *flexible* . . . . the tension between gut reactions and reasoning . . . is built into the general architecture of our brains."); HAIDT, *supra* note 7, at 283 ("human beings . . . have the ability (under special circumstances) to transcend self-interest and lose ourselves (temporarily and ecstatically) in something larger than ourselves . . . we live most of our lives in the ordinary (profane) world, but we achieve our greatest joys in those brief moments of transit to the sacred world, in which we become 'simply a part of a whole.").

[75] GREENE, *supra* note 5, at 175–208 (describing the various possible sources of "a universal metric for weighing the values of different tribes" in making the trade-offs and compromises necessary for the tribes to cooperate with one another); BLOOM, *supra* note 7, at 130 (humans "can engineer certain situations, with the help of customs and law, to eradicate bias"); HAIDT, *supra* note 7, at 299 ("Gods really do help groups cohere, succeed, and outcompete other groups."); *id.* at 306 ("Gods and religions, in sum, are group-level adaptations for producing cohesiveness and trust.").

[76] *See supra* note 43.

[77] Evidence of this is widespread in the culture at large. The well-known "taming factions" structure of our Madisonian form of government, for example, is based on the assumption that argument over political and social policy among individuals, interest groups, and political associations is inevitable and thus needs to be managed rather than suppressed. *See* JOSEPH J. ELLIS, AMERICAN CREATION 166 (2007) (describing framers' acceptance of the Burkean argument that political parties "performed valuable functions in orchestrating [political] debate, much in the way that the adversarial system worked in legal trials"); BRYAN GARSTEN, SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT 176 (2006) ("[The] constitutional system [of the United States] was meant to protect and facilitate sustained dispute . . . "); HAIDT, *supra* note 7, at 282 ("Creating a nation of multiple competing groups and parties was, in fact, seen by American's founding fathers as a way of preventing tyranny."). Adversarial competition also sustains our economic system. *See, e.g.*, ELLIS, *supra* note 77, at 166–67 (describing framers' acceptance of the Adam Smith argument that the "unhindered collision of selfish and ambitious interest groups" is the driving force of capitalism). *See also* Hollander-Blumoff, *supra* note 2, at 387–89 (explaining how "individuals [within the United States] preferred adversarial over inquisitorial legal systems" and describing the qualities that make up a fair, adversarial procedure). Trying to institutionalize a non-adversarial method of dispute bargaining in a

IV. Legal Dispute Bargaining as Social Cooperation

Legal dispute bargaining is a form of social cooperation in which lawyer bargainers work together to resolve conflicts they could not resolve by themselves. In doing so, they rely on the psychological capacities and dispositions for cooperation inherited from natural selection and evolution to make judgments about when to take an adversary's statements at face value and when to subject the statements to critical testing.[78] The first step in this process is determining whether to regard an adversary as stranger or kin.[79] In one sense, most lawyer bargainers are kin. They live in the same communities, go to the same schools, are members of the same organizations and clubs, share a common language, abide by the same institutional values and professional practice standards, have similar educational and economic backgrounds, subscribe to many of the same political and social beliefs, and have similar personal and professional goals in life.[80] Given this, when they bargain over issues in which their interests and objectives are aligned, and there is no advantage to one side or the other in resolving the issues in a particular way, they are functionally members of the same family,[81] and their moral emotions are reliable guides for determining when to trust.[82] If an adversary's statements "feel right" in this situation, that means the feeling can be trusted.

But when lawyers bargain over issues in which their interests and objectives conflict, they are strangers in a functional sense,[83] and the statements of strangers must survive rational testing, not gut reaction, before they can be trusted.[84] Bargainers are functional strangers when

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culture of adversarial argument seems quixotic at best. *See* BLOOM, *supra* note 7, at 210 ("Nobody who has ever watched children interact could miss the enthusiasm with which they debate everyday moral dilemmas."); HAIDT, *supra* note 7, at 105 ("If you put individuals together in the right way, such that some individuals can use their reasoning powers to disconfirm the claims of others, and all individuals feel some common bond or shared fate that allows them to interact civilly, you can create a group that ends up producing good reasoning as an emergent property of the social system.").

[78] Compare Greene's rules of thumb for dealing with the similar problem of making sense of strangers' comments in inter-tribal conflict. GREENE, *supra* note 5, at 350–52 ("Beyond Point-and-Shoot Morality: Six Rules for Modern Herders").

[79] I use "kin" in this section to mean member of the same social group (i.e., "tribe"), a member of what Greene calls "Us" rather than "Them," rather than in the more common understanding of the term as genetically related individual. I do this because "kin" is slightly less cumbersome than "same social group" and for purposes of the present discussion nothing is lost in failing to distinguish between the two meanings.

[80] I limit discussion to domestic dispute bargaining. Bargaining between members of different cultures and countries is different in obvious ways. *See, e.g.*, BLOOM, *supra* note 7, at 91 (describing the different ways in which people from different societies react to being punished for free riding); HAIDT, *supra* note 7, at 131–48 (describing the different ways in which different cultures conceive of morality).

[81] I am assuming a family in which the members get along with and trust one another.

[82] Granting a scheduling request to accommodate work, family, or religious obligations, for example, conceding an issue for which one asks nothing in return, or adding an issue to the bargaining agenda that is not in dispute, are examples of issues in which an adversary's actions can be taken at face value, without skeptical examination.

[83] GREENE, *supra* note 5, at 86 ("Thus, when everyone has competing selfish interests, but those interests are symmetrical, people can fairly easily put their selfish interests aside and find a mutually agreeable solution. But when people's selfish interests come in different forms, people gravitate toward different conceptions of what's fair, and agreement becomes much harder."). Think of bargaining adversaries as "limited purpose strangers" (to adapt a phrase from Charles Fried), strangers for purposes of the bargaining relationship. Charles Fried, *The Lawyer as Friend*: *The Moral Foundations of the Lawyer-Client Relationship,* 85 YALE L.J. 1060, 1071 (1976) (describing the concept of "limited purpose friend").

[84] GREENE, *supra* note 5, at 65 (describing how "our moral machinery gets us into a lot of unnecessary trouble."); *id.* at 293–94 ("[W]hen the problem is Me versus Us . . . we should trust our moral gut reactions . . . [b]ut when there's controversy . . . then you know that you're . . . dealing with Us versus Them. And that's when it's time to

discussing issues of conflict because they do not know one another's true intentions, objectives, and beliefs.[85] They could disclose that information, truthfully and candidly, at the beginning of the bargaining relationship, but that would be making a gift and not a bargain.[86] Almost always, bargainers will have interests in common[87]—coming to an agreement is the most obvious one— but they must discover those interests in ways that do not compromise their individual interests unnecessarily, and this can be difficult.[88] Part of the difficulty stems from the fact that lawyers are committed as a matter of professional practice to advance and defend their clients' goals in the "best possible light."[89] In legal dispute bargaining, this means that they must press for the most favorable outcomes adverse bargainers are willing to provide, rather than the minimum outcomes they are willing to accept.[90] To do this, bargainers routinely overstate their levels of conviction in the arguments they make, and their levels of commitment to the demands and proposals they advance[91] (and are known to do so), both to protect against underestimating the strength of their cases, and to leave room for making the concessions needed to reach

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shift into [meta-morality]."). Greene concludes that "we may be better off if everyone thinks selfishly rather than morally" in bargaining. *Id.* at 86. As he puts it, "if it's just a matter of getting the best deal you can from someone who's just trying to get the best deal he can for himself, there's a lot less wiggle room, and a lot less opportunity for biased fairness to create an impasse." *Id.* at 88. *See also* BLOOM, *supra* note 7, at 68 ("[T]he . . . way to get an equal division—the more human way I think—is that each child is careful to insure that he or she doesn't get less than anyone else.").

[85] LIEBERMAN, *supra* note 7, at 7 (describing the difficulty in "reading other people's minds, to discern their character from the things they say and do" . . . [and how] evolution gave us dedicated neural circuitry to do it").

[86] Bargainers would have to determine the truthfulness of the disclosures, however, and this would start the cycle all over again.

[87] GREENE, *supra* note 5, at 193 (explaining the need for a "substantial moral common ground" for cooperation to be possible among different tribes). Greene believes that the values underlying the moral philosophy of Utilitarianism (but not Utilitarianism itself) provide that common ground, *see id.* at 194–202, and describes himself as a "deep pragmatist." *Id.* at 346. Bloom appears to think that the common ground is found in the behavior of good people in the culture at large, and seems to be more Aristotelian than utilitarian. *See* BLOOM, *supra* note 7, at 192 ("[M]uch of the behavior that we see as good is picked up as part of one's culture, as custom, and never ruminated upon . . . by copying what others do.").

[88] Lieberman argues that the "capacity to appreciate the different beliefs and perspectives of others," what he calls "the miracle of mentalizing," is unique to humans, and describes the difficulties involved in the process and the fMRI studies on which our understanding of it is based. LIEBERMAN, *supra* note 7, at 129, 111–30.

[89] *Bargaining in the Dark*, *supra* note 1, at 68–78 (describing the lawyer obligation to present a client's case in its best light).

[90] Greene explains why it is easy for lawyers to see the most favorable outcome as the correct one. *See* GREENE, *supra* note 5, at 84 ("perceptions of reality [are] distorted by self-interest"); *id.* at 90 ("When the facts are at all ambiguous, [self serving bias causes] people [to] favor the version of the facts that best suits their interests."); *id.* at 91 ("getting the facts right is . . . a commons problem of its own, involving a tension between individual and collective self-interest"). *See generally id.* at 89–95 (describing the role of "biased perception" of facts in human judgments about fairness).

[91] *See* Seul, *supra* note 29, at 908–09 (describing how "parties on all sides of disputes involving deep value differences falsely believe that others, unlike themselves, are completely intransigent . . . [and that they] tend to 'greatly exaggerate the difference between their own and the other's belief systems in a way that exacerbate[s] the conflict' . . . [and that] each side tends to attribute to the other extreme attitudes they do not actually hold") (footnote omitted); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 97–98 (2011) (describing a lawyer bargaining culture of over-commitment to clients that results in a winning at all costs attitude). To give arguments the best chance to succeed lawyer bargainers will express and defend them sincerely, even when they are not fully convinced by the arguments themselves. As long as some percentage of the class of adverse bargainers, however small, could be persuaded by the arguments, bargainers will want to see if the present adversary is in that group.

agreement.[92] It is this feature of lawyer bargaining behavior more than any other—the predictable, systematic, overstatement of objectives and beliefs—that makes many lawyer bargainer statements presumptively suspicious, and this suspicion, in turn, makes the moral emotions an unreliable guide for determining if the statements are true. Lawyer bargainers are not strangers in the sense that they belong to different social groups, therefore, but in the sense that they are committed, at least some of the time, to advancing conflicting objectives, interests, values, and beliefs, and cannot trust their moral emotions when carrying out this task.[93]

Certain kinds of bargaining assertions are particularly difficult to judge emotionally. They include "I have no trouble with that suggestion but my client would never agree to it," "we simply do not have the money to do that," "we never bargain over such issues as a matter of principle," "this is my final offer; I cannot give any more," "I have to have more than that to take back to my client," and other such self-serving assertions grounded in representations about private facts. Statements like these ask tacitly to be taken as sincere, and thus true, but the statements should be seen as "take my word for it" arguments more than expressions of sincere beliefs, and responding emotionally to "take my word for it" arguments is risky. Each of the statements is premised upon empirical assumptions that need to be tested against reasons and evidence, not gut reactions, before they can be trusted. Statements of this sort usually cannot be tested empirically, however, because the evidence needed to do the testing is under the control of the people making the statements, and they are not willing to share it.[94] "Take my word for it" statements are encrypted rather than literal communications, and encrypted communications need to be decoded before they can be understood.[95] They are an illustration of how bargaining conversation is a work experience more than a social one.[96]

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[92] Concession making is a structural feature of bargaining. A bargainer who refuses to concede is not bargaining in good faith. Under most circumstances this is an unfair labor practice. *See Bargaining in the Dark*, *supra* note 1, at 30. *See also* NLRB v. Gen. Elec. Co., 418 F.2d 736 (2d Cir. 1969).

[93] It is difficult for bargainers to trust their moral emotions in such circumstances since "one's sense of fairness is easily tainted by self-interest," GREENE, *supra* note 5, at 83; *id.* at 85 ("[E]xperiments reveal that people are biased negotiators, but, more important, they reveal that their biases are *unconscious*."), and false beliefs can be expressed sincerely. As Greene explains, "we genuinely want to be fair, but in most disputes there is a range of options that might be seen as fair, and we tend to favor the ones that suit us best." GREENE, *supra* note 5, at 83–84. Greene describes this as "biased fairness." GREENE, *supra* note 5, at 83. *See also* HAIDT, *supra* note 7, at 100–03 ("We Can Believe Almost Anything That Supports Our Team").

[94] Sometimes an adversary might produce evidence to corroborate such statements, such as financial records to establish that the client does not have access to the capital needed to satisfy a particular demand. But most of the time there will be no publicly available data against which to test claims on another bargainer's private state of mind.

[95] Structural features of law practice also can influence a bargainer's interpretation of an adversary's proposals and arguments. If one's practice is limited to certain kinds of clients, for example, as is often the case, those clients can form a kind of social group with which the lawyer bargainer identifies, and this identification, in turn, can cause him to look with suspicion, if not hostility, on the claims of groups that do not share the same values, interests, and objectives, irrespective of what the representatives of those groups say or do. *See* HAIDT, *supra* note 7, at xxiii ("People bind themselves into political teams that share moral narratives. Once they accept a particular narrative, they become blind to alternative moral worlds."); BLOOM, *supra* note 7, at 114–15 ("There is a large body of research showing that it takes very little to make a coalition that really matters: to establish group loyalty, to pit people against one another."); *id.* at 119 ("We start off prepared to make distinctions, but it's our environments that tell us precisely how to do so."). *See also* Robert J. Condlin, "*Practice Ready Graduates*": *A Millennialist Fantasy*, 31 TOURO L. REV. 75, 86 (2014) (describing the different types of law practice and the different cultures they produce.). Humans are natural statisticians, they work with stereotypes more than fully formed empirical pictures most of the time, BLOOM, *supra* note 7, at 119–23 ("The only way to cope with the present is by making

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Prior experience with adverse bargainers sometimes can reduce these encryption and interpretation problems, but it cannot eliminate them. Bargainers typically do not debrief one another after a dispute is resolved, with each side disclosing how much more it would have been willing to concede had it been pressed to do so, and thus bargainers rarely if ever know if they made the best possible deals. Not knowing this, it follows that they also rarely know if their interpretations of other bargainers' comments on which past deals were based are accurate. They could have been deceived and not known it. Good bargainers do not let adversaries know how much more they would have been willing to concede because they know that information will come back to haunt them in future negotiations.[97] But without this information, a bargainer has no baseline against which to judge an adversary's veracity, and one must know what someone looks like when lying before it is possible to know what he looks like when telling the truth. Until a bargainer can rule out the possibility that he was deceived in the past, therefore, there is no reason for him to be confident about his interpretive powers in the present. Frequently, repeat bargaining consists of just practicing one's interpretive mistakes.[98]

Clients cannot help resolve these encryption and interpretation problems because most of the time, they do not deal with one another face to face, and thus lack the direct evidence needed to make judgments about the trustworthiness of each other's arguments, statements, and proposals. Clients form their views of one another on the basis of lawyer reports, public information, past dealings, stereotypes, fears, hopes, desires, assumptions about the world and its perils, and the predispositions inherited from natural selection and evolution, and each of these factors acts as a filter to distort judgments about an adversary's likely response to candor, transparency, generosity, and the like. These problems are compounded when clients are risk averse or greedy because such clients will want their lawyers to be more secretive than normal, not revealing anything that could compromise their interests to even the smallest extent, and this will make it more difficult for their lawyers to create the atmosphere of candor, honesty, and fair dealing, needed for trust.

Not all interpretive issues in dispute bargaining are intractable. It is a dispute bargaining truism, for example, that the legal claims of adverse bargainers cannot be satisfied fully if both sides make the same claims. But when views conflict in this way, bargainers sometimes can resolve, or at least narrow, their differences by comparing the strength of their respective claims against standards, both substantive and practical, that are accepted as controlling by everyone in the bargaining relationship, and that are consistent with the impartiality and equal treatment norms inherited from natural selection and evolution.[99] In dispute bargaining, these standards

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generalizations based upon the past."), and stereotypes can take more time to test, confirm, or reject than bargaining timetables sometimes provide.

[96] Bargainers should be sociable, of course, but they also should verify before trusting. Ronald Reagan made the "trust but verify" expression popular in this Country, but Vladimir Ilyich Lenin used it long before Reagan, and it is a rough translation of the old Russian proverb *doveryai, no proveryai* (Доверяй, но проверяй). SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974-2008, at 261 (2009).

[97] The very best bargainers keep adversaries guessing (or in the dark) about this issue for a lifetime.

[98] Reputation and gossip also can influence judgments of when to trust in interactions with people with whom one has had no past dealings. GREENE, *supra* note 5, at 44–45 (describing the role of reputation in deciding whether to cooperate with others). The person's reputation becomes a default profile to be confirmed, modified, or abandoned based on evidence learned in the bargaining conversation. A bargainer can be a stranger because of his reputation, present behavior, or the nature of the issue being discussed, therefore, even if he shares all of the neurobiological markers of kin.

[99] BLOOM, *supra* note 7, at 213 ("If an individual tries to take everything by shouting 'I want it!' the situation devolves into a fight . . . . But statements such as 'I want an even share' or 'I want more because I worked harder'

are found principally in the social and professional norms, cultural conventions, and customs that regulate bargaining practice, as well as the substantive rules that govern the legal issues in dispute.[100]

Because normative standards of this sort do not dictate their application in particular cases, bargainers must come to an agreement about what the standards require, and the terms of that agreement will depend to a large extent upon which bargainers make the best arguments for interpreting the standards.[101] When bargaining positions are grounded on principled beliefs (as most are), modifying or creating doubts about those beliefs is the best way to change the positions,[102] and changing bargaining positions is the best way to produce favorable outcomes. Arguments based on the application of legal and practical norms are different from "take my word for it" arguments in the sense that they can be tested against publicly available standards and evidence. Bargainers have equal access to the norms, conventions, rules, and factual information needed to understand the issues under discussion, and also share an understanding of how to interpret those materials to determine who has the stronger claims.[103] Bargainers on both sides usually know who has the most sophisticated take on the issues under discussion, in other words, even if they do not acknowledge it publicly, and because of this, they are susceptible to arguments that are better than their own.[104] Bargaining outcomes can turn on personal force,

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can be appreciated by rational beings, because . . . these standards, in principle, apply to all of us."). It perhaps is more accurate to say that bargainers try to predict what a court will do with their dispute and reach an agreement consistent with that prediction. Most of the time this will involve arguing for interpretations of the governing substantive standards that are best supported by reasons and evidence. But courts are imperfect interpreters and sometimes their views of the law will differ from the best view, and lawyer bargainers will take that factor into account in framing their arguments. There will be instances in which practical concerns (e.g., an immediate need for money; negative reputational effects of a one-sided settlement; concern about bankrupting the adversary and making the agreement uncollectable; and the like) trump substantive ones, but in such cases bargainers will have to convince their adversaries that the practical concerns are legitimate and serious in the same way they would if making substantive legal arguments.

[100] *See supra* notes 66–69, describing the qualities and sources of such norms. *See also* BLOOM, *supra* note 7, at 129–30 ("[W]e can use our intelligence to override our coalition biases . . . and engineer certain situations, with the help of custom and law, to eradicate bias where we think that the bias is wrong. This is how moral progress happens more generally . . . . [W]e can use our intelligence to manage our information and constrain our options, allowing our better selves to overcome those gut feelings and appetites that we believe we would be better off without.").

[101] HAIDT, *supra* note 7, at 56–58 ("How to win an argument"); Condlin, *Bargaining Without Law*, *supra* note 1, at 298–309 (describing the role of legal argument in influencing bargaining outcome).

[102] BLOOM, *supra* note 7, at 211–13 (describing the "need to justify one's actions to other rational beings."). *But see* HAIDT, *supra* note 7, at 104–05 ("it's hard" [to teach people] "to look on the other side, to look for evidence against their favored view . . . and nobody has yet found a way to do it. It's hard because the confirmation bias is a built-in feature (of an argumentative mind), not a bug that can be removed . . . "); LIEBERMAN, *supra* note 7, at 198 (Medial Prefontal Cortex ("MPFC") activity predicts when "people [will] change their mental representations of the value of [something] . . . in a way that drives their behavior but, at the same time, in a way that they are unaware of.").

[103] Condlin, *Bargaining Without Law*, *supra* note 1, at 310–27 (describing the standards of effective legal argument). *See also* LIEBERMAN, *supra* note 7, at 189–94 (describing how our sense of self-interest is influenced by the social groups of which we are immersed).

[104] *See* Seul, *supra* note 29, at 913 ("Most people are open to influence through deliberation and respectful persuasion appeals. Activities and experiences that tend to produce perspective change over time include: sustained exposure to alternate perspectives; appeals to shared values; experiencing the cognitive dissonance that comes from recognition of kernels of truth in another's perspective and the potential, negative extremes of one's own position; exploring the complexity of and internal inconsistencies within one's own perspectives and value set; and humanizing interactions with one's opponents."). *See also* Condlin, *Bargaining Without Law*, *supra* note 1, at 326–27 (describing the susceptibility of lawyers to good arguments); GREENE, *supra* note 5, at 346 ("like the wind and

stamina, luck, and arbitrary division methods, of course, [105] and often do, but substantive argument provides a more lasting and legitimate[106] basis for resolving disagreements with all types of bargainers, in case after case, year after year.[107]

Argument must be respectful to be convincing; ridiculing another's views, dismissing them out of hand, or refusing to abandon claims that are palpably wrong only offends. Argument also must be based on reasons and evidence rather than self-serving rationalizations and self-favoring perceptions of fact,[108] and it must be sensitive to personal feelings. "When discussions are hostile," as Jonathan Haidt explains, "the odds of chang[ing someone's views] are slight . . . But if there is affection, admiration, or a desire to please the other person, [and one] . . . tries to find the truth in the other person's arguments,"[109] then argument is more likely

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rain, washing over the land year after year, a good argument can change the shape of things."); HAIDT, *supra* note 7, at 79–80 ("When discussions are hostile, the odds of chang[ing minds] are slight . . . But if there is affection, admiration, or a desire to please the other person, then [that person] leans *toward* [one] and . . . tries to find the truth in the [one's] arguments.").

[105] *See Every Day and in Every Way*, *supra* note 1, at 256–69 (describing various non-substantive methods used to resolve disputes).

[106] Reason does not always trump power, luck, and stamina in bargaining, of course. The legal and economic system has built-in structural features (e.g., delay, resource limitations), that can make even strong substantive claims unenforceable as a practical matter, and this in turn can undercut the legitimacy of bargained for outcomes. Lawyer bargainers can minimize this risk, but not eliminate it, by refusing to settle until legal rights are given their due. If they do this, parties with substantively strong cases will do better than parties with substantively weak ones, and that is the way it should be in a reasonably just legal system. *See* James D. Cox et al., *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 384 (2008) (describing how settlements in securities class actions are sensitive to the merits). This will be true even if some bargainers continue to exploit non-substantive factors to reach agreements not justified under existing law. Lawlessness reduced is better than lawlessness ignored, even if lawlessness eliminated is not a possibility.

[107] GREENE, *supra* note 5, at 297–98 (describing how effective cooperation between strangers proceeds by "offering reasons for opinions," discussing contrasting views, and "revising their estimates of how much they understand"). I discuss the role of argument in bargaining in greater detail in Condlin, *Bargaining Without Law*, *supra* note 1, at 298–306. Normative arguments play a role in transactional bargaining as well, but the parties' overlapping self-interests in making a deal discourage transactional bargainers from being combative. Thus, they typically do not overstate, shout, threaten, ridicule, or dismiss one another's views out of hand, and are more likely to look for common ground, uncover dovetailing interests, and explore complementary needs, than are dispute bargainers. This notwithstanding, transactional bargaining is not a completely problem solving experience. Parties to a deal also look past the moment of the deal, important as it is, to the period of time the deal will be in operation and the post-deal period, to make sure their agreement protects them if their present partner turns competitor. In doing so, they often conceal information, suppress arguments, and downplay the importance of certain issues when making the deal that they may reverse course on when the deal ends or goes bad. In transactional bargaining, the concern is not so much with belligerence as with deception, not so much with intransigence as with surprise. *See* Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1339 (2008) ("[T]he relative potential of integrative bargaining tactics is far greater, on average, in transactional negotiations than in distributive ones. But the relative potential of integrative bargaining can easily be overstated even in this context.").

[108] GREENE, *supra* note 5, at 298–00 (explaining the difference between good argument and rationalization and why it is not enough to "make up a plausible story and go with it . . . when we don't know why we feel as we do"); *id.* at 301 ("Learning to recognize [and avoid] rationalizations," is what "permits [bargainers] to establish ground rules that make it harder to fool [them]selves and each other."); *id.* at 301–05 (explaining how "rights" talk "allows us to rationalize our gut feelings without doing any additional work."); *id.* at 306–09 ("When dealing with moral matters that truly have been settled, it makes sense to talk about rights"). *See also supra* note 39.

[109] HAIDT, *supra* note 7, at 79–80; *id.* at 57 ("If there is any one secret of [sic] success it lies in the ability to get the other person's point of view and see things from their [sic] angle as well as your own.") (quoting DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE 36 (1981)); *id.* at 58 ("If you really want to change someone's mind on a moral or political matter, you'll need to see things from that person's angle as well as your own. And if you do truly see it the other person's way—deeply and intuitively—you might even find your own mind opening in

to persuade. This is because "our brains crave the positive evaluation of others," even from strangers, and successfully convincing others requires building such positive evaluation into argument.[110] "The persuader's goal should be to convey respect, warmth, and an openness to dialogue before stating [her] own case. . . . [She should] use . . . social persuasion . . . to prepare the ground before attempting to use . . . reasoned persuasion . . . ."[111]

      Bargaining argument also should be conversational,[112] rather than stylized or theatrical. It should seek to expand understanding rather than narrow it, inform and instruct rather than impress and compete, and attempt to create doubt in pre-negotiation understandings rather than capitulation to a superior view. Dispute bargainers should act simultaneously as both colleagues and adversaries, searching for outcomes in their mutual interest, while bending those outcomes to their individual advantage, and they should do this with substantive arguments rather than socio-psychological tricks, clever word play, and rhetorical or personal force. They should make more and better substantive points than their adversaries, and support those points with more and better reasons. The goal should be to convince adversaries not that one is a better bargainer, but that one has the stronger case.[113] When personal qualities and practical and material factors are held constant, effective dispute bargaining has almost a one-for-one relationship with substantive knowledge, distinctive insight, analytical skill, a more complete frame of reference, and the ability to express views persuasively and respectfully.[114]

      In the end, communitarian and adversarial approaches to dispute bargaining differ principally in their conceptions of adversaries and their standards of when to believe an adversary's statements. Communitarians prefer to think of adversaries as functional kin and to rely on the moral emotions in deciding when to believe them, while adversarial bargainers prefer to think of adversaries as functional strangers and rely on meta-moral arguments to determine when to take their claims as trustworthy. Ordinarily, the choice of one approach over the other would seem to be a matter of personal taste, but the dispositions and capacities for cooperation humans inherit from natural selection and evolution limit the issues, circumstances, and relationships in which each approach will work well. Effective dispute bargaining is simultaneously communitarian and adversarial, in other words, moving back and forth between the two approaches as the objectives and interests under discussion change from shared ones to

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response."). John Stuart Mill describes the moral dimension of bargaining argument:

> Those who, having opinions which they hold to be immensely important, and the contraries to be prodigiously hurtful, [and who] have any deep regard for the general good, will necessarily dislike, as a class and in the abstract, those who think wrong what they think right, and right what they think wrong . . . . [A dislike of error partakes] in a certain sense, of the character of a moral feeling. [This does not mean that one should be a] fanatic, or insensible to good qualities in an opponent, [but only that one should] throw [one's] feelings into his opinions [since it is] truly . . . difficult to understand how any one, who possesses much of both, [could] fail to do [this].

JOHN STUART MILL, AUTOBIOGRAPHY 57 (John M. Robson ed., 1989).

   [110] *Id.* at 77.

   [111] *Id.* at 57.

   [112] *See* Condlin, *Bargaining Without Law*, *supra* note 1, at 310–26 (describing conversational advocacy).

   [113] *See* Condlin*, Bargaining Without Law*, *supra* note 1, at 324.

   [114] It is widely believed that negotiation is mostly bluff and bluster and that the discussion of substantive concerns plays a small and not very important part. This can be true, and will be if one does not insist on more, but when bluff and bluster confront reasons and evidence, each advanced with equal force, reasons and evidence win. To think otherwise is to believe in the contradiction that substantive law is irrelevant to legal disputes. Substantive law defines legal disputes. I discuss this topic at length in Condlin, *Bargaining Without Law*, *supra* note 1, at 298–309.

conflicting ones, and bargainers must use both types of strategies if they are to protect all of the interests at play in even the simplest disputes. The choice of approach at any given moment will depend upon context-specific factors that define the issue under discussion,[115] and the choice will need to be made over and over again as the conversation moves from one issue to the next. But legal bargainers who ignore the natural limits on the human capacity to cooperate, and who try to operate exclusively within either a communitarian or adversarial mode, will not do well. Rodney King had it partly right[116]—sometimes we can all get along; and sometimes we cannot.
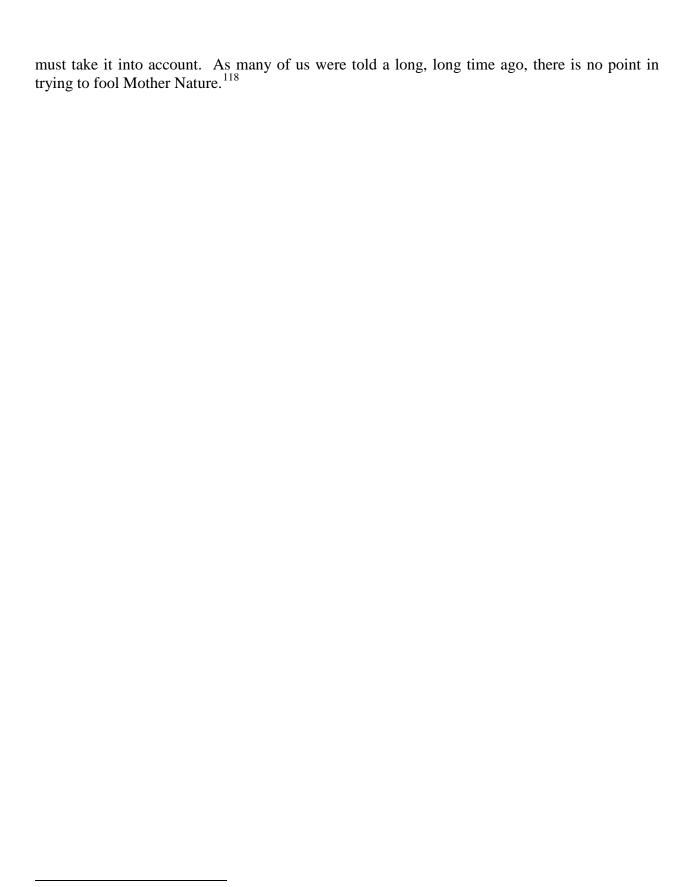
V.   CONCLUSION

Legal dispute bargaining scholarship divided into adversarial and communitarian camps almost from its inception, with each side committed to a different understanding of the nature of legal disputing and different strategies for resolving disputes. Writers on both sides of this scholarly divide acknowledged the legitimacy of the other side's views, but then wrote in such self-contained and exclusivist terms that the debate over the best approach quickly settled into a kind of Kipling-Marx stand-off, where competing factions, reasoning impeccably from mutually exclusive premises, produced intractably incompatible conclusions. The bipolar character of the debate has modulated somewhat over the years, as scholarship has matured and mixed views have emerged, so that now it probably is more accurate to say that dispute bargaining scholarship is distributed somewhat evenly over a communitarian/adversarial spectrum, with pure types at the poles and an assortment of hybrid perspectives (most of which are communitarian) in between.[117] Until now, arguments for the various theories have been based mostly on aesthetic and ideological grounds, but recent research in cognitive neuroscience may change that. We now know that humans are predisposed by nature to resolve disputes by arguing over perceptions of fact, disagreeing over the meaning of norms, and seeking out resolutions that treat all parties equally. This human neurobiological inheritance trumps ideology and aesthetics in shaping dispute bargaining practice, and dispute bargaining theory, adversarial and communitarian alike,

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[115] These factors will include the extent to which bargainers have accurate information about one another's interests, beliefs, and objectives; the degree of risk clients are willing to accept; the cultural and social framework within which the bargaining takes place; the relative importance of producing good outcomes versus cultivating continuing relationships; the nature of the issues under discussion, and the like.

[116] At least implicitly. King's statement was a plea, not a factual claim. He asked, "Can we all get along?" *See* The Truth is Viral, *Can We All Just Get Along? For the Kids and Old People?*, YOUTUBE, https://www.youtube.com/watch?v=1sONfxPCTU0 (video of Rodney King's plea during the 1992 Los Angeles riots), though he is frequently misquoted as having said, "Can we all just get along?" or "Can't we all just get along?"). *See also* GREENE, *supra* note 5, at 292 ("it's not enough for modern [humans] to say 'Let's be reasonable and open to compromise.' A pragmatist needs an explicit and coherent moral philosophy, a second moral compass that provides direction when gut feelings can't be trusted.").

[117] At the pure communitarian end are views of people like Joseph Folger and Robert Baruch Bush, who believe in the transformative power of bargaining and the ability of people to be angels. At the adversarial end are the views of people like James White, who believe that most disputes are based on fundamentally opposed conceptions of fair treatment and equal distribution, and can be resolved only by argumentation and compromise. And in the middle are views that lean in one direction of the other, such as Carrie Menkel-Meadow's problem solving view that assumes most (but not all) disputes are based on mistaken perceptions of interest and can be resolved by resort to shared interests and values, and views like those of Charles Craver, Robert Mnookin, David Lax, and James Sebenius, that combine adversarial and communitarian strategies equally, showing no presumption in favor of one or the other approach.

must take it into account. As many of us were told a long, long time ago, there is no point in trying to fool Mother Nature.[118]

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[118] *See* Crakkerjakk, *70s Mother Nature Chiffon Commercial*, YOUTUBE, https://www.youtube.com/watch?v=LLrTPrp-fW8 ("It's not nice to fool Mother Nature.").