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## Bargaining Without Law

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## Bargaining Without Law

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## BARGAINING WITHOUT LAW

*Like a professional athlete on growth hormones, legal bargaining scholarship has transformed itself over the years. Once a puny assortment of war stories, folk tales, and parlor tricks, now it is a hulking behemoth of social science studies, practitioner surveys, and conceptual models. There is a lot to like in this transformation. Much of the new writing is insightful, sophisticated, and spirited, with things to tell even the most experienced bargainer. But it also is missing something important: law. Many legal scholars now write about bargaining as if the strength of the parties' legal claims does not matter. Rarely do they discuss the place of substantive legal argument in bargaining, for example, and when they do, usually it is in terms of whether the argument is strategically "framed" or "anchored" rather than whether it is well reasoned and supported by evidence (i.e., correct). This shift in focus is a serious mistake. At its core, a legal dispute is a disagreement about the meaning of law, and a disagreement of this nature must be resolved on substantive grounds if parties are to judge the value and legitimacy of settlement options accurately. Psychological and social workarounds may paper over substantive disagreement or suppress it for a time, but they will not resolve it. To be helpful, therefore, bargaining scholarship must show how legal claims are argued—self-interestedly and to a conclusion—without polarizing relationships, producing lingering animosities, or provoking recrimination spirals. This is the heart of bargaining; the rest is sideshow. In this article I attempt to describe a number of ways in which this might be done.*

### I. INTRODUCTION

The last three decades have been fertile ones for legal dispute bargaining<sup>1</sup> theory. Several new and interesting variations have emerged, each grounded in a different

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1. The term "legal dispute bargaining" is ambiguous in a trivial but real sense. It could mean bargaining permitted by the law of a particular jurisdiction, that is, bargaining over matters that it is legal to bargain over, or bargaining over the meaning of the legal rules governing a particular dispute. I use the term in the latter sense. Cf. Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1337 (2008) (defining "legal negotiation" as negotiation "in which the participation of lawyers is ubiquitous").

I also restrict discussion to dispute bargaining and make few if any claims about 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, which a court would have jurisdiction to resolve should the parties choose to assert their claims in a lawsuit. Dispute bargaining differs from transactional bargaining, insofar as is relevant here, principally in the fact that the parties 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 ("[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."). The most important effect of this enforced pairing is that no one needs to make a special effort to be nice to hold the relationship together. They need only avoid being more unpleasant than the experience of litigating in court. This permits parties to use strategies and maneuvers they might eschew 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 a more detailed description of the particular properties that characterize dispute bargaining and the differences between it and transactional bargaining, see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 3–11 (1992). See

intellectual tradition<sup>2</sup> and each supported by a different body of research data, and there is the promise of more to come. Neither monolithic nor mutually exclusive, these new views include the communitarian models of Gerald Williams, Carrie Menkel-Meadow, and Robert Baruch-Bush; the soft adversarial models of Roger Fisher, Robert Mnookin, David Lax, and James Sebenius; the behavioral-economic models of Russell Korobkin, Chris Guthrie, and Jeffrey Rachlinski; and the virtual reality models of online settlement programs such as CyberSettle, The Claim Room, Square Trade, JAMS and others. The different views overlap, complement, and build on one another in many ways, but they seem to agree completely on only one thing: that the traditional adversarial model of legal dispute bargaining practice is no longer up to the task.<sup>3</sup>

The diagnostic claims of what I will call New Legal Bargaining Theory (NLBT)<sup>4</sup> have a lot to be said for them.<sup>5</sup> In many ways, legal dispute bargaining has become

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*also* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 385 n.9 (2010) (describing the differences between “dispute resolution” and “transactional negotiation”); Frank E.A. Sander & Jeffrey Z. Rubin, *The Janus Quality of Negotiation: Dealmaking and Dispute Settlement*, 4 NEGOTIATION J. 109 (1988) (describing the difference between “Deal-Making Negotiation” and “Dispute Settlement Negotiation”). For the classic descriptions of the similarities and differences between adjudication and dispute bargaining, see P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS* 3–24 (1979), H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 137–42 (1970), and Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 644–45, 649–65 (1976).

2. See Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 2–13 (2009) (describing the intellectual traditions behind “the most important ADR process”).
3. Read literally, this literature is about lawyer bargaining behavior, but looking back it now seems clear that it also was an early manifestation of what has come to be called the critique of public discourse. Long before political scientists, public intellectuals, and media pundits began pointing out the destructive effects of overly adversarial conversation practices on discussions of public policy issues generally, legal scholars were making the same criticisms of lawyer bargaining. These larger implications of legal bargaining scholarship went unappreciated, in part, because legal scholars themselves did not identify them, and in part, because the link between legal bargaining and public policy debate is not a natural and self-evident one. In retrospect, however, legal bargaining scholarship was the proverbial canary in the coal mine, warning, first, lawyer bargainers and then public figures, generally, that they needed to find more productive ways to discuss their substantive differences. See Daniel R. Ortiz, *Nice Legal Studies* 1 (Univ. of Va. Sch. of Law Pub. Law & Legal Research Paper Series, No. 2009-12, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474402) (“The last 40-odd years have been tumultuous—within both American culture and legal theory. In both realms, conflict has fragmented consensus, unsettled many certainties, and set friends and colleagues against each other. It’s been nasty . . . , [and] the conflict has exhausted us. Many on all sides feel broken and yearn for simpler times when life was less splintered and social conflict less pressing. After the edginess of the postmodern, we seek the comforts of post-partisanship.”).
4. NLBT is an ungainly, non-euphonious acronym to be sure. Golfers might find it easier to remember if they think of it as niblick, the early name of the golf club now known as the nine-iron. It should not be confused with the mashie-niblick, however, the equivalent of the modern seven-iron. The latter is more phonetically evocative of the traditional adversarial approach to legal bargaining, or at least the link between it and NLBT.
5. There is ambiguity that runs throughout the NLBT critique of lawyer bargaining. One could read the NLBT literature as advice to lawyers, a description of how to bargain effectively within the existing

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corrupted over the years, relying less on reasoned argument from consensus norms<sup>6</sup> and more on rhetorical force, threat, deception, intransigence, and the communication practices of anonymous blogging,<sup>7</sup> or at least more so than is thought to have been the case in the halcyon days of our civic republican past.<sup>8</sup> But NLBT's notions of

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legal system of rights, institutions, and practices, or, alternatively, as a utopian program for radically reconfiguring the existing system along more communal and less self-interested lines. I read the NLBT literature as mostly advice to lawyers. *Accord* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 17–18 (rev. ed. 2005) [hereinafter BUSH & FOLGER, *TRANSFORMATIVE APPROACH TO CONFLICT*] (“[A]s we use the term . . . transformation does *not* mean institutional restructuring . . . but rather a *change in the quality of conflict interaction*.”). While NLBT scholars sometimes speak in the language of personal transformation and deliberative democracy, *see* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347 (2004–2005); Jeffrey R. Seul, *Settling Significant Cases*, 79 *WASH. L. REV.* 881, 943–55 (2004) [hereinafter Seul, *Significant Cases*] (describing how “[s]ettlement processes that create opportunities for perspective change through collective moral deliberation can be important forums for democratic participation”); Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 *OHIO ST. J. ON DISP. RESOL.* 135 (1999), they are law professors, not political theorists, and their arguments usually are grounded in the so-called client-centered approach to legal representation, which asks lawyers to protect client interests, as clients define them, within the existing system of legal and political constraints.

There are exceptions, of course, authors with a genuine interest and background in political theory and structural reform. *See* Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 *HARV. NEGOT. L. REV.* 51 (2009); Frank Dukes, *Public Conflict Resolution: A Transformative Approach*, 9 *NEGOTIATION J.* 45, 47 (1993) (“[P]ublic conflict resolution is not limited to the settlement of disputes; rather, it is a vehicle for changing governing practices and institutional culture of agencies, public officials, citizenry, and communities.”); Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 *J. POL. PHIL.* 64, 69–72 (2010) (describing the relationship between negotiation and political deliberation); André Bächtiger, *On Perfecting the Deliberative Process: Agonistic Inquiry as a Key Deliberative Technique* 3 (Sept. 2–5, 2010) (unpublished manuscript, presented at the 2010 Annual Meeting of the Am. Political Sci. Ass'n), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1642280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642280) (proposing a form of “agonistic inquiry” as “a core but frequently overlooked and undervalued element of a desirable and effective deliberative process”). But for the most part, NLBT scholars do not seek to reconfigure the institutional structures of the world of dispute bargaining as much as change lawyer behavior within those existing structures. I plan to discuss the transformation and deliberative democracy claims in a future article.

6. *See* Eisenberg, *supra* note 1, at 669 (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 “objective criteria.” ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81–93 (2d ed. 1991).
7. *See, e.g., Internet Argument Techniques*, CRACKED.COM, <http://www.cracked.com/funny-3809-internet-argument-techniques/> (last visited Sept. 24, 2010).
8. *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”).

what to do about the problem seem slightly off the mark. The problem is a substantive one—a process designed to be rational, deliberative, and respectful has become stylized, manipulative, and abusive—but NLBT scholarship offers only cosmetic remedies in response. Lawyers may need to learn how to discuss substantive differences more productively, but NLBT scholarship purports to show them only how to be more sociable and psychologically adroit.<sup>9</sup> This form over substance response, seemingly based on the belief that disputes over legal rights do not have more and less legally correct outcomes,<sup>10</sup> is a program for wishing away or papering over the problem of ineffective lawyer dispute bargaining more than one for solving it.<sup>11</sup> More than wishful thinking is needed.

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9. Substantive argument has a natural advantage over psychological maneuvering when it comes to influencing a bargaining adversary. Unlike maneuvering, argument cannot be neutralized by identifying it for what it is. As Alex Stein points out in his analysis of the Blue Cab experiment from *Behavioral Economics*, using a psychological trick to catch someone in a decision error is a “conjurer’s sleight of hand: each trick can be played only once . . . [T]he play uncovers and thereby destroys the trick.” Alex Stein, *A Liberal Challenge to Behavioral Economics: The Case of Probability*, 2 N.Y.U. J.L. & LIBERTY 531, 538 (2007). Thus, one can counteract a framing move by pointing out that framing is being done, but responding to a legal argument by pointing out that one is “playing the law (or evidence) card” would provoke only laughter (and agreement). Argument must be rebutted; it cannot be trumped by meta-commentary. It also can be used over and over again, as situations and relationships change and new information emerges, both in individual disputes and throughout a bargaining career. Argument educates a listener while psychological maneuvering simply manipulates him and, because of that, also often offends him. Because psychological tricks work only against adversaries who are unaware of the tricks, their use truly is an instance of “fishing for suckers.” See Robert J. Condlin, “Every Day and in Every Way We are All Becoming Meta and Meta,” or *How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. ON DISP. RESOL. 231, 243–44 (2008) [hereinafter Condlin, *Communitarian Bargaining*] (explaining how substantive argument does not depend upon fishing for suckers); MNOOKIN, *infra* note 127, at 321–23 (explaining the concept of “fishing for suckers”). I do not suggest that argument is all of dispute bargaining, just a necessary part. See Robert J. Condlin, “Cases on Both Sides”: *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 67–72 (1985) [hereinafter Condlin, *Cases on Both Sides*] (describing the nature of dispute bargaining and the role substantive argument plays in it). For a comprehensive list of factors that can play a role in influencing dispute bargaining outcome, see Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors’ and Officers’ Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 755, 783–820 (2009), describing “the key factors influencing settlement” in securities class actions.
  10. This belief usually is accompanied by the equally controversial belief that legal disputes typically are grounded in mistaken perceptions of interest rather than competing conceptions of rights, and that they would go away if people could simply get their priorities straight. See Alberstein, *supra* note 2, at 5 (“Under the interpretive paradigm of mediation, the reality of the conflict does not exist outside the perceptions of the parties . . .”); Seul, *Significant Cases*, *supra* note 5, at 909 (“[S]tudies suggest there is often less ideological and practical distance between opposing moral communities than individuals on each side of a dispute realize.”).
  11. See Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1205, 1218–32 (2009) (omitting the consideration of substantive legal rights from a description of the “fundamental principles” that “all camps [in the dispute resolution debate] might endorse”). This focus on form over substance may be another instance of the well known academic preference for the study of process over the acquisition of knowledge, a preference perhaps reflected best in the now more than century-long debate over the shape of primary and secondary education in the United States. For a succinct summary of that debate by one of its most important contemporary participants, see E.D. Hirsch Jr., *How to Save the Schools*, N.Y. REV. BOOKS, May 13, 2010, at 16, 16–19, available at <http://www.nybooks.com/articles/archives/2010/may/13/how-save-schools/>, reviewing DIANE RAVITCH, *THE*

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I discuss the foregoing claims in the following manner. In Part II, I summarize the NLBT criticisms of the traditional adversarial model of legal dispute bargaining practice and describe the implications those criticisms have for the reformulation of dispute bargaining theory. In Part III, I describe the alternative conceptions of legal dispute bargaining practice advanced by NLBT scholars and show how those conceptions share a tacit and sometimes almost explicit disdain for the role of substantive legal argument.<sup>12</sup> In Part IV, I speculate about why NLBT scholars would leave law out of their conceptions of dispute bargaining practice and explain why this

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DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION (2010).

Scholars in other fields, notably politics, political theory, philosophy, and legal ethics, have responded to the problem of ineffective substantive discourse in a quite different way. Rather than turn to psychological and social maneuvering to avoid or work around the problem, they have revisited their conceptions of substantive argument to make them more reason-based and deliberative. See RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE*, at xi (2006) (describing common ground among Americans for argument over “rival convictions about the nature and force of human rights, the role of religion in politics, the distribution of the community’s economic wealth, and the character and forms of the politics through which those decisions are made”); JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* 136–37 (2009) (describing a “deliberatively thick” reasoned persuasion); BRYAN GARSTEN, *SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT* 174–212 (2006) (describing a reconstituted Madisonian form of argumentative deliberation); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 94 (2008) (describing a “fidelity” and “negative capability” based conception of legal representation that enables a lawyer “to sustain all sides of an argument, to equivocate without any irritable reaching after a conclusion, to remain content with persuasion rather than proof”); Mansbridge et al., *supra* note 5, at 70–84 (describing a form of political deliberation in which self-interest and power play prominent roles). Others would deal with the problem of ineffective substantive argument by trimming or constraining it. See THOMAS NAGEL, *CONCEALMENT AND EXPOSURE AND OTHER ESSAYS* 20–26 (2002) (describing the process of “privatizing” argument over hotly contested issues); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5–10 (1999) (describing a judicial decisionmaking method that avoids debate over “fundamental issues” whenever possible). None of these projects is likely to be the final word on the subject, of course. There are objections one could make to each, but the important point is that scholars in related disciplines are confronting the problem of adversarial discourse head on, not ignoring or avoiding it in the hope that it will go away on its own, and NLBT scholars should be doing the same thing.

12. In an important new manuscript, Professors Stark and Frenkel describe the distinctive nature of “substantive argument,” as the concept is understood in the social science literature on persuasion, and distinguish it from other types of argument used in dispute bargaining. Substantive argument, they explain, is “outcome-oriented argument” designed to have parties to a dispute

consider how their offers and demands might be perceived by the opposing party; by helping them to come to terms with the fact that their initial goals for the mediation may not be . . . achievable; to consider the reality of how their current proposals for resolution compare with their non-settlement options; or by asking questions, or making statements, designed to encourage them to think about the weaknesses of their case, or other ways that a disinterested person might look at contested events.

James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion* 5 (Univ. of Pa. Law Sch. Pub. Law and Legal Theory Research Paper Series, No. 11-07, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1769167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1769167). In dispute negotiation, this process “tends to take as its starting point norms of general applicability derived from sources outside the immediate dispute.” Eisenberg, *supra* note 1, at 669; see also FISHER, URY & PATTON, *supra* note 6, at 83–86.



omission is fatal to the development of a satisfactory theory of dispute bargaining. Finally, reversing course, in Part V, I show how substantive legal argument might be understood so as to fit compatibly into any robust theory of legal dispute bargaining, NLBT theories included.

## II. THE NLBT CRITIQUE OF LEGAL DISPUTE BARGAINING PRACTICE

Legal dispute bargaining is a complex social process that resists attempts at explanation in terms of some single, all-encompassing metaphor. It is a hybrid of the ordinary social experience of disagreeing with a friend and the formal work experience of arguing to a court. It requires one to be adversarial but not abusive, sociable but not intimate, truthful but not candid, and informal but not relaxed. It is a study in tensions, sitting astride the famous private-public distinction as both a part of the state's public system for redressing legal injury and also a private escape from it. It is private in the sense that it is party-run and largely unmonitored, so that when bargainers agree to ignore the law and resolve their disagreements according to personally created normative standards, there is little the formal judicial system will be able or want to do about it.<sup>13</sup> Yet it also operates famously "in the shadow of the law,"<sup>14</sup> where legal rules create bargaining chips that make strategic and tactical moves available, provide standards against which to judge the desirability of proposed

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13. See Hollander-Blumoff, *supra* note 1, at 383 (describing how "negotiation is the back-room, realpolitik, down-and-dirty way that most cases get resolved"); see also 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 (2005) (recommending that lawyers devise their own contractually based ethical standards for bargaining).
  14. Robert H. Mnookin & Lewis Kornheiser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). "Shadow" scholarship about bargaining is growing so rapidly that one might legitimately wonder whether soon it will overtake its older "Getting" sibling in total output. Compare Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000), Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010), Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010), Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605 (2003), Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789 (2009), and Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621 (2003), with ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* (1988), ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE* (1995), ROGER FISHER & ALAN SHARP, *GETTING IT DONE: HOW TO LEAD WHEN YOU'RE NOT IN CHARGE* (1999), FISHER, URY & PATTON, *supra* note 6, WILLIAM URY, *GETTING PAST NO* (1993), and Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991). I suppose only "the Shadow knows." NLBT scholarship combines the two concepts, in effect, to advocate "Getting Out of the Shadow of the Law." See Condlin, *supra* note 1, at 1 (arguing that there is not enough light in the world of bargaining theory to produce shadows).



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agreements, and offer an alternative institutional arrangement for resolving disputes in the event that bargaining breaks down.<sup>15</sup>

Dispute bargaining exists, not because it is intrinsically satisfying, aesthetically pleasing, or essential to personal development, but because it is an instrumentally useful process for resolving competing claims to real world resources. It is principally a strategic process, characterized by the bilateral presentation, defense, and assessment of conflicting entitlement claims. Strategy is not all of dispute bargaining, of course, but it is an inescapable part of it, and it is the part that gives the process its essential character. A bargainer has no choice but to be strategic, other than the choice not to bargain at all. Given this, the central strategic decisions in dispute bargaining include whether to share information or conceal it, describe objectives accurately or inflate them, and most importantly for present purposes, argue legal claims reasonably or ignore them altogether.<sup>16</sup> In the bargaining literature, this set of decisions often is reduced to the binary choice of whether to adopt a cooperative or competitive bargaining strategy, and lawyers, historically, have been thought to prefer competition, either because they enjoy it, think it has the greatest chance of producing a maximum return for their clients, or see it as a necessary part of the professional obligation to provide zealous representation. To be “skillful, energetic, uncritical, and obedient instruments” of their clients’ selfish ends is the essence of legal representation for many lawyers, and this view is embodied in the traditional, adversarial approach to legal dispute bargaining.<sup>17</sup> NLBT’s principal contribution to the world of dispute

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15. Dispute bargaining is perhaps strangest of all in Wikiland. In the words of David Hoffman and Salil Mehra, “Wikipedia appears to have created the first dispute resolution system whose goal is to encourage the parties to continue to dispute with one another.” David A. Hoffman & Salil K. Mehra, *Wikitruth Through Wikiorde*, 59 EMORY L.J. 151, 156 (2009). Or put another way, the first “dispute resolution process that does not actually resolve disputes.” *Id.* at 194. The online encyclopedia’s highly sophisticated arbitration system for settling debates about the accuracy of articles posted on its website performs two distinctly different functions simultaneously. “[I]t seeks to remove [by outright ban] those who would destroy Wikipedia through their failure to abide by its norms and rules,” and at the same time “provide guidance [by administrative sanctions, cautions, probations, and the like] to those who value Wikipedia as a community, but who disagree as to proper conduct . . .” *Id.* at 196. It does this in order “to retain those users who take the initiative to edit” and on whose efforts Wikipedia depends, but also to “weed out” those users whose energies it believes cannot be productively channeled,” *id.* at 195, and those who would bury the site under a “march of the trolls.” *Id.* at 200 (citing Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1494 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)) (“Internet chat rooms or blog comments began with useful discussions, and then saw their initial audience driven out by spammers, flamers, trolls, and know-nothings.”)). The site’s principles of participation thus “are less bright-line rules [of conduct] than methods to gauge the commitment . . . of individual participants,” Hoffman & Mehra, *supra*, at 207, in order to determine who belongs in the Wikipedia community and who does not. If, as the old saying goes, “the problem in life is the personnel; if we could just get better personnel,” then Wikipedia appears to have worked out a way to do this. In this, it is unlike legal dispute settlement systems generally.
  16. Condlin, *supra* note 1, at 4–10 (describing the strategic dimension of dispute bargaining); Condlin, *Cases on Both Sides*, *supra* note 9, at 67–70 (describing the “assessment, persuasion, and exchange” dimensions of dispute bargaining).
  17. Condlin, *supra* note 1, at 75–76; accord Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011) (describing a lawyer bargaining culture of over-commitment to clients that results in a winning at all costs attitude).

bargaining theory is to call into question the conception of dispute bargaining as the self-interested and adversarial competition over instrumental ends.

NLBT criticizes the adversarial model of dispute bargaining for a number of social and psychological failings that, if true, would make even a parent ashamed. Adversarial bargaining, it is charged, is belligerent, wasteful, close-minded, self-interested, intransigent, insulting, rigid, mechanical, unimaginative, polarizing, demagogic, vituperative, shrill, linear, and much more.<sup>18</sup> These could be criticisms either of form or substance, depending upon how they were developed. But for the most part, NLBT scholars have emphasized their form dimensions, finding fault with lawyer bargainers for their attitudes, motives, and manners more than the content of their substantive arguments or the reasonableness of their offer and demand strategies. In fact, substance rarely is discussed in the NLBT literature. For example, adversarial bargainers are criticized for responding to settlement proposals in a “take-it-or-leave-it” fashion, without regard for whether they have reasons for being rigid or are doing so out of spite, meanness, or belligerence; for turning bargaining conversations into stylized fights without regard for whether they started the fights or are simply defending themselves; and for acting self-interestedly irrespective of whether their interests are worthy of protection or are just manifestations of selfishness and greed (and so on, and so forth).<sup>19</sup> NLBT scholars appear to think

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18. Most of these criticisms were first expressed systematically by Professor Menkel-Meadow in an early article describing a problem-solving alternative to adversarial bargaining, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 765–94 (1984) (describing the “structure and process of adversarial negotiation”), but many other commentators have added to the critique since then. See 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”); John S. Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOTIATION J. 179, 183 (1986) (describing adversarial bargaining as “aimed at persuading, coercing, deceiving or otherwise manipulating the opponent to an acceptable agreement”); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 163–67 (2002) (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, *Communitarian Bargaining*, *supra* note 9, at 238–45, and in 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, 8–16 (2007). The criticisms resemble Professors Hoffman and Mehra’s list of “over thirty distinct ways to irritate . . . Wikipedia users.” Hoffman & Mehra, *supra* note 15, at 179–82.
19. The stark, Manichean quality of these criticisms (i.e., characterizing bargaining practices as either good or bad in themselves, irrespective of the circumstances in, or motives for, which they are used) also is evident in the research methods that NLBT scholars use to collect law practice (as opposed to game playing) data on bargaining. Research surveys, for example, usually ask lawyers to describe their bargaining experiences in terms of a series of bipolar adjective sets that divide bargaining behavior into mutually exclusive adversarial or communitarian categories without equal opportunity to report back mixed, qualified, contingent, or hybrid forms of the same behaviors. See Leonard Greenhalgh, *Relationships in Negotiations*, 3 NEGOTIATION J. 235 (1987) (describing metaphors for bargaining practice in bipolar, mutually exclusive, and unqualified terms); Schneider, *supra* note 18, at 163–65; see also Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEHAV. SCIENTIST 211, 218 (1983) (characterizing the escalation of conflict in the PATCO strike as “nonrational” without examining the reasoning process resulting in the escalation).

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that certain types of bargaining behavior are always inappropriate, whatever the reasons or circumstances, usually because such behaviors introduce disagreement and conflict into the bargaining relationship. NLBT scholars do not like conflict.<sup>20</sup>

Avoiding unnecessary conflict in bargaining is desirable, of course, but avoiding conflict at all cost can be counterproductive much of the time. Legal disputes are grounded in conflict, or at least in disagreements about who legally is entitled to what, and many of these disagreements are worth arguing about.<sup>21</sup> If the goal is making bargaining productive, one is better off focusing on the manner in which bargainers argue and the types of issues they argue about, rather than the fact that they argue at all. If bargaining argument is not always intelligent, open-minded, respectful, and fair, for example, it makes more sense to object to the absence of those properties than it does to criticize the fact of argument itself. Argument is (or can be) a learning experience,<sup>22</sup> expanding perspectives, provoking insights, and

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20. See BUSH & FOLGER, *TRANSFORMATIVE APPROACH TO CONFLICT*, *supra* note 5, at 48–51 (describing what the experience of conflict “means to people”); FISHER, URY & PATTON, *supra* note 6, at 8–9; *infra* note 56 and accompanying text. In this regard, NLBT scholars may be “[l]ike broken-down veterans . . . [who] now look back in anguish [over the last forty years and wonder whether] the fighting [over legal theory] was worth it.” Ortiz, *supra* note 3, at 2. *But see* Hoffman & Mehra, *supra* note 15, at 163 (“Conflict is by definition critical to dispute resolution.”).

21. John Stuart Mill explains why this is so:

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 . . . .

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

A dislike of error, continued Mill, partakes “in a certain sense, of the character of a moral feeling.” *Id.* This does not mean that one should be a “fanatic,” or “insensible to good qualities in an opponent,” but 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].” *Id.*; *see also* GARSTEN, *supra* note 11, at 194–96 (describing the role of emotion in deliberative judgment).

22. In a sense, all learning begins in some form of disagreement. Until there is disagreement, there is nothing new to learn, and disagreement is resolved by argument. *See* Bächtiger, *supra* note 5, at 4 (“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 Kloppenberg, *A Nation Arguing with Its Conscience*, *HARVARD 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 . . . .”). Because it educates, disagreement may even be “transformative.” Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *NEGOTIATION J.* 217, 240 (1995) (“[M]ediation is transformative because it is educational . . . . [W]e learn about other people, other ways to conceptualize problems, ways to turn crises into opportunities, creative new ways to resolve complex issues and interact with each other.”). One might describe the shift in perspective from the traditional conception of dispute bargaining practice to the NLBT conception as a shift from belligerent adversarialism to collegial adversarialism. There is no effective non-adversarial option, the claims of some NLBT scholars notwithstanding.

generating ideas for dissolving differences.<sup>23</sup> It can inform decision-making and make it more thoughtful, and it is not inevitably a vehicle for abuse, punishment, ridicule, or insult. I return to this topic at greater length in Part V.

### III. THE NLBT ALTERNATIVES TO ADVERSARIAL BARGAINING

NLBT's new conceptual models are grounded, for the most part, in social psychology scholarship of the late twentieth century.<sup>24</sup> While replete with suggestions for making bargaining behavior more sociable and psychologically sophisticated, few of these models say much about improving the substantive legal content of the dispute bargaining conversation. NLBT does not explicitly reject the idea of arguing substantive differences more productively, it simply does not devote any significant attention to the topic. In the few instances when it discusses substantive argument, it does so in a perfunctory and desultory manner, ultimately dismissing it as not a useful vehicle for reforming bargaining practice.<sup>25</sup> This attitude is evident in all of the major subdivisions of NLBT scholarship:<sup>26</sup>

*The Cordiality View.* The cordiality view as a subset of NLBT tries to neutralize the destructive effects of adversarial bargaining by encouraging bargainers to be friendly (i.e., smile, make eye contact, ask about the kids). Trading on the reciprocity norm, proponents of this view argue, in effect, that niceness begets niceness, and that bargainers who disclose information voluntarily, make reasonable demands, and adjust their views generously will reap what they sow.<sup>27</sup> In a world of cordial

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23. See GARSTEN, *supra* note 11, at 174 (defending argument as a “constitutive part of deliberation”). Like enemies, bargaining adversaries often provide the best learning. See ARTHUR SCHOPENHAUER, *PARERGA AND PARALIPOMENA: A COLLECTION OF PHILOSOPHICAL ESSAYS* 72 (T. Bailey Saunders trans., 2007) (“Your friends will tell you that they are sincere; your enemies are really so. Let your enemies’ censure be like a bitter medicine, to be used as a means of self-knowledge.”).
24. The social psychology literature on bargaining was introduced into legal education principally by the clinical education movement. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* (1977); ROBERT S. REDMOUNT & THOMAS L. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1980); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* (1976). The most recent NLBT models are grounded in the behavioral economics literature of the last ten years. See *infra* note 101.
25. See Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162, 162–63 (2009) (“As a first approximation, the legal merits of the lawsuit matter, of course. . . . But there is much more to settlement negotiations than the facts of the dispute and the relevant legal rules. . . . [Moreover,] the legal merits of a case cannot be measured precisely.”); MACFARLANE, *THE NEW LAWYER*, *supra* note 18, at 108–10 (describing “an alternative conception of advocacy” in negotiation).
26. I describe these various schools of NLBT scholarship in greater detail in Condlin, *supra* note 1, at 16–68, and Condlin, *supra* note 18, at 8–16, and thus an abbreviated synopsis of each, highlighting its most salient properties, will do here. For another typology of NLBT scholarship, see Hollander-Blumoff, *supra* note 1, at 391–401.
27. Many have written about the power of reciprocity and cordiality in bargaining. See Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. (SPECIAL ISSUE) 829, 830–33 (2004) (describing the natural urge to reciprocate as the “fourth principle of influence that a lawyer might use” to “induce her counterpart to settle on terms that are advantageous to [the lawyer’s] client”); Russell Korobkin, *A*

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bargaining, there will be no need to argue substantive differences because there will be little, if anything, to disagree about. Gerald Williams is perhaps the most well known supporter of this view.<sup>28</sup>

*The Problem Solving View.* Problem solving theory asks bargainers to approach bargaining as a joint venture in which group interests dominate self-interests, long-term satisfaction is more important than short-term gain, and positive sum collaborations are preferable to zero sum contests. It recommends replacing substantive argument with a kind of joint brainstorming in which bargainers expand the bargaining pie and invent options for mutual gain so that there is something for everyone. Carrie Menkel-Meadow is the most well known proponent of this view.<sup>29</sup>

*The Principled (or Soft Adversarial) View.* While accepting many of the conclusions and recommendations of problem solving theory, principled bargaining theory also acknowledges the need to argue about distributive issues and suggests ways in which this can be done.<sup>30</sup> It differs from adversarial bargaining principally in its conception of how argument should proceed (e.g., on the basis of “objective criteria,” in terms of “interests not positions,” etc.), and in its emphasis on softening the effects of argument by using the communication practices of other NLBT approaches.<sup>31</sup> Principled

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*Positive Theory of Legal Negotiating*, 88 GEO. L.J. 1789, 1821 (2000) (describing “The Reciprocity Norm”); Leigh L. Thompson et al., *Some Like It Hot: The Case for the Emotional Negotiator*, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 139, 142 (1999) (hypothesizing that the trusting attitude implicit in cooperative behavior may stimulate reciprocal behavior in others); Leigh Thompson & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 J. Soc. ISSUES 109 (2002) (describing social contagion as “the spread of affect, attitude, or behavior from Person A (the ‘initiator’) to Person B (the ‘recipient’) where the recipient does not perceive an intentional influence attempt on the part of the initiator;” and describing the type of social contagion most relevant to legal negotiation as “echo contagion,” something “which occurs when a social actor imitates or reflects spontaneously the affect or behavior of an initiator”).

28. GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983). Professor Williams does not adopt a cordiality view explicitly, but he lays the groundwork for it by arguing that effective bargainers are six times more likely to be cooperative than competitive and by distinguishing the two styles principally in terms of social skill. Cooperative bargainers are “courteous, personable, friendly, tactful [and] sincere,” while competitive bargainers are “tough, dominant, forceful, aggressive, attacking, ambitious, [egotistical, and] arrogant.” *Id.* at 21–23. He acknowledges that the two styles have properties in common, *id.* at 27–30, and that one can bargain effectively in either style, but concludes 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.
29. See Menkel-Meadow, *supra* note 18, at 801–28 (describing the structure and process of problem-solving negotiation).
30. Put another way, principled bargaining theory accepts the well-known Lax and Sebenius point that bargaining involves both “creating value and claiming value.” 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”).
31. Belief in the existence of objective criteria for resolving disputes about entitlement claims is another form of wishing away the problem of substantive disagreement. It sees disagreement as based on mistaken perceptions of rights rather than incommensurable conceptions of the good, see Seul, *Significant Cases*, *supra* note 5, at 953 (describing how “those who participate openly in deliberative processes may find that their own and others’ perceptions of self-interest shift”), and thus as a problem of analytical motor skill rather than politics or morality and, as such, susceptible to a technical resolution. For



bargaining dampens bargaining argument and marginalizes it, but does not banish it. Roger Fisher, William Ury, Robert Mnookin, David Lax, and James Sebenius are the most well known proponents of this view.<sup>32</sup>

*The Behavioral Economics View.* This subset of NLBT sees psychological advantage-taking, rather than substantive argument, as the prime mover in dispute bargaining and describes strategies for exploiting the tacit heuristics and biases people use unselfconsciously to make bargaining judgments. One might think of it as the bargaining theory equivalent of hacking, a program for worming one's way surreptitiously into an adversary's decision process so as to work around the problem of substantive disagreement rather than engage and resolve it. Russell Korobkin, Chris Guthrie, and Jeffrey Rachlinski are the most well known proponents of this view.<sup>33</sup>

*The Instant Messaging View.* This subset of NLBT minimizes the role of argument in bargaining by eliminating face-to-face interactions among bargainers altogether, thereby reducing bargaining to a form of online chat in which parties are permitted to make demands, offers, and proposals, but are not permitted to explain or defend those choices in a conversational give and take. Legal argument, to the extent it is possible in this format, is made implicitly in the decisions of what, when, and how to make proposals for settlement, rather than explicitly in the normative assertions about why the proposals make sense. Online settlement programs are the best example of this view.<sup>34</sup>

*Residuary Views.* Several miscellaneous types of NLBT rely alternately on fair division algorithms, parables, fables, folkloric rules of thumb, mood altering techniques, and the like, to provide what one might think of as parlor trick methods for settling legal disputes. These views have little in common with one another save

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criticisms of the concept of objective criteria, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1133 (2000) and Condlin, *supra* note 1, at 30.

32. FISHER, URY & PATTON, *supra* note 6; LAX & SEBENIUS, *supra* note 30.

33. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43 (1999); Korobkin, *supra* note 27; see also *infra* note 101.

34. See Yannick Gabuthy, *Online Dispute Resolution and Bargaining*, 17 EUR. J.L. & ECON. 353, 353 (2004) (describing online negotiation as involving a "blind-bidding process in which an automated algorithm evaluates bids from the parties and settles the case if the offers are within a prescribed range"); Jelle van Veenen, *A Model for Uncovering Interests Using Online Dispute Resolution 2* (Tilburg Inst. for Interdisciplinary Studies of Civil Law and Conflict Resolution Sys. Working Paper Series on Access to Justice Dispute Resolution and Conflict Sys. Design, No. 005/2010, 2010), available at <http://ssrn.com/abstracts=1635195> (describing the concept of a "hypothetical interest model" and "three case studies [showing] how this model may be enriched with expert knowledge to help ODR [online dispute resolution] users uncover their interests"); Marc Mason & Avrom Sherr, *Evaluation of the Small Claims Online Dispute Resolution Pilot* (Sept. 1, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1407631> (describing the lack of a role for law in online settlement). There is a related body of literature on e-mail negotiation. See Noam Ebner et al., *You've Got Agreement: Negotiating via Email, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 89 (Christopher Honeyman et al. eds., 2009); Lynn A. Epstein, *Cyber E-Mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?*, 36 TULSA L.J. 839 (2001).

for a certain surface level inventiveness, a belief in the ephemeral nature of disputing, and an assumption that substantive disagreement is not the central feature of a legal dispute. These approaches work best against novice bargainers (and usually only once against them), and are the favorite topics of popular commentators on legal bargaining.<sup>35</sup>

While these multiple variations of NLBT differ in many ways, they share a common understanding of dispute bargaining as principally a psychological and social phenomenon rather than a legal one.<sup>36</sup> This is evident not only in the NLBT prescriptive advice for bargainers but also in the research instruments NLBT uses to produce the data on which that advice is based. Whether they are specially constructed decision scenarios, hypothetical bargaining stories, bargaining games and puzzles, or

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35. See Condlin, *Communitarian Bargaining*, *supra* note 9, at 245–69 (describing the use of algorithms, folkloric rules of thumb, parables, and the like as a basis for bargaining theory). On mood-altering techniques, see 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. See also 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).
36. Only rarely does someone say this explicitly, see 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”), but the almost exclusive reliance by NLBT scholars on psychological and economic theories, concepts, and insights makes it a natural inference. Hollander-Blumoff, *supra* note 1, 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 most susceptible to an analysis based on principles of human behavior.”); see, e.g., CHARLES B. WIGGINS & L. RANDOLPH LOWERY, *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). This fascination with social psychology and behavioral economics might be another example of what Judge Edwards had in mind when he lamented the fact that legal education has come to “emphasiz[e] abstract theory at the expense of practical scholarship.” Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). But see Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1 (2010) (finding no general downward trend in court usage of academic legal scholarship in business law cases); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. (forthcoming 2011) (manuscript at 114), available at <http://ssrn.com/abstract=1640681> (finding that “over the last fifty-nine years . . . there has been a marked increase in the use of legal scholarship in the reported opinions of the circuit courts of appeals”). I do not suggest that psychology, or social science generally, has nothing to teach lawyers about dispute bargaining. Social science research is particularly good at identifying strategically problematic patterns in bargaining behavior after the fact. It just is not as helpful in identifying bargaining strategies to be used in the first instance. In part, this is because legal dispute bargaining is not principally a socio-psychological phenomenon—the background presence of a controlling body of law gives it a distinctive legal character and identity—and in part because social-psychological strategies once known are easily countered. See *supra* note 9 and accompanying text.



actual case studies, these instruments invariably exclude the factual detail needed to understand and evaluate the strength of the legal claims embedded in the bargaining problems depicted.<sup>37</sup> In fact, they often omit a description of the legal issues in dispute altogether.<sup>38</sup> It is difficult to apply the concepts of fault, blame, entitlement,

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37. Many examples could be given, but one should suffice. Consider the study by Professor Babcock and her colleagues examining the extent to which expectations about trial outcome influences a negotiator's reservation values. Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289 (1995). Lawyer participants in the study were told that the defendant had admitted liability (in some unspecified "products liability" action), and that the only thing left to do was assess damages. They were given a list of one hundred "recent court awards" taken from "cases very similar to this one" and asked to determine what a jury would award in their case and what they would advise their clients to accept (or pay) in settlement. *Id.* at 292. The information on "recent court awards" consisted of seventeen different verdict amounts, beginning at \$400,000 and increasing in \$25,000 increments to \$800,000, listed in ascending order in a column, with the frequency of each award listed in a parallel column. *Id.* The frequency numbers were distributed perfectly over a bell-shaped curve. Subjects were told nothing about court costs, attorneys' fees, calendar delays, the characteristics of the judge and jurors who would decide the damage issue if the parties could not agree, the jurisdiction's law on damages, the factual and legal details of each of the individual cases listed in the "recent court awards" column, and other such information. *Id.* The statement that the "awards cases" were "very similar" was inherently implausible given the wide variation in the dollar amounts awarded and the absence of any additional factual information to distinguish the cases. It would have been impossible for a lawyer to make an informed judgment about the liability point, one way or the other, on the basis of the information provided.

Professor Babcock and her team have conducted studies of bargaining based on more elaborately developed materials, *see, e.g.*, Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995) (describing materials that included transcripts of party and witness testimony, police reports, and maps from the lawsuit on which the experimental case was based), but even these studies reproduce only a pale picture of the real life problems on which the studies were based, and are insufficient for a lawyer to make an informed judgment about legal liability. For equally cryptic case materials, *see* Korobkin, *supra* note 25, at 167, 200–05 ("This legal standard, along with the facts . . . were intended to suggest . . . [that] both parties had a possibility of prevailing and victory would be a 'sure thing' for neither."). *See also* Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 36–37 (2002) (describing materials given to subjects in experiments testing "how lawyers and law students think about issues that arise in negotiations concerning lawsuits and potential lawsuits"); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 96–110 (1997) (describing materials given to subjects in experiments testing whether "disputants would be more likely to favor the certainty of settlement over the risk of trial if the settlement is coded as a gain, rather than a loss, from a reference point"); Korobkin & Guthrie, *supra* note 33, at 120, 167–92 (describing materials given to subjects in experiments studying "how people involved in lawsuits respond to settlement offers").

38. This is not surprising or troublesome. Most social science research on dispute bargaining ignores issues of legal liability on principle, notwithstanding that most dispute bargaining judgments are grounded in beliefs or assumptions about legal liability. *See* Korobkin, *supra* note 25, at 167 ("This legal standard, along with the facts . . . were intended to suggest . . . [that] both parties had a possibility of prevailing and victory would be a 'sure thing' for neither."); Korobkin & Guthrie, *supra* note 33, at 111–17, 123 (describing how studies based on "Rational Actor Settlement Theories" are designed to prevent the factor of "uncertainty concerning the legal outcome if the parties go to court" from "affecting the results of [the] experiments"). Social scientists do this because they believe that real life liability issues are too complicated and their resolutions too subjective and indeterminate, to be studied in their own right. *See id.* at 118–20 ("[I]t is extremely difficult to use actual trial data to substantiate theories of bargaining."); Korobkin, *supra* note 25, at 163 ("It is difficult, if not impossible, to judge a negotiator's success in litigation bargaining by reference to actual settlement outcomes because the legal merits of a case cannot be measured precisely . . . .

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and rights to the data produced by these instruments because the information needed to work with these concepts is largely absent.<sup>39</sup> Even in the infrequent instance when opposing legal positions are identified and described, the specific arguments made in support of those positions rarely are reported. It is as if proponents of NLBT think it does not matter who has the stronger case in a legal dispute and that all that counts is who is the most psychologically adept and sociable bargainer.<sup>40</sup>

In fairness, the differences between NLBT and traditional legal bargaining theory may have narrowed over the years, and now the differences may be more ones of emphasis than approach.<sup>41</sup> Some early NLBT scholarship identified and described the

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[N]o two cases have precisely the same legal value.”). It is understandable that researchers would prefer to work with simple problems capable of being administered quickly and manageably to large numbers of unsophisticated subjects (e.g., undergraduates at the beginning of psychology class), and data which can be coded in precise mathematical terms. Problems and data of this sort permit more sharply defined conclusions and more striking illustrations of the evidence to support them. This is not a criticism of the problems or data, but simply a reminder that they cannot support any robust conclusions about the role of substantive argument in legal dispute bargaining. See Jennifer H. Arlen & Eric L. Talley, *Introduction to EXPERIMENTAL LAW AND ECONOMICS*, at xxxvii (Jennifer H. Arlen & Eric L. Talley eds., 2008) (“[T]o the extent that the experiment is . . . designed to provide insight into how people in fact do make decisions in . . . settlement behavior . . . [,] the experimenter must . . . ensure that the factors dictating choice in the experiment are analogous to those of real-world settings.”). I discuss these issues in more detail in Condlin, *Communitarian Bargaining*, *supra* note 9, at 233–43.

39. See, e.g., Menkel-Meadow, *supra* note 18, at 795–96 (analyzing the bargaining patterns in a personal injury lawsuit without considering the issue of who was responsible for the accident).

40. NLBT’s lack of interest in legal argument is reflected in the scholarly literature generally. There are few entries on the subject in the principal negotiation anthology, see WIGGINS & LOWERY, *supra* note 36, equally few in the so-called “desk reference for the experienced negotiator,” see AM. BAR ASS’N SECTION OF DISPUTE RESOLUTION, *THE NEGOTIATOR’S FIELDBOOK* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006), little or no discussion in even the newest negotiation casebooks, see JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* (2d ed. 2010); but see DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND PRACTICE* 118–20 (2d ed. 2007) (describing the elements of effective bargaining argument), and very few articles in the law journals generally. The subject simply does not seem to interest NLBT scholars. Every now and then an NLBT writer discusses bargaining “advocacy” or “persuasion,” but usually in brief, general, and hortatory terms that are difficult to disagree with and equally difficult to act on. See, e.g., Julie Macfarlane, *The New Advocacy*, in *THE NEGOTIATOR’S FIELDBOOK*, *supra*, at 513, 517–21 (sketching a brief outline of “an alternative model of advocacy” for negotiation). Professors Stark and Frenkel’s analysis of the role of persuasion in mediation is an important and welcome exception to this state of affairs. Stark & Frenkel, *supra* note 12. Hopefully, their work is a sign of things to come. Professor Korobkin feels differently about this. As he sees it

the problem with the existing literature is [not] that it ignores substantive law. It almost always assumes that substantive law provides the essential entitlements that shape the bargaining zone. It just too often assumes, usually implicitly, that each party’s judgments of the legal merits are static and unresponsive to persuasive tactics.

E-mail from Russell Korobkin, Professor, Univ. of Cal. L.A. Sch. of Law, to author (Aug. 31, 2010) (on file with author). While I agree with this characterization of the existing literature, I see it more as an explanation for why the literature ignores (i.e., does not discuss) the role of substantive law in bargaining than as an alternative description of the problem. I discuss the role of argument in legal dispute bargaining in Condlin, *supra* note 18, at 14 n.45. See also Condlin, *Cases on Both Sides*, *supra* note 9, at 67–70 (describing the role of legal argument in dispute bargaining).

41. NLBT’s fascination with Behavioral Economics research might suggest just the opposite. See Robert Condlin, *Legal Bargaining Theory’s New “Prospecting” Agenda: It May Be Social Science, but is it News?*, 10

role of substantive legal argument in bargaining but did not discuss it in any detail. The lawyer responses to Professor Williams's surveys,<sup>42</sup> for example, identified the ability to "present [a] position in ways that other attorneys accepted as being rational, fair, and persuasive"<sup>43</sup> as a key quality of effective bargaining, yet Professor Williams and his colleagues chose to give greater emphasis to reports about the importance of being sociable. In the same vein, Professors Fisher, Ury, and Patton described how "objective criteria" could be used to help resolve substantive disagreements on a principled basis,<sup>44</sup> though they too saw this process as a secondary feature of effective bargaining, subordinate to tactics and strategies that minimized differences and sought common ground. Even Professor Menkel-Meadow, after some early hesitation,<sup>45</sup> seemed to accept the idea that substantive argument<sup>46</sup> could be an important factor in promoting agreement, though she held open the possibility (and seemed to hope) that it need not.<sup>47</sup> It is fair to say that, on balance, NLBT's willingness even to acknowledge the place of substantive argument in dispute bargaining has been lukewarm from the beginning, and is still far from enthusiastic.

Conflict-free interaction seems to be the Holy Grail of NLBT<sup>48</sup> and acknowledging that argument has a role to play in bargaining would entail accepting

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PEPP. DISP. RESOL. L.J. 215, 217–24 (2010) (describing the increasing prominence of Behavioral Economics scholarship in legal bargaining theory).

42. Professor Williams's work is cited widely as the starting point for NLBT scholarship, though this is not a completely accurate claim. See Condlin, *Communitarian Bargaining*, *supra* note 9, at 278 nn.190–95 (describing scholarship on legal bargaining which predates Williams's work); Condlin, *supra* note 41, at 217 nn.20–21.

43. WILLIAMS, *supra* note 28, at 40. Professor Williams summarizes his findings in this way:

What is suggested here, then, is that a forceful person who has low regard for social amenities may function effectively as a legal negotiator *if* he can show himself to be perceptive, analytical, realistic, and self-controlled in negotiations. On the other hand, if the same forceful person does not demonstrate the skills of perceptiveness, analytical ability, and realistic evaluation of his position, yet tries to maximize his position by competitive tactics, he will be seen as argumentative, quarrelsome, and irritating, and as someone who, in lieu of skilled preparation, resorts to bluffing, bullying or evasive tactics in an effort to maximize his outcome.

*Id.*

44. FISHER, URY & PATTON, *supra* note 6, at 88–89.

45. See Menkel-Meadow, *supra* note 18, at 817 ("There is nothing in the problem-solving model [of negotiation] which necessarily compels parties to consider the justice of their solutions . . ."); *id.* at 826 ("[When] the parties have widely divergent views . . . one of the primary advantages [of problem-solving negotiation] . . . is that no judgment need be made about whose argument is right or wrong."); see also Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 555–56, 565 (2006).

46. 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 settlement).

47. *Id.*

48. Linda Stamato expresses this view in a particularly graphic and forceful (perhaps even Orwellian) language.

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the inevitability of conflict. Perhaps to avoid this tacit concession, NLBT scholars have examined even their own data through a somewhat cloudy lens, privileging *a priori* beliefs about how bargaining should proceed over evidence of how it does proceed, and softening their understanding of bargaining practice rather than toughening their understanding of bargaining skill. Rather than encouraging robust conversation about differences, they promote mutually advantageous and strategic maneuvering (e.g., discuss interests rather than rights, expand the pie to create something for everyone, look to consensus governing principles, and the like) to smooth out disagreement and suppress conflict. Mutually advantageous maneuvering is important, of course, but it cannot reconcile incompatible conceptions of legal rights or dissolve fundamental disagreements over values. These conflicts need to be argued to a resolution, even if that resolution is tentative, contingent, and highly qualified. Fundamental differences do not go away simply because each side can appreciate that the other side would disagree.

### IV. WHY NLBT MUST MAKE ROOM FOR LEGAL ARGUMENT

It is not hard to understand why NLBT scholars would want to avoid discussing the role of substantive argument in legal dispute bargaining.<sup>49</sup> Legal rules, at least

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The world is no longer suitable for unbridled competition . . . if indeed it ever was; mutual dependence and cooperative problem-solving approaches are now “in.” Clearly the proverbial handwriting is on the wall for this and subsequent generations: Create an interdependent, collective, directed world to replace the hedonistic, competitive, and litigious environment we know; populate it with “stewards” who can cope with critical local, national, and international problems; recapture control from the surrogates; reconstitute visions of the public domain; and prepare for the shared stewardship of a negotiated order.

Linda Stamato, *Toward a Negotiated Order: Reflections on the Path to Transforming Society (and Some Obstacles Along the Way)*, 7 NEGOTIATION J. 265, 271 (1991) (book review); see also *id.* at 265 (“[The] ideal community is one that has moved, substantially, toward a negotiated order.”); *id.* at 266 (“[Those advocating cooperative approaches to negotiation] are seeking to restructure society itself, to produce a new economic, political, and social order.”).

49. Substantive legal argument plays a role in transactional bargaining as well, but lawyers argue law differently in transactional settings. The self-interest in making a deal encourages transactional bargainers to avoid the more outwardly adversarial forms of legal argument. Thus, they usually do not overstate, shout, threaten, ridicule, or dismiss other bargainers’ views out of hand as frequently as do bargainers locked together in a lawsuit. They also are more likely to look for common ground, uncover dovetailing interests, and explore complementary needs. Self-interest merges with joint interest in transactional bargaining to make adversarial bargaining nearly identical to problem-solving bargaining much of the time. This notwithstanding, transactional bargaining is not a completely problem solving experience. Parties to a deal invariably look past the moment of the deal, important as it is, to the period of time the deal will be in operation, as well as the post-deal period, to make sure their agreement protects them when 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 so that they are prepared to reverse course when the deal ends or goes bad. In transactional bargaining, the concern is not so much with belligerence as it is with deception, not so much with intransigence as it is with surprise. See Korobkin, *supra* note 1, at 1339 (“[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.”).

the types of rules that give rise to lawsuits, are rarely amenable to knock-down, dispositive arguments about meaning.<sup>50</sup> As a consequence, any lawyer with a modicum of rhetorical skill can drag out argument almost indefinitely, trading on the belief tacitly shared by most lawyers that “there are always cases on both sides.”<sup>51</sup> For bargainers with weak legal claims, in fact, this may be the most attractive option, and since at least one lawyer in every negotiation is likely to have weak (or weaker) legal claims, interminable argument is almost a structural feature of legal dispute bargaining. Interminable argument can annoy, however, and when annoyance turns into frustration or anger, as it often does, it can paralyze negotiations and cause them to fail. Lawyer bargainers often use this concern to make one of the best-known arguments against argument, pointing out, usually at a point in a negotiation when the conversation has reached an impasse, that “it is useless to get bogged down in an argument neither of us can win.”<sup>52</sup> If this argument persuades lawyer bargainers to

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Professor Korobkin suggests that this is a problem for bargaining theory generally. As he explains it,

The problem as I see it . . . is that the negotiation literature as a whole (not just the legal negotiation literature) mostly ignores the general problem of how negotiator 1 can persuade negotiator 2 that the latter should value making a deal more than he otherwise might. Analytically, I see [this as a] problem [of] how to persuade the other person to increase his reservation price, without changing the nature of the negotiation through integrative bargaining, but just by convincing him that he has . . . [misjudged the value of] agreement. Arguing the legal merits in litigation is just a special case of this tactic.

E-mail from Russell Korobkin, *supra* note 40. *Cf. infra* note 108 (describing the strategy of constructing a bargaining range that is imbalanced in one’s favor).

50. Some put a legal realist gloss on this point and argue that substantive argument in bargaining, like legal analysis generally, is inevitably subjective and indeterminate and depends upon shifting political and practical factors (or worse) for its content. *See, e.g.,* Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 Nev. L.J. 487, 495 (2007) (adopting the view that the meaning of law is inevitably subjective) (citing Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 8 (1999) (“[J]udicial decisions are little more than the judge’s idea of what is right, based on his or her life experiences . . .”). Professor Shestowsky takes the point a step further and adopts the well-known sarcasm that judicial interpretation depends upon “what the judge ate for breakfast.” Shestowsky, *supra*, at 496 n.36. Professor Moffitt gives the point Biblical proportions. *See* Moffitt, *supra* note 11, at 208 (describing the American common law system as “in a state of judicial Babel”). I take no position on the question of whether legal analysis has independent content or is just politics (or flapping butterfly wings) masquerading as rules. I assume only that, whether described as rights, claims, interests, rules, principles, tradition, conventions, practices, or whatever, parties to a dispute must share a set of authoritative background norms of some kind, no matter how rudimentary or limited, for principled conversation about differences to be possible. *See generally* RICHARD FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY* (1980) (discussing the importance of shared background norms in principled conversation about differences). Even participants in the rights debate acknowledge this and differ primarily on the contours and content of those norms.
51. Condlin, *Cases on Both Sides*, *supra* note 9, at 65 (discussing the shared assumption that there always are cases on both sides).
52. Professors Stark and Frenkel provide an example from the mediation of an employment discrimination lawsuit. They describe how counsel for a defendant company interrupted the claimant’s description of why she was fired in order to state: “We, of course, could offer a different view of all of this [referring to the plaintiff’s description of why she was fired] . . . . But perhaps we can make some progress if we try to deal with the legal and monetary issues instead of rehashing contested [factual] allegations.” Stark & Frenkel, *supra* note 12, at 2; *see also* Menkel-Meadow, *supra* note 18, at 826 (“Proposals justified by the

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abandon argument as a means of settling particular disputes, as it often does, it is not surprising that an extension of this argument would convince legal bargaining scholars to abandon argument as a vehicle for reformulating dispute bargaining theory. That said, there is no small irony in the fact that lawyer bargainers and legal bargaining theorists would think law is an unimportant factor in resolving legal disputes.

Other NLBT scholars minimize the role of legal argument in dispute bargaining for mostly aesthetic reasons. They associate argument with abusiveness, close-mindedness, and irrationality, and find those qualities tacky, demeaning, and asocial.<sup>53</sup> Resorting to argument, for them, represents a failure to understand the simple truism that perceptions of interests in life often are intractable, irreconcilable, and not susceptible to being tamed or transformed by reasoned deliberation.<sup>54</sup> In an ideal world, people simply accommodate conflicting interests, they do not argue about them. When probed, this view usually turns out to be more faith-based than

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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 factfinder, negotiators may find themselves involved in precisely the sort of unproductive argumentation inherent in adversarial negotiation.”). Professor Menkel-Meadow’s suggestion that “unproductive argumentation” is “inherent in adversarial negotiation” is a good example of a characteristic move of NLBT scholarship—that of demonizing and replacing disfavored words with euphemistic substitutes. Thus, “adversarial” has given way to “collaborative,” “aggressive” to “assertive,” “position” to “interest,” and the like, as if language somehow was responsible for the problem in the first instance, and a change in language would bring about a change in reality. NLBT’s objections to legal argument typically are to its belligerence, rudeness, rigidity, and the like, not to its “adversarial” nature. Taken literally, the notion that one can bargain non-adversarially would strike an experienced bargainer as naïve.

53. See Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOTIATION J. 485, 491 (2006) (describing adversarial bargaining as “dark, competitive, and brutish”); 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.”); Stark & Frenkel, *supra* note 12, at 6–7 (“[For many mediators] the word ‘persuasion’ has a pejorative connotation . . . [, conjuring up] images of . . . heavy-handed neutrals seeking to get a deal at almost any cost [even though mediators would include all forms of direction and influence in the concept of persuasion, not just argumentation].”); Peppet, *supra* note 13, at 516, 531 (describing how some lawyers do not “relish” the adversarial aspect of lawyer bargaining); Macfarlane, *supra* note 40, at 517 (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.”); Menkel-Meadow, *supra* note 45, at 560 (“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.”).
54. See Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407 (2009). Professor Aragaki seems to see perceptions of self-interest as brute facts of bargaining life, not capable of being altered no matter how irrational, mistaken, uninformed, immoral, or unjust they might be. In a sentiment reminiscent of Neville Chamberlain, he argues:

The task is not to find good enough reasons that provide us with a warrant to compel our solutions on others—those we consider lunatics or enemies, and who, in turn, look at us in the same light. Rather, it is to realize that in an increasingly globalized environment, we are struck with each other; that we have no real choice but to work with the Hitlers and Ahmadinejads of the world if we seek to forge genuine arrangements that have any durable hope of managing conflict.



reasoned (not surprisingly), an artifact of personal history more than the outcome of deliberation and judgment, and thus not amenable to reasoned discussion (on the principle of *de gustibus non est disputandum*). There is no arguing with people who object to argument on the basis of taste.

Still other NLBT scholars avoid the topic of bargaining argument because they despair of saying anything generally true or useful about it. For them, statements about argument effectiveness inevitably are context-specific, limited by the nature of the particular rules, parties (including the judges who will resolve the disputes if negotiations break down), evidence, and other real-world factors that define the bargaining problems under examination. Proponents of this view acknowledge that one can make statements about argument effectiveness in general, of the type usually found in advocacy textbooks and bar journal articles, but they do not believe that such statements will be of much help in solving specific bargaining disputes. They also acknowledge that it is possible to say whether specific arguments were influential in the resolution of particular disputes and to describe how the arguments could have been made stronger, but they think that this sort of *post hoc*, context-specific information is of limited usefulness in constructing a general theory of bargaining.<sup>55</sup>

Then there are those who avoid the subject of substantive legal argument on psychological grounds, believing that disagreements about the law are better suppressed or minimized than confronted because (in the words of a friend):

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 [sic], 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.<sup>56</sup>

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*Id.* at 474–75. He even seems to have doubts about the superiority of the “doctrine of liberal democracy” over “Nazism.” *Id.* at 475. One wonders why he would turn to reasoned argument to support this view, using reason to debunk using reason, so to speak.

55. Professor Frenkel adds an additional twist to this explanation. He suggests that many drawn to the dispute resolution field could “soft pedal” the role of legal argument in negotiation “as part of an effort to claim the uniqueness of negotiation as an area of study” so as to differentiate it from “other (‘hard’) law courses (including entrenched appellate and other advocacy courses) . . .” E-mail from Douglas Frenkel, Professor, Univ. of Pa. Law Sch., to author (Aug. 25, 2010) (on file with author).
56. E-mail from David Matz, Professor, Univ. of Mass., to author (Nov. 1, 2009) (on file with author). *But see* Ortiz, *supra* note 3, at 5 (“I suggest we need to face up to . . . conflict. Niceness may make us feel better but only because we fail to see its partiality and violence. . . . Disagreement and conflict can . . . serve a healthy social function. If nothing else, they can focus us on our ideals, our imperfections, and our differences and let us see—sometimes painfully—how law actually works. And just as important, the discomfort they bring can galvanize us into productive . . . action.”); Mansbridge et al., *supra* note 5, at 69 (“In all deliberative theories, disagreement, conflict, arguing, and the confrontation of reasons pro and con are crucial to the process.”).



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These are serious concerns, no doubt. Lawyers do not self-select for the ability to resolve disputes, most have no special training in the process and as a group they may be less comfortable with conflict than people generally.<sup>57</sup> Moreover, they often are prone to see disagreement before it is present, quick to interpret others' motives as selfish and vindictive, quick to take offense at maneuvering even when benign or well-intended, and almost programmed to respond negatively to suggestions and proposals that come from adversaries. Reactions of this sort usually aggravate conflict more than they resolve it.<sup>58</sup> On the other hand, conflict is the defining feature of legal dispute bargaining, not a severable or dispensable part of it. Lawyers who engage in dispute bargaining have no choice but to embrace and manage the conflict animating the disputes. Differences of opinion about legal rights do not go away simply because one chooses to ignore or suppress them.<sup>59</sup> Instead, they fester, increase in intensity, and often reassert themselves in more virulent and destructive forms in circumstances in which it is more difficult to understand and control them. When it comes to disagreements over legal rights, therefore, lawyer dispute bargainers do not have the proverbial flee or fight choice; they must fight (i.e., assert and defend their clients' rights) at the risk of not resolving the disagreements fully and not representing their clients competently. Treating legal rights as if they do not matter, in a sort of "out of sight, out of mind" fashion ("lumping it" in the parlance of some bargaining theories),<sup>60</sup> not only betrays client expectations about legal representation but also undercuts the legitimacy of informal dispute settlement as a system.

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57. See Condlin, *supra* note 18, at 85 (describing how the stylized manner in which lawyers argue may be designed to remove the emotional intensity and discomfort associated with real conflict and make the experience impersonal). That lawyers are conflict averse would be ironic, of course, but perhaps not surprising. Just as sociopaths 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, Paranoid Wimps—Nothing Has Changed*, 78 UMKC L. REV. 1049, 1052 (2010) (describing "the neurotic, paranoid wimpiness" of first year law students); BUSH & FOLGER, *TRANSFORMATIVE APPROACH TO CONFLICT*, *supra* note 5, at 49–51 (describing how people respond to conflict).
58. See SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF* 26–30, 57–61 (2006) (describing lawyer and law student attributes); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549, 586–91 (1998) (describing the lawyer attributes that would have to change to resolve the "tripartite crisis in professionalism, public opinion, and lawyer dissatisfaction"); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1349–62 (describing the "personality traits and other attributes" of lawyers); Seul, *Significant Cases*, *supra* note 5, at 908–09 (describing how "parties on all sides of disputes involving deep value differences falsely believe that others, unlike themselves, are completely intransigent . . . [that they] tend to 'greatly exaggerate the difference between their own and the other's belief systems in a way that exacerbates the conflict' . . . [and that] each side tends to attribute to the other extreme attitudes they do not actually hold").
59. Suppressing conflict also can have partisan effects. See Ortiz, *supra* note 3, at 46 ("[A]ttempts at banishment [of conflict] only settle conflict on one party's particular terms.").
60. WILLIAM L. URY, JEANNE M. BRETT & STEVEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* 9 (1988) ("One party [to a dispute] may decide to 'lump it,' dropping her claim or giving in to the other's claim because she believes pursuing the dispute is not in her interest, or because she concludes she does not have

There are three distinct methods for resolving disputes informally and most legal bargaining theories combine them in different measures.<sup>61</sup> The most popular, at least at the present time in the NLBT literature, is dividing the items in dispute roughly in half, independent of the strength of the parties' respective legal claims. Proponents of this equal-division approach assume that treating parties equally in a literal sense is the same as treating them equally in a legal or moral sense, though this assumption is counterfactual much of the time.<sup>62</sup> Equal-division proposals have their place in dispute settlement, of course, but usually only after bargainers have narrowed their differences on principled grounds, reached an impasse, become exhausted, and need a neutral, face-saving mechanism for bringing the negotiation to a conclusion (which everyone prefers over deadlock).<sup>63</sup> Splitting the difference<sup>64</sup> works best, in other words, when all other methods have been exhausted. Adopting it as a strategy at the outset of a negotiation is a form of giving up on bargaining before it has been tried.

Alternatively, bargainers can settle disputes arbitrarily, by flipping a coin (in effect, if not literally), using other types of random outcome generators, or relying on strategies that are unrelated to the merits of the parties' legal and moral claims.<sup>65</sup> Methods of this sort can be efficient and inexpensive and even produce outcomes that are stable in the short term, but bargainers rarely are attracted to them, at least in the first instance, because they substitute luck or power for entitlement, and make the idea of legal rights nearly meaningless. Like equal-division methods, arbitrary

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the power to resolve it to her satisfaction.”). In the social science literature, the process of “dealing with harms and injuries by forbearance rather than by informing the wrongdoer and seeking redress is . . . [more formally expressed as] *avoidance or exit*.” Williams, *supra* note 1, at 2 (emphasis added).

61. This simplifies things greatly, of course, since there are dozens of idiosyncratic settlement methods described in the bargaining literature. I mean to say only that, deprived of their curlicues, bells and whistles, each of these individual methods can be reduced to some combination or mixture of neutral, arbitrary, and normative strategies.
62. This is perhaps illustrated best by Anatole France's well-known dictum that “the majestic equality of the laws forbids rich and poor alike to sleep under bridges, beg in the streets and steal . . . bread.” ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens Whale trans., Dodd, Mead & Co. 1930) (1894); *cf.* Korobkin, *supra* note 27, at 1828 (“Subjects [in social science research] . . . believe that unequal divisions are fair if one party is more deserving in some way external to the experiment . . .”).
63. An impasse can occur at any time in bargaining; it need not come at the end. It can be a stage in both the discussion of an individual topic in the bargaining conversation or in the bargaining conversation as a whole.
64. This often is a more difficult technical task than one might assume. *See* Condlin, *Communitarian Bargaining*, *supra* note 9, at 266–67 (describing the difficulties involved in dividing items in equal halves).
65. Power-based strategies are the best example. The concept of “merits” can be complicated. *See* Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 *DENV. U. L. REV.* 407, 409–13 (2010) (discussing the “meaning of ‘on the merits’”); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *VAND. L. REV.* 1465, 1472–73 (2004) (describing the difficulty of assessing the merits of securities claims). Some use it to include both issues of substantive liability and a wide range of practical concerns (e.g., recoverable damages, difficulties of proof, availability of third party payers, costs of litigation, lost opportunity costs, publicity concerns, and the like) that can play a role in determining the value of a party's legal claim. *See* Baker & Griffith, *supra* note 9, at 779–83 (describing “What We Talk About When We Talk About Merits”). I use the term in its narrowest sense, as including only issues of substantive legal liability.

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settlement methods work their effects independently of bargainer discussion and deliberation and thus give up on the possibility of bargaining before it has begun. They are anti-bargaining methods more than bargaining ones.

Or, bargainers can settle disputes based on normative judgments about the value of their clients' respective claims, grounded in either their own judgments of what the claims are worth, or predictions of what a court would do with the claims if negotiations broke down. Most bargainers (and clients) prefer this option even when they say they do not (i.e., when they say that arguing law inevitably is inconclusive and counterproductive) because the need for legitimacy in dispute settlement runs deep<sup>66</sup> and substantive law is the default legitimating mechanism for disputes about legal rights. Lawyer bargainers tacitly acknowledge this when they return to arguing law in negotiation, as they regularly do, even after they have concluded that it is unproductive to do so. With all of its uncertainties and unpleasantness, coming to some kind of agreement about what the parties are entitled to (even if no more than agreeing to disagree)<sup>67</sup> holds out greater promise for stable<sup>68</sup> and mutually satisfactory outcomes than the alternatives of dividing everything in half, flipping a coin, or strong-arming an adversary into an agreement.

Basing settlement on normative grounds does more than give disputants a reason to feel satisfied, however. It also benefits the system of informal dispute settlement as a whole by increasing the likelihood that negotiated agreements will be legitimate. Parties who bring their disputes to the legal system (as well as parties who are caught up in the system through no choice of their own), are entitled to resolutions grounded in law. Legal rights should have the same force in a boardroom, hallway, or law office that they have in a courtroom. As I argued several years ago:

[People who] use the legal system . . . are entitled to presume that their disputes will be resolved according to law. They may choose to waive this entitlement for non-legal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and [the] decision [to do this] is not troublesome if it represents the free choice of one [set of considerations] . . . over another, when [the

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66. See Korobkin, *supra* note 27, at 1817–18 (describing “The Importance of Fairness” in negotiation and the relationship of the merits of the case to the legitimacy of the parties’ negotiated agreement); Hollander-Blumoff, *supra* note 1, at 389 n.32, 390–401 (describing a “long line of research in both psychology and . . . economics . . . establish[ing] that individuals care about the fairness of the outcomes they receive” in negotiation, and the representative examples of “fairness” research). Professor Hollander-Blumoff criticizes this research for focusing almost exclusively on negotiation outcomes, arguing that fair procedures contribute equally to party perceptions of settlement legitimacy. *Id.* at 391–97.

67. See, e.g., Mansbridge et al., *supra* note 5 (describing “incompletely theorized agreements”).

68. It is difficult to test this “stability” claim empirically, both because data is hard to come by and because it is not clear what sort of data, over what time frame, would suffice even if it were available. For example, if a party walks away from a settlement thinking that her legal rights have been abused, but abides by the literal terms of the settlement anyway (because not abiding by them would be too costly), but also loses respect for the legal system in the process and “works to rule,” so to speak, from thereafter, to do all she can to undercut the implementation of the settlement, is the settlement stable? The answer would have to be yes and no, I would think, and this illustrates one of the simplest difficulties in testing the stability of settlements empirically.

consequences of all the] . . . choices are known. But the selection of a negotiated outcome over an adjudicated one, by itself, should not be seen as a waiver of this entitlement.<sup>69</sup> In a reasonably just legal system . . . the justice of negotiated

69. Condlin, *supra* note 18, at 82 (quotations omitted). Some social science research (based mostly on the Ultimatum Game) has found that bargainers sometimes are willing to concede substantive entitlement claims in return for being treated “fairly” (i.e., respectfully), in the negotiation process, particularly if the stakes involved are not large and the experience of playing the game is the total universe of data on which the “outcome-process” trade-off is based (both conditions are satisfied in Ultimatum Game research). See Korobkin & Ulen, *supra* note 31, at 1135–36 (describing the findings of Ultimatum Game research); Korobkin & Doherty, *supra* note 25, at 176; Shestowsky, *supra* note 50, at 490 n.12 (summarizing the studies on “how laypeople assess dispute resolution procedures”). Under certain conditions, in other words, bargainers say they will trade “substantive justice” for “procedural justice,” at least if asked about it after the fact. See Hollander-Blumoff, *supra* note 1, at 398 (“[P]eople reject outcomes that are economically favorable to them because they do not comport with norms of [procedural] fairness.”); *id.* at 384, 407–408 (describing the differences between the legal and psychological meanings of “procedural justice”); Korobkin, *supra* note 27, at 1822–25 (describing the relationship between “Procedural Fairness” and “Substantive Fairness”); Shestowsky, *supra* note 50, at 491 (“Counterintuitively [sic], people’s ex post reactions to their dispute resolution experiences are not even driven by whether or not they ‘won’ their case. Rather, after the dispute has ended, disputants typically evaluate the procedure they used in non-instrumental terms, by considering how fairly they were treated rather than on the outcome they obtained.”).

From a practical bargainer’s perspective, trading substance for procedure seems ill advised. The experience of negotiation is over quickly (and for most parties it does not recur), but the consequences of negotiation are felt well into the future. If trading money for respectful treatment turns out to be a bad decision down the road because the money runs out sooner than expected, see, e.g., Paula Reed Ward, *Girl’s Mother Calls Settlement with Pittsburgh Public Schools Unfair*, PITTSBURGH POST-GAZETTE, Aug. 5, 2010, at B5, available at <http://www.post-gazette.com/pg/10217/1077775-53.stm> (describing a party who changed her mind about the fairness of a settlement agreement after the fact), the client will have learned too late that respect and fairness are not always the same thing. Cf. Donna Shestowsky & Jeanne Brett, *Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 93 (2008) (“Ex ante attraction did not predict ex post global satisfaction when disputants used a nonadjudicative [dispute settlement] procedure.”). The issue is complicated by the fact that clients usually do not participate in the negotiations, making the judgment of whether they were treated fairly a vicarious one at best. See Williams, *supra* note 1, at 10 (“[C]lients are not present during the negotiations. Rather, the lawyers negotiate on behalf of their clients, then report back what happened.”).

Clients are entitled to be short-term thinkers, of course, see Korobkin & Guthrie, *supra* note 37, at 135–36 (“[T]he lawyer should recognize that a client’s stated preference might be utility maximizing even if it diverges from expected value analysis.”), but lawyers should be suspicious of their decisions when they are. In fact, a lawyer’s duty as counselor often requires him to encourage a client to think about settlement in long range terms and to provide the information and guidance needed to help the client do that, particularly if the lawyer’s interests in cordial bargaining relations has the potential to conflict with the client’s interest in the best possible outcome. See Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 COLUM. L. REV. (SIDEBAR) 39, 45 (2008) (“[T]he lawyer’s role is to get the most for her client and to keep her client focused on the injury she is trying to redress.”); MACFARLANE, *THE NEW LAWYER*, *supra* note 18, at 121 (“[S]ome collaborative lawyers . . . hold their client [sic] to the decisions that represent his ‘highest functioning self.’”); Korobkin & Guthrie, *supra* note 37, at 100 (demonstrating that attorneys often prefer guaranteed settlements over risky litigation with lower expected value); Shestowsky & Brett, *supra*, at 98–99 (“As a general matter, laypeople look to their lawyers for guidance on how to approach their disputes. They are also influenced by their lawyer’s procedural preferences and settlement tendencies.”). Social science research on “Procedural Justice” may have interesting implications for principal-agent and client counseling issues therefore, but not equally interesting ones for bargaining. See, e.g., Forrest S. Mosten & John Lande, *The Uniform Collaborative*

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outcomes exists . . . [in direct proportion] to the extent the parties' competing legal claims are competently raised, debated, and resolved.<sup>70</sup>

A familiar example from the NLBT literature will help illustrate this point. Professor Menkel-Meadow, in her classic description of problem-solving bargaining, uses the venerable case of *Valley Marine Bank v. Terry James* to show how an adversarial dispute bargaining problem can be re-conceptualized in problem solving terms.<sup>71</sup>

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*Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process*, 38 HOFSTRA L. REV. 611 (2009) (describing the information sufficient for parties to make an informed decision about the benefits and risks of collaborative dispute resolution). As a consequence, it is outside the scope of the present discussion.

70. See Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 391 (2009) (“[T]o serve as effective counselors, attorneys must ensure that their clients understand the legal considerations and the implications of the law for the clients’ goals.”). Bargainers also can base settlements on what would make each party happy, which will not always be the same as what they are entitled to. See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010) (arguing that human welfare should be measured in terms of subjective well-being, and settlement outcome evaluated in terms of its effect on reported well-being). *But see* Swedloff, *supra* note 69, at 39–49 (summarizing the empirical and normative criticisms of hedonic adaptation scholarship, and concluding that “even if adaptation is strong enough and ubiquitous enough to affect settlements, it is not clear that a greater number of settlements for less money is a desirable outcome”). A party with greater practical leverage (e.g., resources to withstand delay or impose costs, tolerance for conflict, embarrassing private information about the adversary, and the like), sometimes may be able to coerce settlement on terms that would be illegitimate under existing legal rules, but this is more akin to extortion than bargaining. On the nature and sources of bargaining power, see Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 *passim* (2000) (describing the “four sources of power that bear discussion and analysis” in the negotiation context), Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCIENTIST 149, 150–64 (1983) (describing “Categories of [Bargaining] Power”), and Bertram H. Raven, *The Bases of Power: Origins and Recent Developments*, 49 J. SOC. ISSUES 227, 232–37 (1993) (describing the “resources a person might have to draw upon to exercise [social] influence”).

Scholarly efforts notwithstanding, it is difficult to formulate a non-circular definition of bargaining power. It is not difficult, after a negotiation is over, to identify the factors that were influential in shaping the result, but it is very difficult to predict what those factors will be in advance of a negotiation. No particular skill, type of information, or resource is inevitably powerful. Ignorance, lack of money, or even a failure to understand the issues in dispute can be a source of power in the right circumstances. Professor Korobkin’s thoughtful discussion of the subject is illustrative of this difficulty. Russell Korobkin, *On Bargaining Power*, in *THE NEGOTIATOR’S FIELDBOOK*, *supra* note 40, at 251. He begins by defining bargaining power as “the ability to convince the other negotiator to give us what we want,” *id.*, and goes on to say that “[i]n any situation in which a mutually beneficial agreement [is] possible, the party with relatively less power [will] yield to the party with relatively more [power],” but then, almost immediately thereafter, adds that “the less powerful party might resent the sense of coercion or inequity inherent in the more powerful negotiator’s demands and refuse to yield, even knowing that this course of action will result in a worse outcome for himself . . .” *Id.* at 255. More power can be less power, in other words, depending upon how the parties react to and use it. Unfortunately, this is true and therein lies the problem in defining bargaining power.

71. Menkel-Meadow, *supra* note 18, at 772–75. The case was prepared in 1975 by the Office of Program Support of the National Legal Services Corporation to train staff attorneys in local Neighborhood Legal Services offices to bargain more aggressively. *Id.* at 772 n.75. Many of these attorneys had slipped into a pattern of processing cases bureaucratically—not pursuing affirmative remedies, agreeing to settlements that were little more than extended payment plans, and the like—and the national office wanted to show how much more was possible.

Valley Marine Bank sued James to recover the balance on a retail installment sales contract for the purchase of an automobile on which James arguably had defaulted.<sup>72</sup> James purchased the car from Stead Motors<sup>73</sup> and Stead assigned its rights under the purchase contract to the bank. The car overheated and stalled frequently, causing James to be late for, or miss, work on several occasions. She took the car to Stead's service department several times to have it repaired but Stead was unable (or unwilling—either explanation made sense), to correct the problem. Eventually, she became frustrated and returned the car to Stead, telling the dealer that she no longer wanted it. The bank, which owned the rights under the purchase contract at that point, repossessed the car, sold it at a Sheriff's sale (to Stead), and sued James for the difference between the amount realized at the sale and the balance due under the contract.<sup>74</sup> James defended affirmatively in fraud, negligent misrepresentation, unconscionability, and breach of warranty and counterclaimed for damages based on Stead's alleged violations of the federal Truth in Lending Act, the state Retail Installment Sales Act, and the repossession provisions of the state Commercial Code. James's potential damage and penalty claims added up to a little more than \$10,000 (in 1975 dollars).

Assume you represent James, are about to meet with the lawyer for Valley Marine Bank to settle the case and need to decide what approach to take in the meeting.<sup>75</sup> James has told you that finding a reliable car to get to work trumps every other consideration in the case. However she gets it, she needs a reliable car. Stead might be the most convenient source of a car but only if it can fix James's present car and keep it running, or if that is not possible, provide an adequate substitute, but at the time of the lawsuit it had not been able to do either. Determining whether to rely on Stead or look elsewhere, therefore, will depend in part<sup>76</sup> upon information about Stead—its competence, good faith, trustworthiness, willingness to honor its agreement, automobile inventory, and the like—that cannot be asked about directly. The lawyer for the bank might not know the answers to the questions, for one thing, but even if he did, his answers would be self-serving. To expect anything else would be unreasonable and naive.

You also would need to know the cost of an acceptable replacement car from another dealer in the event James chose not to deal with Stead, and whether a cash

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72. Professor Menkel-Meadow describes the case as a lawsuit by Stead Motors against James, probably to make it easier to understand the central issues in dispute, but in the original problem Stead had assigned its rights under the automobile purchase contract to Valley Marine Bank, and the bank was the plaintiff in the lawsuit. Professor Menkel-Meadow calls the purchaser both James and Brown at different points in her discussion, *id.*, but I will use James.

73. Professor Menkel-Meadow calls the dealership Sneed, *id.*, but I will use Stead. That was the dealer's name in the original problem.

74. The bank also asked for attorney's fees and court costs incurred in suing to recover the unpaid balance. *Id.* at 773.

75. See Gross & Syverud, *supra* note 14, at 328–29 (describing the process of choosing a bargaining strategy).

76. It also will depend upon information about the car.



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settlement of James's counterclaims against the bank would provide enough money to pay for it. What the bank would pay to settle the counterclaims will depend upon both the strength of the claims themselves (objective and perceived), and other practical considerations the bank would take into account in calculating its best offer (e.g., avoiding publicity, court costs, attorney's fees, and the like).<sup>77</sup> You would not be privy to the bank's calculations, of course, so your best strategy for finding out the most the bank would be willing to pay would be to bargain as aggressively as you could and press for as much money as possible until it was clear that the bank would offer no more. It is not that James inevitably would prefer money to a repaired car, just that she would not know which she preferred until she knew the most the bank was willing to pay.

Thus far, the signs point toward taking an aggressive approach in bargaining with the bank, but the issue is more complicated. Any continuing relationship between James and Stead, should that be James's best option, might be compromised by an overly adversarial approach toward the bank. Such an approach could involve questioning Stead's honesty and competence, among other things, and Stead might resent that.<sup>78</sup> As a consequence, the judgment of how forcefully to negotiate with the bank, particularly what arguments to make and what sources of leverage to use, would need to be revisited on a continuing basis during the negotiation itself, based on a contemporaneous and parallel assessment of how the negotiation was likely to end.<sup>79</sup> If, for example, it looked like Stead could be trusted to get its act together (e.g., it was able to explain why James did not receive better service, expressed genuine remorse for what had happened, and had put procedures in place to insure that it did not happen again), you might decide not to use the full range of aggressive moves available, on the chance that they might make a continuing relationship between James and Stead more difficult to establish.

On the other hand, if the bank was unreasonably secretive, belligerent, rigid, or uncooperative, it might make sense to use all of the arguments and leverage at your command, if only to avoid being exploited. Judgments about the nature of the bank's approach would themselves be complicated, of course, and would need to be tested on an ongoing basis to be sure that what looked like intransigence was not just cautious cooperation, or vice versa. But assuming you could do this, the goal throughout would be to proceed only on the basis of an accurate understanding of what was being conceded. And since legal rights are the principal item of concession in legal dispute bargaining, that means an accurate understanding of James's legal rights. Since it would be difficult, if not impossible, to understand those rights unilaterally, the risk of self-serving assessment would be too great, you would need to

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77. Korobkin, *supra* note 25, at 172–73, 180–81 (describing the process of estimating an adversary's bottom line).

78. The bank and Stead had repeated this "sale and repossession" scenario several times with the same car, so any criticism of Stead's role in the process, even if expressed only to the bank, almost certainly would get back to Stead.

79. Gross & Syverud, *supra* note 14, at 328 ("At each step in the negotiations [a bargainer] will consider both how the opposing party will react to a possible move and how the court might rule at trial.").



discuss your views about the nature and extent of James's rights fully with the lawyer for the bank.<sup>80</sup> Only a discussion that took both sides' perspectives into account would produce an understanding of the rights that was complete enough to support a fully informed judgment about what to do. Therefore, any bargainer, even a problem solving one, would need to argue James's legal claims with the bank fully, forcefully, and to a conclusion.

Argument over law can be conflictual and unpleasant, of course, but conflict and unpleasantness are not inner circles of hell. In fact, arguing about substantive differences, even robustly, is a major part of what principled life is all about.<sup>81</sup> Subordinating the client's interest in legal rights and the legal system's interest in a legitimate resolution to the lawyer's interest in tranquil bargaining relations inverts the hierarchy of obligations at the heart of the standard conception of the lawyer's role and denies the promise of the rule of law. Issues of self-interest and system legitimacy probably do not arise in a Hegelian spirit world, or one of Platonic forms, because (so far as we know), spirits do not bargain. But in the world the rest of us inhabit these issues are ineliminable features of social, legal, and political life and, as such, are factors that any viable theory of dispute settlement must recognize and make room for.<sup>82</sup> Even the need to argue that point is a form of validating it.

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80. If the parties agreed about the extent of Stead's legal obligation to James, they still would need to bargain over the worth of that obligation and what it would take to satisfy it. This would require substantive argument of a different kind.

81. As Martin Luther King explains:

[T]here is a type of constructive . . . tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need [of having] . . . gadflies to create the kind of tension in society that will help men to rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation.

Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), available at [http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated\\_letter\\_from\\_birmingham/](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated_letter_from_birmingham/).

82. It is curious that NLBT scholars would leave argument out of their conception of legal bargaining, given the pervasiveness of argument 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 arguments over political and social policy among individuals, interest groups, and political associations are inevitable and need to be managed. 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"); GARSTEN, *supra* note 11, at 176 ("[The] constitutional system [of the United States] was meant to protect and facilitate sustained dispute . . ."); Bächtiger, *supra* note 5, at 17 ("Oppositional activity and adversarial debate are generally considered key components of the liberal account of democracy."). This assumption also is found in one form or another underlying most of our legal, social, and economic systems. See, e.g., ELLIS, *supra*, 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 1, 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); *id.* at 388 n.29 (citing to the research literature on adversary justice). Trying to

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### V. MAKING DISPUTE BARGAINING ARGUMENT EFFECTIVE

Dispute bargaining argument works best when it is conversational and not oratorical.<sup>83</sup> The private, personal, and face-to-face nature of the bargaining interaction makes it inappropriate for parties to make speeches, score debater's points, or rely on the mannerisms and maneuvers of public oratory to influence one another.<sup>84</sup>

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institutionalize a non-argumentative method of dispute settlement within a culture of argument seems quixotic at best.

83. It is difficult to describe the qualities of effective legal argument in non-platitudinous terms. The legal advocacy literature has struggled with this problem over the years, often unsuccessfully, and the world does not need another admonition to “go for the jugular.” See Honorable John W. Davis, Address delivered before the Association of the Bar of the City of New York: The Argument of an Appeal (Oct. 22, 1940), in 26 A.B.A. J. 895, 897 (1940) (recommending that advocates “go for the jugular”). Social science research is an important source of guidance on the topic, of course, but the language of social science can be idiosyncratic, obscurantist, self-sealing, and annoying, and its findings self-evident. These qualities often make it difficult for lawyers to learn from the research or take it seriously. See CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 26 (1974) (describing how language can be “self-sealing”); Condlin, *Communitarian Bargaining*, *supra* note 9, at 269–76 (describing how social science bargaining research terminology is sometimes idiosyncratic and obscurantist); Condlin, *supra* note 41, at 264–69 (describing how social science bargaining research findings are sometimes self-evident); Edwards, *supra* note 36, at 43–57 (describing the difficulties lawyers have in learning from “impractical” scholarship). I will try, in the discussion that follows, to describe the qualities of effective bargaining argument in a manner that is both true to the findings of social science research and yet is expressed in the language of ordinary lawyer conversation. For more technical discussions, see Hollander-Blumoff, *supra* note 1, at 389–91, 407–20, describing the “factors individuals rely on when making their subjective assessments of whether or not they have been treated fairly” in dispute settlement, and Stark & Frenkel, *supra* note 12, at 6–31, summarizing the findings of meta-analyses of empirical studies by social psychologists and communication theorists on effective persuasion. I limit the discussion here to what Professors Stark & Frenkel describe as “Persuasion by Direct Statement.” *Id.* at 39–47. The *Journal of the Association of Legal Writing Directors* also is an excellent source of scholarship on the findings of social science research on persuasion. See, e.g., *Best Practices in Persuasion*, 6 J. ASS’N LEGAL WRITING DIRECTORS (2009).

One might question whether advice about bargaining argument ever can be useful if both sides know it. Won't it be self-canceling, as it is with the conventional bargaining wisdom of “never make the first offer”? The traditional response is to say that bargainers who follow the advice skillfully will be more successful than bargainers who do not, but in the present context, a slightly different answer is called for. If all bargainers argue in the manner described in this article, negotiation outcome will be determined more by the relative strengths of the parties' legal claims than by the relative proficiency of their lawyers' bargaining skills. Parties with strong cases will do better than parties with weak cases, as they should in a reasonably just legal system (and sometimes do). 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 bargaining skill to reach agreements not justified under existing law. Lawlessness will be reduced to whatever extent, great or little, an accurate understanding of the parties' legal rights plays in shaping negotiation outcome.

84. I limit discussion to the types of bargaining interactions typically found in pretrial conferences, law office meetings, corridor conversations, and other instances of what Professors Lax and Sebenius call the “at-the-table” dimension of negotiation. DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 1, 181–203 (2006) (describing the “at-the-table” dimension of negotiation). Changing people's minds, giving them new doubts, and unsettling them in any of the myriad ways the human psyche permits, operates pretty much the same way in all of these settings. Situational and personal factors can introduce different restrictions

Skillful bargainers shape their argument to fit the conventions and communication practices of ordinary social conversation in order to expand an adversary's understanding of the issues in dispute and create doubts about his pre-negotiation assessment of those issues. Argument of this sort seeks to inform and instruct rather than preach, impress, hector, or punish. It relies on reason more than fear, insecurity, sympathy, or ignorance and is most effective when it adheres to the standards of ordinary rationality, or at least appears to adhere those standards.<sup>85</sup> There are exceptions, of course.<sup>86</sup> Some bargaining argument is designed to surprise a listener with novel or clever points, or points made more forcefully than expected, and use the listener's anxiety at being surprised or frightened (and perhaps embarrassed), to knock the listener off balance and cause him (temporarily at least) to be a little less skeptical, or a little more deferential, than he otherwise would be.<sup>87</sup>

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from setting to setting, of course, but once those limits are established, people are influenced in pretty much the same way whenever they interact face-to-face (fanatics, ideologues, and crazy people excepted, of course). However, bargaining in its entirety involves more than face-to-face meetings, *see id.* at 2, 53–97 (describing the “away-from-the-table” dimension of negotiation), and often the moves and maneuvers that are made away from the table (e.g., in telephone calls, letters, e-mails, pleadings, motion practice, discovery, pre-trial conferences, or simply the passage of time), have more of an effect on the outcome than what is said face-to-face. The principles described here apply equally to away-from-the-table behavior, but they sometimes need to be modified to take account of different situational constraints, practice conventions, time limits, personal relationships, and the like. Professor Macfarlane appears to recommend minimizing the role of away-from-the-table maneuvering in bargaining, MACFARLANE, *THE NEW LAWYER*, *supra* note 18, at 111–13, but if so, this overlooks the way in which background procedural moves help create the incentive and constraint structures within which negotiation decisions are made. *See* Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement* 14–20 (Temple U. Beasley Sch. of Law Legal Studies Research Paper, No. 2011-8, 2010), *available at* <http://ssrn.com/abstract=1649643> (describing the settlement effects of filing motions in litigated cases).

85. I equivocate on whether the discussion that follows is prescriptive or descriptive. The answer is complicated. At one level, I intend the claims to be descriptive. I believe that what I say is an accurate portrayal of the way successful bargainers already behave much of the time. One does not hear much about this type of behavior because conversational argument is not flashy, theatrical, or even noteworthy. It works its effects silently, without fanfare, and below the radar screen of people searching for advocacy techniques in dispute bargaining practice. Being invisible is one of its goals and one of the principal reasons it works as well as it does. But the consequence of invisibility is that there is no clear, quantifiable empirical data to support it. The best data comes from observation studies of actual bargaining practice, but they are in short supply, and the few that exist do not examine the issue directly. So while I believe what I am about to say is descriptively accurate, I will express it in prescriptive language, as a way of acknowledging the limitations of the underlying data. I also recognize that not all bargaining arguments proceed as I describe here and that there are harsh variations of the approach I set out, but I will leave those variations for another day. *See infra* note 128 and accompanying text.
86. There is no “model of persuasive communication that provides a general explanation for the successes and failures . . . in changing attitudes and behaviors.” KATHLEEN KELLEY REARDON, *PERSUASION: THEORY AND CONTEXT* 61 (1981). For a description of several often-competing theoretical formulations, *see id.* at 62–111.
87. Bargainers rarely admit, or perhaps even recognize, when this happens. Usually, they explain less favorable than predicted outcomes (both to clients and themselves), as dictated by facts beyond their control, saying that they got all that was possible and that their pre-negotiation estimates were overly optimistic. No doubt such statements sometimes are true, but the fact that they are made automatically and are self-serving gives one reasons to wonder.

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Argument also can be designed to evoke sympathy, trigger guilt, induce remorse, or provoke other sentiments designed to disable an adversary's critical faculties and produce a more generous response than the adversary had planned.<sup>88</sup> But argument usually succeeds with competent bargainers only when it says something seemingly new and true about the issues in dispute, expanding perspectives, creating doubts, and sometimes even changing minds.<sup>89</sup>

Argument produces these effects not only when it is undeniably correct—often it is difficult to know when this is so—but also when it appears to be correct, when it has the outward properties that lawyers associate with correct arguments.<sup>90</sup> The most

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88. See Stark & Frenkel, *supra* note 12, at 17 (describing “Persuasion Based on Emotions: Fear and Guilt”).

89. See Seul, *Significant Cases*, *supra* note 5, 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.”).

90. The assumption here is that bargainers share a set of canons for interpreting law. Cf. GULLIVER, *supra* note 1, at 190–94 (“[T]he dispute begins in terms of norms, whatever else may also be involved. . . . That is to say, the dispute itself . . . is defined in part by a normative framework that both parties more or less accept in the situation.”); Eisenberg, *supra* note 1, at 650–51 (“Internalization of moral standards and the pressure of peer-group and public opinion contribute to the force of principles and rules in such negotiation.”); *id.* at 639 (“[I]n most cases of dispute-negotiation the outcome is heavily determined by the principles, rules, and precedents that the parties invoke.”); Mnookin & Kornhauser, *supra* note 14, at 968 (“[Parties] bargain in the shadow of the law. . . . [T]he outcome that the law will impose . . . gives each [bargainer] . . . an endowment of sorts.”); *id.* at 977–80 (describing the ways in which different substantive norms “give various amounts of bargaining chips to the parties”). In this respect, dispute bargaining is a hybrid of both bargaining and adjudication, and thus not identical to the pure bargaining scenarios that make up the data base of much of the non-legal, social science literature on bargaining. See, e.g., Daniel Druckman, *Social-Psychological Approaches to the Study of Negotiation*, in NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES 24 (Daniel Druckman ed., 1977) [hereinafter NEGOTIATIONS].

Game-theoretic and economic models commonly assume argument away. See generally SAMUEL B. BACHARACH & EDWARD J. LAWLER, BARGAINING: POWER, TACTICS, AND OUTCOME 6–25 (1981) (discussing game-theory—particularly that of John Nash and John Hicks); *id.* at 26–36 (discussing economic theory—particularly that of Frederick Zeuthen and Jan Pen); ORAN YOUNG, BARGAINING: FORMAL THEORIES OF NEGOTIATION 135–36, 138–41 (1975) (economic and game-theoretic models); *id.* at 136–37 (discussing economic theory that allows for only strategic and manipulative interaction); *id.* at 23–36 (game theory); GULLIVER, *supra* note 1, at 190 (economic theory); WILLIAMS, *supra* note 28, at 68 (economic and game-theoretic models). Some social psychological models provide for argument, see, e.g., JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 261–62 (1975), but most restrict their analysis to the uses of threat, promise, and appeal. See *id.* at 278–88 (discussing appeals, demands, promises, and threats); THOMAS SCHELLING, THE STRATEGY OF CONFLICT 33–46 (1960) (discussing threat, promise, and commitment); WILLIAMS, *supra* note 28, at 79–81 (discussing concession making in the section on “argumentation”). Social science literature typically treats bargaining as a series of strategic moves, made over time, and converging in the middle, paying little attention to the question of how one persuades an adversary of where that middle lies. See OMAR BARTOS, PROCESS AND OUTCOME OF NEGOTIATIONS 10 (1974); YOUNG, *supra*, at 131–32. But see Dean G. Pruitt & Steven A. Lewis, *The Psychology of Integrative Bargaining*, in NEGOTIATIONS, *supra*, at 161 (conceptualizing bargaining in terms of both persuasion and problem solving). These commentators often agree that argumentation (or debate as it is frequently called), is an important feature of bargaining and that it has been unwisely neglected, see GULLIVER, *supra* note 1, at

familiar of these properties are what I will call detail, multi-dimensionality, balance, subtlety, and emphasis.<sup>91</sup>

*Detail.*<sup>92</sup> The best conversational argument is one that is fully developed. It is particular as well as general, graphic as well as abstract, and complicated as well as clear. This development can take the form of an item-by-item comparison of situations alleged to be analogous, a word-by-word interpretation of the parts of relevant rules likely to be controversial, a careful examination of social policies and moral norms implicated in the dispute, a witness-by-witness description of how the case will be proved (including an explanation of why witnesses will be believed), or various combinations of the above, all linked together in a single, cumulative, argumentative thread. Argument of this sort trades on the belief that something about which a great deal can be said likely to be correct—that an argument which holds up no matter how extensively it is played out—is not just clever or novel, but true.<sup>93</sup>

Lawyer bargainers often are hesitant to spell out arguments in this kind of detail, particularly in face-to-face conversation, because they assume that what they are about to say either is self-evident and already understood or, even if new, is a waste of time because lawyers are impervious to argument. Adversaries will reinforce these assumptions by signaling that they are not interested in what one has to say, often implying that it would be insulting to press the point. A bargainer cannot give in to these assumptions without arguing against himself, however, and arguing against oneself guarantees that one's arguments will have no effect. A bargainer must act as if the adversary does not understand the full force of what he is about to hear, notwithstanding his protestations to the contrary, and spell out the arguments in all their detail. Should he fail to do this, the adversary will reduce the arguments to self-serving summaries, discount them in good faith, and cause them to drop out as a factor of influence in the negotiation.

Examining legal issues from the perspective of their different analytical dimensions is one of the most common methods for developing argument in sufficient detail. Even the simplest legal issue can be argued in terms of rule, policy, principle, analogy, custom, and consequences. Take the question of whether a landlord will be

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10; Charles Walcott et al., *The Role of Debate in Negotiation*, in NEGOTIATIONS, *supra*, at 208, but there is little follow-up to that conclusion.

91. There are almost as many ways to describe the qualities of persuasive argument as there are writers on the subject of rhetoric. I use these particular terms only because they are familiar ones for me. See Condlin, *Cases on Both Sides*, *supra* note 9, at 83–89.

92. Professors Stark & Frenkel discuss one dimension of this quality under the rubric of “Argument Explicitness.” Stark & Frenkel, *supra* note 12, at 26–29.

93. One can get carried away with detail, of course, and make arguments that are so elaborate as to be opaque, but if this risk is avoided, the more extensively developed an argument is the more likely it is to persuade. This does not mean that the full details of an argument should be presented all at once, in a long didactic soliloquy, to insure that nothing is left out. Experienced bargainers are suspicious of speeches and think that something must be wrong with an argument if it needs to be “delivered,” even when they cannot say immediately what is wrong with it. They assume that true arguments can be expressed in many different ways as the structure of a conversation dictates, and that the best ones just leak out over time, as if writing themselves.

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permitted to evict a tenant from an apartment with housing code violations. From the perspective of the tenant one could argue that statutory or decisional rules prohibit the eviction, that denying eviction is necessary to insure that landlords maintain local housing stock, that this particular landlord lacks clean hands, that eviction has been denied routinely in similar cases in the past, that the eviction might have serious collateral consequences that make it not worth the risk (e.g., other tenants might get upset and withhold rent), and that, as a practical matter, the housing court will not permit an eviction when a rental unit is not up to code. Each of these arguments, if available, could be spelled out at length, so that their cumulative effect will be greater than their effects taken individually, and the adversary will be left with the impression that the arguments might never end.<sup>94</sup> Argument of this sort is influential, not just because it is detailed, but also because it examines the issues in dispute from every conceivable vantage point, perspective, and angle and, everything else being equal, a comprehensive understanding trumps a narrow one.

*Multi-dimensionality.* Thinking about issues in a dispute from the perspective of multiple analytical dimensions also enables a bargainer to generate more discrete arguments in advance of a negotiation than he otherwise would by thinking about the bargaining problem as an undifferentiated whole.<sup>95</sup> With a larger set of arguments, a bargainer will be prepared to make new points continuously throughout the bargaining conversation, staying one frame of reference ahead of the adversary, and always saying something new even as the adversary begins to recycle familiar arguments in different language. At some point, the comparative inadequacy of the adversary's understanding will become apparent to everyone, the adversary included, and when this happens, the adversary will acknowledge it in some tacit fashion, often by changing the topic of discussion. A shift of this sort usually indicates that the adversary has run out of things to say on the point and hopes to find success in some other area. Often, this is as much of a sign as one can get that an argument has had an effect, but it is enough. And when it happens, it makes sense for the bargainer to move on.

*Balance.* Good argument rarely is one-sided. If a dispute reaches a point where lawyers have been hired, pleadings filed, discovery taken, and bargaining commenced, there usually is something to be said for each side. There are familiar exceptions of course—the strike suit, the neighborhood feud, the recidivist litigator—but most people do not throw good money after bad.<sup>96</sup> At a minimum, bargainers are likely to

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94. See Stark & Frenkel, *supra* note 12, at 43 (“[A]rguments that a) explicitly reveal their sources and/or b) provide more explicit argumentative support ‘are significantly more credible and significantly more persuasive than their less explicit counterparts.’”).

95. This strategy builds on the insight underlying the historian’s “interminable fallacy,” that of making a short story long. DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARDS A LOGIC OF HISTORICAL THOUGHT* 149–50 (1970).

96. This is true even in contingent fee cases where there is “little incentive to bring weak cases with low prospects of recovery.” Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 131 (2009); see also Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1968–69 (2002) (finding that hourly and contingent fee attorneys spend about the same amount of time on matters).



believe that their arguments are made in good faith and this belief must be respected in fashioning a response.<sup>97</sup> A claim that all the reasonable arguments are on one side and that the adversary's views are unintelligent or unreasonable, is not likely to evoke sympathy or weaken conviction much of the time. Bargainers must acknowledge the legitimacy of their adversary's strong arguments and make concessions when warranted or risk not being thought of as serious. It simply will not work to say, "I'm right and you're wrong," in one form or another, over and over again, in the hope that the other bargainer will become tired and give up. Dispute bargaining must protect everyone's legal rights—the adversary's included.<sup>98</sup> A bargaining pattern that admits no substantive weakness rarely is warranted and rarely is successful.<sup>99</sup>

*Subtlety.* Parties believe in arguments they have an active hand in shaping and are suspicious of those that are preached to them.<sup>100</sup> As a consequence, bargainers should make adversaries work to understand arguments, even to the point of having them complete the arguments themselves when it is reasonable to expect this. Subtlety is the quality of argument that makes this kind of listener involvement possible. Subtlety ordinarily is achieved by leaving constituent parts of an argument implicit. Information that the adversary can be expected to know and provide on his own is not mentioned. Tacit biases, values, and decision heuristics that influence the adversary's judgments are neutralized or exploited, as needed.<sup>101</sup> Features of the

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97. See GARSTEN, *supra* note 11, at 198–99 (In “real persuasion . . . [s]peakers treat their listeners’ existing opinions with a certain deference, and yet they do not cater to them.”).

98. Many bargainers mistakenly assume they can be the only ones to succeed in the bargaining universe. They fail to understand Robert Axelrod's carefully detailed insight that, in bargaining, “the other's success is virtually a prerequisite of your doing well for yourself.” ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 112 (1984).

99. An argument that considers all views on an issue, but also explains why one view is better, is described in the social science literature as containing a “two-sided refutational message.” Unsurprisingly, messages of this sort “are more persuasive than either one-sided messages or two-sided, non-refutational messages.” Stark & Frenkel, *supra* note 12, at 39–40.

100. This effect often results not so much from an increased understanding of the argument in question as from “a lowering of psychological resistance whenever a person regards the persuasive arguments emanating from others as his ‘own’ ideas.” Bert T. King & Irving L. Janis, *Comparison of the Effectiveness of Improvised versus Non-Improvised Role-Playing in Producing Opinion Changes*, 9 *HUM. REL.* 177, 183 (1956). As a long-term researcher in the field put it, “self-persuasion has staying power.” Elliot Aronson, *The Power of Self-Persuasion*, 54 *AM. PSYCHOLOGIST* 875, 877 (1999); see also Stark & Frenkel, *supra* note 12, at 10–16 (summarizing social science research on “counter-attitudinal advocacy”).

101. A growing body of NLBT scholarship based on behavioral economics research describes the strategies and maneuvers through which this is done. See Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 *U. CHI. L. REV.* 163 (2000); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 *VAND. L. REV.* 2017 (2006); Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 *MARQ. L. REV.* 795 (2004); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 *OHIO ST. J. ON DISP. RESOL.* 597 (2006); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. CAL. L. REV.* 113 (1996); Korobkin, *supra* note 1; Korobkin, *supra* note 37; Korobkin & Guthrie, *supra* note 37; Korobkin & Guthrie, *supra* note 33; Malhotra & Bazerman, *supra* note 36. I discuss this literature at greater length in Condlin, *supra* note 41, at 232–69. While it often makes sense for bargainers to adopt the techniques and practices of NLBT scholarship, it does not follow that they should adopt a NLBT



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situation (e.g., an impecunious party, community attitudes, informal court practices, crowded dockets, and the like) are allowed to work their influence quietly in the background rather than invoked explicitly. Telling an adversary, in effect, that he has no practical choice but to concede is offensive, largely because it is a move based on power, not right, and few bargainers respond favorably to being pushed around, at least when the pushing is obvious.<sup>102</sup> A bargainer who engages an adversary intellectually, on the other hand, transforms conversation from speechmaking to analysis and builds his case on the adversary's own thoughts.

*Emphasis.* Bargaining argument also must have a point (or points) of emphasis. The structure of individual arguments, as well as the arrangement of argument as a whole, must call attention to certain parts of the argument over others. Some points will be important because they represent thresholds (e.g., jurisdictional claims) that must be overcome for remaining claims to have force. Others will have implications for issues throughout the case (e.g., arguments about witness credibility), make extraordinary recoveries available (e.g., punitive or treble damage theories), or be the strongest arguments in the case. If adversaries are left free to determine for themselves which parts of arguments are important and which are not, they will respond only to those that are easiest to rebut and ignore the rest. A bargainer must define his own agenda at the peril of being thought not to understand his case if he does not. The same is true for points within a single argument. A bargainer who makes an argument based on a claim of fraud, for example, and fails to take the initiative in explaining how he will prove intent to deceive, gives the impression that he does not understand the difficulty in proving fraud and is using the term only for its *in terrorem* effect.<sup>103</sup> Such arguments regularly are ignored.

Content is not everything in legal argument; emotion also plays a role. A bargainer who claims to be offended by a demand but who does not seem to be upset, sends two messages rather than one. This will confuse a listener and cause him to suspend judgment until the messages sort themselves out. Rarely should emotion carry the weight of an argument—substantive content does that—but the emotional dimension of an argument must corroborate the verbal one or it will undercut it. In

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conception of bargaining success. All bargainers are entitled (and obligated, if the client insists on it) to seek a disproportionate return when their cases are stronger than those of their adversaries. This kind of substantive (as opposed to social) aggressiveness is difficult to fault, at least on reflection, because it is just a form of sticking up for oneself. See William P. Bottom & Paul W. Paese, *Judgment Accuracy and the Asymmetric Cost of Errors in Distributive Bargaining*, 8 GROUP DECISION & NEGOTIATION 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”).

102. See Mansbridge et al., *supra* note 5, at 80 (“[T]he absence of coercive power is a regulative ideal, impossible to achieve but serving in many circumstances as a standard against which to measure practice.”). Rational argument also is grounded in power, of course, but the power of reason has a normative legitimacy that the power of practical or personal leverage does not.

103. The foregoing properties also work in combination to prevent any one of them from getting out of hand. For example, emphasizing certain arguments or parts of an argument over others, or leaving parts of an argument implicit and for the listener to fill in, helps prevent elaborately developed arguments from becoming unintelligible, unwieldy, or oppressive.

bargaining, this emotion rarely is extreme. It has little of the histrionics, theatricality, or drama of the courtroom. Seriousness usually is more appropriate than outrage, annoyance more appropriate than disgust, conviction more appropriate than certainty. The key qualities are proportionality and congruence. Emotion must be proportionate to and congruent with the substantive point being expressed.

Conversational argument also attends to style. Arguments must be made confidently, of course, but also matter-of-factly, without defensiveness or belligerence, as if self-evident. Skillful bargainers build arguments slowly and incrementally, one piece at a time, in short, on-point, statements responding to adversary's assertions and questions. They avoid long, didactic soliloquies, off-topic evasions, forceful outbursts, and other stylized moves that distract from the content of what they have to say and make that content more difficult to hear. They allow the structure of the underlying social conversation to dictate the arrangement and organization of their arguments and do not force points where they do not fit or raise points at all when they are not needed, even if prepared to do so. They maintain the social integrity of the conversation above all else, knowing that it is easiest to persuade someone when it does not appear that one is trying to do so.

In a related fashion, experienced bargainers also are careful not to filibuster or interrupt in order to prevent their ideas from being challenged.<sup>104</sup> They take objections seriously, never dismiss them out of hand, ridicule them as unworthy, or talk over them until the adversary gives up. They acknowledge weaknesses in their own arguments, knowing that denial usually is transparent, and abandon arguments if defending them would undercut their credibility as a whole. They avoid name-calling, *ad hominem* attack, caricatured characterization and other such moves that rely principally on personal power,<sup>105</sup> and remain unfailingly courteous and respectful, channeling their conviction into the content of what they say rather than the force with which they say it. Throughout, they give the impression that they are confident in their understanding of the issues in dispute, believe that anyone who considers the issues fully and fairly ultimately will see things their way, and are willing to wait for as long as it takes for this to happen. They do not become frustrated when adversaries do not concede quickly, or protest when they continue to object. They expect objections and see them as reasonable. They understand that the adversary is just doing his job.

While the foregoing properties are important, the quality most closely associated with effective conversational argument, perhaps counter-intuitively, is the ability to persist in the face of rejection, to push through an adversary's dismissals, and continue to press one's points until they have had their full effect.<sup>106</sup> Experienced bargainers

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104. Hollander-Blumoff, *supra* note 1, at 29 ("Feeling listened to, heard, and able to have the opportunity to speak are relevant to a dyadic interaction just as in a more formal setting.").

105. Threats are the best example. While some bargainers can be intimidated, most are offended by threats and resist their use. See Condlin, *Cases on Both Sides*, *supra* note 9, at 69–70 (describing the difference in the effects produced by threat and argument). *But see infra* note 127 and accompanying text.

106. Stark & Frenkel, *supra* note 12, at 8 ("Theorists agree that persuasion is usually an incremental process, in which people's minds are changed gradually and by degrees, by means of multiple interventions over

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expect arguments to be rejected, at least at first; why else would there be a dispute? But they do not treat this as a fixed condition or think that there is nothing they can do about it.<sup>107</sup> They assume that an adversary's beliefs are tentative, whether expressed as such or not, because these beliefs necessarily are based on a one-sided understanding of the issues in dispute, and they think they can change that understanding if given enough time.<sup>108</sup> When they meet resistance, therefore, they continue to press their arguments in different ways—rephrasing them, offering new evidence in support, probing for details about the adversary's objections, trimming and modifying the points only as a last resort and only after being given good reasons for doing so. In a sense, they act on a variation of Doctor Johnson's well-known reply to Boswell—that one does not know whether an argument will work until another bargainer refuses to be moved by it under all circumstances.<sup>109</sup>

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time.”) (citing HERBERT SIMONS, *PERSUASION IN SOCIETY* 30 (2001)). Professor Bächtiger refers to this quality of argument as *insisting* and describes it as “a sustained process of questioning and disputing, [in which] the goal is a thorough and rigid inquiry of the matter under consideration.” Bächtiger, *supra* note 5, at 7. “Deliberation without a strong dose of sustained critical questioning and (radical) disputation,” he explains, “is deficient from a normative perspective.” *Id.* at 8.

107. This is a reasonable belief much of the time. See Bottom & Paese, *supra* note 101, at 356–57 (describing studies showing that confident and optimistic bargainers are able to alter adversary expectations about negotiation outcome).
108. “Enough time” means longer than a less optimistic approach to bargaining would take. See Bottom & Paese, *supra* note 101, at 362 (“[Optimistic bargainers] took more than twice as long to negotiate as . . . [bargainers with an] accurate [understanding of the reservation price of their counterparts] . . . [but t]his persistence led to much more profitable agreements.”). Professor Elizabeth Loftus and her colleagues argue that optimism bias of this sort can cause lawyers to make inaccurate predictions about litigation outcomes, and this, in turn, can cause them to give unreliable advice to clients about whether to accept a settlement offer or proceed to trial. Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 *PSYCHOL. PUB. POL'Y & L.* 133, 149–50 (2010). While perhaps accurate with respect to the issue of outcome prediction, Professor Loftus and her colleagues seem not to understand how optimism bias can be adaptive in legal dispute bargaining. If dispute bargaining proceeds by dividing a so-called “bargaining range” established by the parties' first serious offers, as most scholars agree that it does, bargaining success often will depend upon being able to create a range that is imbalanced in one's favor. Trying to gain a disproportionate share of a range, once established, is difficult because winning and losing is obvious, and all bargainers will resist losing obviously. But creating a range that tips incrementally in one's favor and then dividing it evenly, is a strategy that sometimes is easier to conceal. Optimism bias about his case enables a bargainer to make an excessive initial demand sincerely and in good faith, and this in turn enables him to define his end of the bargaining range in favorable terms, either by shaping the range to his advantage or by neutralizing his adversary's efforts to do the same. It also guarantees that any subsequent concessions will be authentic and this in turn will make it seem less likely that he was playing games all along. Ironically, Professor Loftus and her colleagues hint at these possible advantages of optimism bias but do not seem to recognize the extent of their importance. *Id.* at 137 (“[L]awyers with high confidence levels were more likely to be successful than their counterparts whose confidence estimates were lower . . .”).
109. “BOSWELL. ‘But what do you think of supporting a cause which you know to be bad?’ JOHNSON. ‘Sir, you do not know it to be good or bad till the Judge determines it. . . .’” 2 JAMES BOSWELL, *The Life (1766–1776)*, in BOSWELL'S LIFE OF JOHNSON 47 (George Birkbeck Hill ed., 1934) (1791). No single type of argument works best in all circumstances to push an adversary to his limits, of course, but there will be such arguments in every case, and bargainers should not give up until they have been tried. Often it will

Persistence of this sort can seem stubborn, close-minded, or unfair, of course, so skillful bargainers anticipate this reaction and counteract it by communicating a pre-emptive (and genuine) willingness to modify their views when given good reasons for doing so. They express their views in sincere, non-preachy, almost apologetic terms, as if based on a fidelity to law and a corollary obligation to protect their clients' rights, rather than a propensity to disagree or compete. They want only what their clients are entitled to, no more, but also no less. They focus their attention on the issues in dispute rather than bargaining strategy, believing that it is easier to influence someone with substantive ideas than skill maneuvers. They give the impression of always being close to reaching an agreement, with "only a couple of additional things to work out," and avoid the "take it or leave it" message implicit in self-serving statements like "I will not move from my position."<sup>110</sup> They understand that intransigence begets intransigence and that both together produce impasse, and thus are careful to extend the bargaining conversation with reasons rather than threats, bluffs, and pronouncements.<sup>111</sup>

Skillful bargainers understand that bargaining arguments sometimes can become frustrating and that frustration can lead to anger and impasse. But they also recognize that frustration is not the same as intransigence and that adjusting slowly to frustration is not the same as being rigid, so they do not let feelings of disappointment and lack of success back them into stylized, interminable "salvo-salvo-truce" colloquies.<sup>112</sup> Instead, they work through their frustrations by isolating and digging into the substantive differences that separate them and do not get distracted by objections, perceived or real, to an adversary's motives, attitudes, or manners. They understand that bargaining is work, not social relations, and that the slings and arrows of bargaining arguments are not personal.<sup>113</sup>

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be difficult to know what those arguments are, and that is why bargainers should try everything before concluding that nothing will work.

110. This is a little like giving directions to a non-native speaker who does not understand the first time, by saying it again, louder, and usually it is equally successful. *See* Bächtiger, *supra* note 5, at 20 ("[T]he most important condition [for fostering deliberation] is that a questioner or challenger cannot stay confrontational and adversarial throughout the process. He or she must strike a careful balance between confrontational and constructive speech acts. Put differently, some positive reciprocity is required in order to spur a creative process of reflection and transformation.").
111. *Cf.* Mansbridge et al., *supra* note 5, at 92 ("[A] spirit of partisanship, trying to win within certain rules of the game, along with an active spirit of contest and opposition, might in practice produce just the organization and protection of ideas that lively deliberation demands."). Argument is a pervasive feature of negotiation, not a discrete segment that is taken up separately and completed. Bargainers discuss issues of substantive disagreement continuously throughout a negotiation, while proposing and defending offers, inquiring about factual and evidentiary matters, making small talk, and even while filling time waiting to see where the conversation will go next. The issue of how to judge the worth of competing settlement proposals is always on the table in negotiation, and argument is the primary vehicle for constructing the standards used to make that judgment.
112. Condlin, *Cases on Both Sides*, *supra* note 9, at 102 n.81.
113. Of all the issues in dispute bargaining, how to deal with contentiousness is perhaps the most sensitive one for NLBT scholars. NLBT asks bargainers to avoid contentiousness rather than manage it, to lighten up rather than toughen up, but contentiousness is endemic to dispute bargaining and not

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Perhaps the most difficult judgment in making conversational argument is knowing when to stop, knowing when an argument has had all of the effect it is going to and needs to be dropped. Rarely will an adversary provide a clear signal of when this is so; rarely will he say, for example, "You know, you're right. I hadn't thought of that. You win." But this kind of statement usually is not needed. The strength of a bargainer's resolve is tied inevitably to his understanding of the issues in dispute and when that understanding is shown to be false or incomplete, his resolve weakens. It is not that a bargainer consciously decides to have less confidence in a position, or says to himself, "I feel my resolve weakening," it simply happens, and understandably so. When a foundation collapses, the building above it collapses as well.<sup>114</sup> The goal in bargaining argument, therefore, is to tell an adversary something new about the issues in dispute, something he had not thought of on his own, and something that causes him to have second thoughts about what he believes to be true.<sup>115</sup>

Some bargaining argument is effective because it is undeniably true, but most argument is effective because it creates doubts an adversary cannot overcome within the time frame of the negotiation. The adversary may not agree with a particular point, may even feel certain he could prove it wrong if given a little more time, but unless he can explain how the point fails (to himself as much as anyone) while still in the negotiation, he is likely to be influenced by it. Doubt is not the same as a change of mind, of course, and the new information (i.e., facts, insights, perspectives) ultimately may turn out to be unimportant, or compatible with the adversary's prior views. But until it is clear that this is so, new information weakens an adversary's conviction in his case, and a weakened conviction makes him more willing to concede.<sup>116</sup> One should stop arguing a point, therefore, when it is clear that the point has registered fully, the adversary is unable to rebut it, and it is fair to assume that he has new doubts about his position.<sup>117</sup> Continuing to argue at that point would be insulting and would jeopardize the gains already made.

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something one can run from. The need is not so much to reject NLBT as it is to redirect it, to change its purpose from that of making bargaining conversation pleasant to that of making it productive, even at the cost of some discomfort.

114. As Professor Bächtiger puts it, when "argumentation proceeds to the point in which the challenged person can no longer (reasonably) defend the indefensible . . . the 'forceless force' of good argument takes over." Bächtiger, *supra* note 5, at 21.
115. See Mansbridge et al., *supra* note 5, at 78 ("When participants change their minds in deliberation, as in practice they often do, they most frequently do so because they have acquired new factual information.").
116. Strong arguments that go un rebutted do not automatically result in favorable settlements. Bargainers must link arguments to demands and trade in proportion to the strength of their substantive cases if they are to obtain favorable settlements. It is possible, in other words, to give back in the trading phase of bargaining what is gained in the advocacy phase. In fact, it happens quite often. The issue of how one makes the linkage between argument and trading is outside the scope of this discussion.
117. Signs that a bargainer has no immediate response to an argument can appear in facial expressions, speech patterns (e.g., starting and stopping, pauses, long filibuster-like statements), tone, pace, topic selection, and the like, as well as in the literal content of what is said. There is a rich literature on such so-called paralinguistic clues.

Conversational argument also must be real and not feigned. Most lawyers see through pretense quickly and are not moved by insincere arguments.<sup>118</sup> Before convincing others, therefore, bargainers first must convince themselves of what they plan to say so that their arguments are sincere and not just pretend. This does not mean convince oneself in an “out of sight, out of mind” manner, where gaps and weaknesses in arguments are suppressed, ignored, or denied. Instead, it means develop a justified belief that the arguments could convince reasonable people a significant percentage of the time. A bargainer who is not convinced in this way should abandon the arguments even if they are strong in some objective sense (i.e., reasonable people could believe them), at the risk of tainting everything else he says if he does not. Imagination and inventiveness play a larger role than strength of personality or rhetorical skill in constructing arguments of this sort. Skillful bargainers simply invent more arguments that hold up under scrutiny (or at least appear to) than do unskillful bargainers. They do not try to compensate for weak reasoning with loud tone, fast pace, forceful demeanor, and the like.<sup>119</sup> If they cannot support a point convincingly with reasons and evidence, they do not make it. Conversational argument does not work magically by turning weak claims into strong ones; instead, it presents claims in as complete, articulate, and clever a fashion as possible.<sup>120</sup>

Argument is an interactive process and thus its effectiveness also depends on the nature of the adversary. Not everyone reacts to all types of arguments in the same way. Some people do not mind rhetorical questioning, for example, while others are

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118. It is strange that bargainers would think they could recognize insincerity in adversaries and yet act as if adversaries could not see it in them. Yet, bargainers routinely make insincere arguments and expect them to be believed. They are a little like the famous “K-T Man” of behavioral economics in this regard, who both buys insurance and plays the lottery. Daniel McFadden, *Rationality for Economists?*, 19 J. RISK & UNCERTAINTY 73, 83 (1999) (coining the expression “K-T Man” to describe the behavioral model of decisionmaking described by Daniel Kahneman and Amos Tversky); Condlin, *supra* note 41, at 227 (describing how the fact that people both purchase insurance and play lotteries stimulated Daniel Kahneman and Amos Tversky to examine how individuals make decisions about risk).

119. A weak argument is not any stronger at a higher decibel level or at a faster speed, but those attributes can be distracting and make weaknesses more difficult to spot.

120. Some hesitate to argue law in the belief that it is a bad strategy. They say: “I don’t want to reveal all of my points or connect all the dots prematurely. It will give the other side my closing argument.” This concern is especially acute when negotiation takes place (as it often does) before discovery is completed and what the witnesses will say and what the documentary and physical evidence will show is not yet fully known. The response to this concern is quite simple. It is not possible to get the benefit of legal argument without making it. If one has strong legal arguments, those arguments will hold up over time, and there is no risk in telling someone about them early, so to speak. If they do not hold up over time, because new evidence or better arguments undercut them, then they were not good arguments to begin with, and one should have expected to have to modify them at some point. A weak substantive case should not win in negotiation unless the adversary’s case is weaker. Advocacy should aim to persuade an adversary (or at least weaken his conviction), not deceive him. Some prefer more of a game-playing or power-based approach to bargaining, of course, but the preference is ill advised. It creates legitimacy problems for the system of informal dispute resolution as a whole and competence problems for individual bargainers (because game playing and power based moves are transparent and easily countered—any good bargainer would rather face bargaining tricks than strong substantive arguments). *See supra* note 9 and accompanying text. Deception, circumspection, equivocation, secrecy, and the like also add unnecessarily to the cost of bargaining because they delay it for no good reason.



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put off by it. Some object to being told things didactically, while others do not mind. Some resent interruptions, while others could care less. Some enjoy a pleasant, friendly demeanor, while others see it as a symptom of smiley-faced, realtor syndrome and are suspicious of it. The examples could go on. Therefore, it is not possible to describe effective bargaining argument in a single prescriptive template or construct a set of guidelines guaranteed to work against all types of adversaries and in all types of situations. There are many ways to adapt the above qualities to a particular context, and choices must be made. Still, bargainers must begin somewhere. They must make some default assumptions to carry them until they have enough situation and adversary-specific information to make adjustments. It is safest to start with the assumptions that the adverse bargainer is rational, open-minded, interested in the merits of the dispute, able to articulate and defend his own views adequately, and not unduly sensitive or fragile. Such an approach sends a message of respect and seriousness that has wide, cross-personality appeal and makes no unilateral compromises of position that would be impossible to retract.<sup>121</sup> It is the way one would approach a colleague, a friend, or a respected authority figure, and an adverse bargainer is entitled to no less.<sup>122</sup>

Making dispute bargaining argument substantive and eschewing the theatrics and stylized maneuvering of the courtroom<sup>123</sup> does not prevent bargainers from acting strategically. Legal rules are famously indeterminate; they do not have a single, fixed, and incontestable meaning. Language is not that constraining.<sup>124</sup> This indeterminability is a plus in dispute bargaining because it permits good faith, objective analysis to exist side by side with self-interested argument.<sup>125</sup> A skillful

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121. See Mansbridge et al., *supra* note 5, at 91 (“Even in international politics ‘truth-seeking arguing’ can play an important role in negotiation among cooperative antagonists, as when James Baker convinced Michael Gorbachev that a united Germany would be less threatening within NATO than outside it.”).

122. Bächtiger, *supra* note 5, at 7 (describing how “(radical) disputation can . . . occur between friends and partners and out of good will”). Argument of this type can even provide a form of the “procedural justice” that Professor Hollander-Blumoff argues is essential to the perception of being treated fairly in negotiation. Hollander-Blumoff, *supra* note 1, at 410–20 (describing the nature and role of “procedural justice” in dispute bargaining).

123. Cf. Wikipedia’s dispute settlement “Principle of Decorum”:

Wikipedia users are expected to behave reasonably, calmly, and courteously in their interactions with other users; to approach even difficult situations in a dignified fashion and with a constructive and collaborative outlook; and to avoid acting in a manner that brings the project into disrepute. Unseemly conduct, such as personal attacks, incivility, assumptions of bad faith, trolling, harassment, disruptive point-making, and gaming the system, is prohibited.

*Wikipedia: Requests for Arbitration/Homeopathy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Wikipedia:Requests\\_for\\_arbitration/Homeopathy#Decorum](http://en.wikipedia.org/wiki/Wikipedia:Requests_for_arbitration/Homeopathy#Decorum) (last modified May 27, 2011).

124. Even a simple “Keep Off the Grass” sign in front of a drug rehabilitation center has at least four possible meanings.

125. Psychologists usually explain self-interested interpretation as a product of the self-serving bias and see it as categorically distinct from objective analysis. Arlen & Talley, *supra* note 38, at xlv (“Psychologists have long argued that people do not evaluate uncertain information objectively. Rather, they tend to analyze the information through a mental filter that results in them evaluating the information in a way

bargainer does not argue fanciful interpretations of legal rules; instead, he shapes the inevitable indeterminacy present in the rules to his advantage by making arguments that move the settlement outcome incrementally in his direction from a core cluster of possible, reasonable outcomes, winning small rather than big. Lawyers corrupt this process when they try to win every point, relying on practical power, strength of personality, and rhetorical force to give weight to what they say. In an ideal world, dispute bargaining conversation has the substantive ends of formal adjudication, the intellectual character of objective analysis, and the outward appearance of social conversation.<sup>126</sup> Arguing in this manner does not prevent lawyers from producing maximum client returns; it simply prevents vulgar, transparent, and illegitimate efforts in that regard.

Argument of this sort works against even highly experienced and skilled bargainers. It sometimes is possible, as Professor Mnookin and his colleagues famously put it, to “fish for suckers.”<sup>127</sup> But it is a mistake to begin every negotiation with the default assumption that the adversary is a sucker. If he is not, he will be offended at being treated in that way and will be difficult to work with for the remainder of the negotiation (and often in subsequent negotiations). Like a witness caught lying under oath, a bargainer who begins a negotiation by insulting the intelligence of his adversary will find it difficult to re-establish his credibility within the time frame of the relationship. If the adversary truly is a sucker, on the other hand, there is nothing lost in treating him with respect at the outset. No position is compromised, no secret information is revealed, and no gain is forgone in doing so. A respectful, substantive approach to legal dispute bargaining has all of the positive effects of an overly adversarial one and none of the risks.<sup>128</sup>

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that is favorable to them. Thus, people over-estimate their own skill and luck, and produce more positive estimates of future outcomes than are by an objective analysis of the objective information.”). This notwithstanding, self-serving bias can be an adaptive trait in dispute bargaining. *See supra* note 108 and accompanying text.

126. When considered in combination with the well-known debate over managerial judging, one might think of the central question in modern dispute resolution scholarship as whether bargainers should be more like judges, or judges more like bargainers.
127. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 321–22 (2000) (“[A] competitive hard bargainer will achieve a better result for a client than a problem-solver—if the other side is represented by ineffective counsel so eager to settle the dispute or make a deal that he simply offers concession after concession. . . . [P]roblem-solving [bargaining] . . . probably gives up some opportunities to fish for suckers. . .”).
128. In practice, the problem of how to deal with a less than competent adversary is more complicated than this. If one accepts a norm of maximizing for judging bargaining outcome, as most lawyers do, Hollander-Blumoff, *supra* note 1, at 412 (“Maximizing outcomes has long been understood as the cornerstone of negotiation teaching and practice.”), the effectiveness of any particular bargaining style will depend, in major part, on how well it captures the benefits of various deficiencies in an adversary. Yet, all adversaries are deficient to some extent; the designation is more one of degree and type than of binary choice. Some are dumb, some are unprepared, some are hotheads, some are sloppy or sentimental, some are generous, some are underfinanced, some have tight limits, some are squeamish, some are overconfident, some are bored, and some are unduly credulous; the possibilities (and combinations of possibilities) are nearly endless, and any one of these qualities may be exploited under the right circumstances. Even good bargainers expose vulnerabilities unnecessarily or prematurely, and when this

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It remains only to consider why all lawyers do not approach dispute bargaining in this manner; what does the recommendation to argue substantive differences conversationally overlook or leave out? For some, it may be a fear that the failure to be more stylistically competitive will make them look like an easy mark, that other bargainers will think they have little tolerance for conflict or commitment to their case and can be pushed around.<sup>129</sup> If so, the concern is an illusory one. Whether to give up too easily in bargaining (i.e., make too generous a deal) is under the unilateral control of each individual bargainer, no matter what an adversary may think. A bargainer always is free to refuse to concede to an overtly competitive style even if he cannot counteract that style in kind, or neutralize it in some other way. This is one of the beauties of negotiation. No one can be compelled to make a concession he is unwilling to make (for any reason). Eventually, the adversary will notice that overt competitiveness does not work and will change his approach. Reason can trump power in negotiation if one insists on it, but only if one insists on it.<sup>130</sup> If the concern is looking like an easy mark, therefore, the antidote is simple: do not be one, and the issue is off the table.

Other dispute bargainers no doubt like adversarial give-and-take for its own sake. Whether for reasons of taste, emotional makeup, ideology, or personal history, they argue in an overly competitive fashion because they enjoy it. If this risks wasting resources, polarizing relationships, or triggering long-term recrimination cycles, as it often does, so be it. Bargainers who feel this way usually justify the choice on the ground that it produces out-of-the-ordinary returns, and sometimes they will be

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happens, a maximizing strategy would take advantage of the openings. Techniques that work against good opponents do not always work equally well against bad (or incapacitated) ones, however. The game of chess is played differently against a grandmaster than it is against a casual player, just as psychological ploys that might fool a world-class poker or bridge player would be utterly lost on an amateur. Therefore, a skillful bargainer might very well adopt a philosophy of “to each according to his skills; from each according to his vulnerabilities,” and reject the approach of “one size fits all.” For such a person, a bargaining theory must indicate when different strategies are appropriate, not describe a single optimum approach. Exploiting vulnerability is the dark side of bargaining, however, and identifying whether and when it is appropriate is outside the scope of the present discussion. Here I take up the less difficult question of whether substantive legal argument has a role to play in any robust conception of legal bargaining, NLBT conceptions included, and it is easier to make the point that it does by using examples of argument at its best. Discussion of the dark side will have to wait for another day. Professor Markovits’s rejuvenation of the adversary champion model of legal representation may prove helpful in that regard. MARKOVITS, *supra* note 11, at 94 (arguing that lawyers are justified in “sustain[ing] all sides of an argument, . . . equivocat[ing] without any irritability reaching after a conclusion, . . . [and] remain[ing] content with persuasion rather than proof”). See also Bächtiger, *supra* note 5, and Mansbridge et al., *supra* note 5, at 82, describing situations in which “it is morally acceptable . . . to exercise power or consonantly depart from the deliberative ideal.”

129. See MACFARLANE, *THE NEW LAWYER*, *supra* note 18, at 98–100 (describing the “appeal of the zealous advocacy concept”).

130. Reason does not always trump power, of course, and legal rights are not always more important in influencing the negotiation outcome than practical considerations. The legal system has built-in biases that frequently make even substantively strong claims unenforceable as a practical matter. Lawyer bargainers add to this problem, however, when they fail to insist that legal rights be given their due.

right.<sup>131</sup> Some bargainers can be bullied and will pay above market rates to avoid it. But most of the time, the benefits from an overly competitive bargaining style are emotional and psychological to the bargainer rather than economic to the client, and clients do not always (or perhaps ever) understand this.<sup>132</sup> Often, bargainers do not understand either. Bargainers who shape their strategies motivated by the thrill of the contest do both their clients and themselves a disservice—their clients in individual cases and themselves over a career in bargaining.<sup>133</sup>

Still other bargainers argue in an overly adversarial fashion because they see argument as public performance rather than private conversation, as monologue rather than dialogue, or as a sort of language and concept contest in which the adversary is just another contestant, and the goal is to impress, intimidate, or overpower an audience rather than to learn from a colleague. Often, they develop this understanding of legal argument in law school moot court competitions, trial advocacy courses, and the stylized discussions that go by the name of Socratic dialogue in large law school classes, where looking good is usually more important than being correct (since no one ever is correct). Law school professors routinely say that they teach argument as conversation, but students do not always take this message from the instruction, and for understandable reasons. Law schools' advocacy instruction usually takes place in public, before audiences more interested in judging than learning, and is graded on the basis of stand-alone, oratorical qualities rather than success in changing beliefs. Under these circumstances, it is not surprising that

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131. See William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367 (1999) (“The dirty little secret of much of the interest-based bargaining literature is that toughness works—sometimes.”); Hollander-Blumoff, *supra* note 1, at 395 (“Typical negotiation behavior has a hardball, ‘anything goes’ quality . . . [because] individuals are motivated by their desire to maximize their gain in negotiation and [believe that] competitive, no-holds-barred behavior is the way to do so.”).
132. This is just one of the many ways in which the well-known principal-agent problem arises in bargaining. For discussions of other variations, see Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996); see also John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987). The tendency of legal bargainers to privilege the lawyer interest in cordial bargaining relations over the client interest in maximum economic return may be an unintended consequence of the moral activist view of legal representation that was popular in legal ethics scholarship at the end of the last century. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160–61 (1988); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998); Gordon, *supra* note 8. If lawyers ultimately are in charge of some or all of the ethical choices in legal representation, it may not be that large a leap for them to think they are in charge of the aesthetic, style, and taste issues as well. No doubt Professors Cochran, Gordon, Luban, Shaffer, and Simon would object to this extension of their views, but it may be an understandable extension nonetheless. For an intelligent and respectful critique of the moral activist view, see Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010). For an equally intelligent and respectful response, see David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101 (2010).
133. See Condlin, *supra* note 1, at 62–66 (describing how collaborative bargaining strategies produce larger gains over the course of a bargaining career than competitive strategies).

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the students would come away from the experience thinking of argument as more oratory than conversation, and it is equally unsurprising that this perspective would shape their behavior in all settings where argument is called for, both during law school and after. Motor skill habit works in that way.

What then can be said about dispute bargaining argument in general? To begin with, it is important to argue. A bargainer who does not express and defend his understanding of the legal issues in a dispute guarantees that his understanding will play little role in shaping the negotiated outcome of that dispute. One must speak up to have influence. When parties argue legal issues fully, however, bargaining can take longer, frustration and antagonism can grow, and the risk of deadlock can increase. Sometimes the chance to improve outcome marginally will not be worth these added risks, and parties will choose to suppress or abandon arguments even when the arguments are strong. But when the goal in negotiation is to reach the best possible outcome in an individual case, a bargainer must act as if the adversary is rational, and a rational adversary will defer only to a stronger legal case. To assume otherwise is to abandon the realm of law and reason and enter that of luck, power, and chance, where unpredictable things happen.

The best bargaining argument derives its strength from reasons more than rhetorical technique and avoids the belligerence and dogmatism associated with popular images of lawyer advocacy. Demeanor is kept in check (i.e., no shouting, ridicule, rapid-fire response, debater's points, cheap shots, and the like—these are qualities of making an argument, not arguing); points are expressed respectfully, intelligently, and open-mindedly (although also self-interestedly); and objections are examined fully and fairly. One does not expect to win every point, win big, or even win substantially out of proportion to the strength of one's case, particularly if the adversary is skilled and there is something to be said for each side's position. Success consists of moving the outcome an increment or two closer to one's side of the mean outcome that other reasonable bargainers would produce in the same case.<sup>134</sup>

Good argument also is often indirect and inexplicit, creating a world in which the adversary is left free to draw conclusions for himself, ostensibly uninfluenced by what one has to say.<sup>135</sup> It looks a lot like conversation between close colleagues about a matter of common interest in which each person has a slightly different view of how the matter should be resolved. Each presses his view intently, but respectfully, so as not to undercut the good feeling he has for the other or jeopardize his chance to work with the other in the future, but also to convince the other to see things his way. He does this, not for its own sake, but to have the better (his) view carry the day, because it is the better view. If the other bargainer shows that he is wrong in that regard, in whole or in part, he acknowledges it and modifies his view

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134. If everyone did this it would move the mean, of course, but it would not change the definition of success.

135. Often this is done in away-from-the-table behavior, *see* LAX & SEBENIUS, *supra* note 84, at 53–97 (describing away-from-the-table negotiation), in discovery, motion practice, and the like, where a bargainer can shape the world of incentives and constraints within which the adversary comes to these conclusions.

accordingly.<sup>136</sup> Some might think this describes learning more than argument, but all learning grows out of argument. Without competing views and the need to compare and evaluate them, there is nothing to be learned,<sup>137</sup> and argument is the process through which competing views are compared and evaluated.

A bargainer need not soft-pedal or simplify arguments to make them easier to understand or more palatable to hear. No one resents someone for having clearly defined ideas and a willingness to express and defend them. It is the social quality of argument, not its substantive content, that provokes retaliation, causes hurt feelings, and produces lingering animosities, at least among reasonable people. Someone who is enjoyable to be around is enjoyable to be around whether he is arguing with you or not, and that is as true (perhaps even more so) in high stakes bargaining as it is in social life generally. Argument is not a shell game and it does not depend upon intellectual prestidigitation for its effect. A skillful advocate does not turn a weak claim into a strong one with psychological tricks, theatrical mannerisms, or oratorical force. Instead, he invents more arguments than his adversary and defends them more intelligently and convincingly, either because he has thought about the issues in greater detail, or because he has the stronger case. Non-substantive methods sometimes succeed in bargaining, but a bargaining approach should be chosen for its ability to work over a lifetime, in the largest number of settings, and with the widest range of personalities. And an approach based on good faith, substantive argument has the best chance of doing this.

## VI. CONCLUSION

By all accounts, legal dispute bargaining has fallen on hard times. Rational, deliberative, and respectful at its best, it now frequently is stylized, manipulative, and abusive, denying both effective representation to individuals in particular cases and substantive legitimacy to the system of informal dispute settlement as a whole. Legal bargaining scholars recognize the problem, indeed they have documented it in great detail, but until now their corresponding efforts to right the ship have been surprisingly timid and superficial. Perhaps overreacting to the combativeness of traditional adversarial bargaining, they have ignored their own legal training and experience and turned instead to the social sciences for strategies to suppress, deny, manipulate, and work around the disagreements that make up legal disputes. The most obvious manifestation of this excess of sociability is the reduced, almost non-existent, attention given in legal bargaining scholarship to the role of substantive

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136. In a sense, conversational argument demands from bargainers what the deliberative ideal demands of citizens facing a vote, that they “actively seek[] out opposing views, listen[] attentively to the full panoply of those views, offer[] justifications for . . . [their] own views, tak[e] seriously the objections to those justifications, and be[] willing to revise . . . [their] views on the basis of the objections of others . . .” Mansbridge et al., *supra* note 5, at 89. The principal difference is that voters seek to “promot[e] the common good and fairness to all concerned,” and bargainers seek to promote their own self-interested ends. *Id.*

137. Bächtiger, *supra* note 5, at 11–12 (“[W]ithout disagreement about validity claims, there is no need to enter deliberation.”).



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legal argument in dispute bargaining practice. There are many reasons to explain this—some practical, some aesthetic, some ideological, and all understandable—yet these reasons notwithstanding, this perspectival shift from law to psychology (or substance to form) is likely to prove ill advised over time. Legal disputes are grounded in disagreements about the meaning of legal rules, and legal rules, in turn, are embodiments of competing conceptions of the good. Conflicts over issues of this sort are not resolved by imagining a world in which they do not exist<sup>138</sup> or by papering them over with social and psychological tricks. Lawyers will continue to argue about legal rights when they settle disputes because they have no other choice. Whether legal academics will make room for this reality in their conception of dispute bargaining practice, by joining practical wisdom with social science research to the benefit of both, remains to be seen. There was a time when this type of interrelationship was common.<sup>139</sup> Hopefully, that time will come again.<sup>140</sup>

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138. Professor Menkel-Meadow provides an interesting illustration of such “imaginative reconstruction” in a special section of the *Negotiation Journal*, where she summarizes the past twenty-five years of negotiation scholarship without discussing (or citing) the work of Gary Bellow, Charles Craver, Harry Edwards, James Freund, Donald Gifford, Jonathan Hyman, Chester Karrass, Gary Lowenthal, Michael Meltsner, Robert McKersie, Beatrice Moulton, Rex Perschbacher, Richard Schell, Philip Schrag, Richard Walton, Gerald Wetlaufer, James White, and many others, all of whom have a more adversarial perspective on bargaining than she. See Carrie Menkel-Meadow, *Chronicling the Complexification of Negotiation Theory and Practice*, 25 *NEGOTIATION J.* 415, 416–24 (2009). Recounting negotiation history in this way is a little like telling the story of the American Civil War without mentioning the North. It reminds one of Judge Leventhal’s well-known quip about interpreting legislative history: that it consists of “looking over a crowd and picking out your friends.” Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *IOWA L. REV.* 195, 214 (1983) (“It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends.’”). Professor Menkel-Meadow does not limit her account of history to work published in the *Negotiation Journal*, so the selective nature of her look back is difficult to explain.

139. See Thomas A. Kochan, *Foreword* to RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM*, at x (2d ed. 1991) (“[In the nineteen fifties and sixties] the intellectual giants of the field [of Industrial Relations bargaining scholarship] . . . were scholar-practitioners, individuals who moved comfortably and skillfully among the worlds of research, policy advising, and dispute resolution. To do otherwise meant that one lacked the specific insights and base of experience to make informed contributions to knowledge.”).

140. Change may be in the works. The principled bargaining variation of NLBT always has included legal argument in its conception of effective bargaining practice, and while there have been cracks in the problem solving façade from the beginning. See, e.g., Murray, *supra* note 18, at 182–83 (“[T]he problem-solving negotiator . . . us[es] the merits as the central negotiating focus. . . .”). Now even the most enthusiastic proponent of problem-solving theory seems to agree that discussion of the substantive merits of a legal dispute can promote settlement. See, e.g., Menkel-Meadow, *supra* note 46, at 600 (describing the “‘substantive’ problem-solving possibilities of negotiations that are conducted through analysis, rational thinking, and coordination, rather than power-plays, competition and deception”).