Bargaining With a Hugger: The Weaknesses and Limits of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can’t All Just Get Along

Robert J. Condlin*

Introduction

The communitarian conception of bargaining now popular with legal academics presupposes a world in which people are always at their best. Clients and lawyers share information about themselves and their situations candidly and honestly, construct agreements

* Professor of Law, University of Maryland School of Law. Work on this article was supported by a grant from the UM Foundation. Participants in the University of Maryland Law School Faculty Workshop made many helpful comments on an earlier draft and Charles Sullivan, David Bogen, Gerald Wetlaufer and James Stark made particularly helpful suggestions. Susan McCarty and Eric Sherbine turned an unmanageable mish-mash of note material into coherent and even proper text. My thanks to all of them.

1 Apologies to Professor Alshuler. See Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 HARY. L. REV. 1808 (1986).

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

from the perspective of their common interests and resolve differences according to objectively derived and jointly agreed upon substantive standards. They “connect”\(^4\) as persons and in the process convert what in lesser hands might be a form of stylized combat into a kind of joint venture,\(^5\) and sometimes even a lasting friendship.\(^6\) This, in turn, takes the hard edge off their disputing\(^7\) and makes it less antagonistic, less competitive, less deceptive, less manipulative and less mean-spirited than it otherwise might be. One might even say that communitarian bargainers create a kind of dispute-settlement Nirvana (or Eden),\(^8\) where self-interest is not

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\(^5\) John Stuart Mill’s description of his working relationship with Harriet Taylor captures the particular understanding of joint venture I have in mind:

> When two persons have their thoughts and speculations completely in common; when all subjects of intellectual or moral interest are discussed between them in daily life . . . when they set out from the same principles, and arrive at their conclusions by processes pursued jointly, it is of little consequence in respect to the question of originality, which of them holds the pen . . .

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

\(^6\) See e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 7 (1991) (“Many people recognize the high costs of hard positional bargaining . . . [and] . . . hope to avoid them by following a more gentle style of negotiation. Instead of seeing the other side as adversaries, they prefer to see them as friends.”). On the nature of friendship, see Robert J. Condlin, “What’s Love Got To Do With It?” “It’s Not Like They’re Your Friends For Christ’s Sake”: The Complicated Relationship Between Lawyer and Client, 82 Neb. L. Rev. 211, 250-70 (2004).

\(^7\) Throughout this article I will limit my discussion to dispute-bargaining. Transactional bargaining is different in several significant respects. See Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 Md. L. Rev. 65, 65 n.1 (1985) (describing the differences between “dispute negotiation” and “rulemaking negotiation”).

\(^8\) Some claim “transformative” powers for communitarian bargaining, seeing it as a means of moral rebirth and growth for its participants. See e.g., ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). Professors Baruch-Bush and Folger discuss mediation but since mediation is just another form of multi-party bargaining, as this article’s discussion will show, their claim also would seem to apply to pure bargaining. For elaborations on the claim, see Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135 (1999); Bruce Winick & David Wexler, The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic 3 (“lawyers thus inevitably are therapeutic agents. Once this insight is absorbed, it is transformative.”) http://ssrn.com/abstract=199142; Jonathan R. Cohen, *Advising Clients to Apologize*, 72 So. Cal. L. Rev. 1009 (1999) (describing how the communitarian move of apologizing in negotiation “may . . . offer paths for spiritual and psychological growth”). Much of the feminist literature on legal bargaining makes a similar claim. See e.g., Kolb & Putnam, supra note 4, at 472-74 (describing the relationship among “Gender, interdependence, and the possibilities for transformative outcomes.”) Professors Shaffer and Cochran defend a large scale version of the claim grounded in religious doctrine, though they see transformation as an experience visited by lawyers upon clients for the clients’ own good. This “lawyer as savior” perspective has always been around and may be increasing in popularity. See e.g., Kristin Huston, *The Lawyer as Savior: What Literature Says About the Attorney’s Role in Redemption*, 73 UMKC L. Rev. 161, 163 (2004) (synopsizing the “salvation stories” of three of the usual suspects – Finch, Bartleby and Portia – as
naked, force is not brutish, entitlement claims are not legalistic and everyone acts in the spirit and to the limits, of their social potential. This is a wonderfully inspiring story, full of nobility and grandeur and it would be a source of great comfort in an unfriendly and fractious world if it was true.9 But sadly, the assumptions communitarian bargaining theory makes about legal disputing are too idealized to serve as a guide to real-life bargaining most of the time and its foundational dogma, that bargaining distributions are natural, self-evident and complementary,10 depicting lawyers as “a special kind of savior – able to protect, inform and aid in ways and at times when no one else can,” and suggesting that this image “instructs lawyers in the varying paths to be traveled” in life and “gives great meaning” to various lawyer roles.). For a critical discussion, see Condlin, supra note 6, at 280-95. Scott Peppet proposes that lawyers construct their own bargaining rules on the ground that such a process would “facilitate[e] the moral development of [the legal profession].” See Scott R. Peppet, Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism, 90 IOWA L. REV. 475, 516 (2005). And Professor Menkel-Meadow seems to believe that communitarian methods are the answer to the problems with “deliberative democracy.” See Carrie Menkel-Meadow, The Lawyer’s Role(s) in Deliberative Democracy, 5 NEV. L.J. 347 (2005). While different in obvious respects, one might paraphrase the common theme in these arguments as: “Communitarian bargaining, like Freud and Jesus, can save you from your sins.” In its own way, each of these proposals ignores the familiar dictum of not letting the perfect be the enemy of the good. For a discussion of the Nirvana fallacy, see Maxwell L. Stearns, The Misguided Renaissance of Social Choice, 103 YALE L.J. 1219, 1230 n.33 (1994).

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

10 See e.g., Carrie Menkel-Meadow, When Winning Isn’t Everything: The Lawyer as Problem-Solver, 28 HOFSTRA L. REV. 905, 915 (2000) (describing the “important observation of social psychologist George Homans . . . [that] people often have complimentary interests . . . and do not always value things exactly the same (sic) way,” using the familiar icing/cake example as an illustration); Max H. Bazerman, Negotiator Judgment: A Critical Look at the Rationality Assumption, 27 AM. BEH. SCI. 211 (1985) (criticizing the “mythical fixed-pie assumption” of distributive bargaining and implying that integrative trade-offs between bargainer interests are always preferable and available). This dogma may be true for disputes between what Anthony Appiah calls “constitutionally antagonistic groups,” though even these groups sometimes want what the adversary wants simply because the adversary wants it. For a thoughtful discussion, see Kwame Anthony Appiah, Negation as Affirmation, in THE ETHICS OF IDENTITY 138-41 (2005). Communitarian bargaining theorists seem to assume a Jack Sprat world in which all bargainers, fortuitously, are paired with their constitutionally antagonistic opposites. The related phenomenon, of rejecting what adversaries want simply because they want it, is described in the negotiation literature as “reactive devaluation.” For representative discussions, see Russell Korobkin & Chris Guthrie, Heuristics and Biases at the Bargaining Table, 87 MARQ. L. REV. 795 (2004) (“a proposal can look less desirable than it otherwise would merely because a counterpart offered it”); Ross, Reactive Devaluation in Negotiation and Conflict Resolution, in KENNETH J. ARROW, BARRIERS TO CONFLICT RESOLUTION 34-40 (1995) (“Several theories of psychological consistency hold that any
is based on a vision of humans before the fall. The communitarian view is more mythic than data-based, appealing mostly to those who have little direct experience with bargaining practice itself, those who have never entered the fray so to speak, or what’s worse, have entered it, done badly and now want to change the ground rules so they will do better in the future.\footnote{See Peppet, supra note 8, at 516, 531 (describing how some lawyers do not “relish” the standard adversarial conception of lawyer bargaining role and would like to change it to create a work environment that is more personally compatible). Another strategy is to change the description of the bargaining universe on which theory operates. Descriptions of bargaining practice in much of the academic literature are so airily ethereal, thin, or fanciful, that real life bargainers often would not recognize them as descriptions of bargaining. It’s as if academic commentators reconstitute the world to fit their analytical categories rather than the other way around. It brings to mind an aphorism attributed to Abraham Maslow (and no doubt many others), that if you give a kid a hammer soon he will discover that everything in the world needs pounding.}

Most lawyers recognize the limitations of the communitarian view of bargaining and successfully resist its pull, clinging to various forms of old-fashioned, win-lose, aggressive, bottom-line methods.\footnote{Milton Huemann and Jonathan M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,” 12 Ohio St. J. Disp. Resol. 253, 262-65 (1997) (lawyers describing why they continue to use adversarial bargaining methods). The issue is complicated by the fact that professional ethics norms require lawyers to provide loyal and diligent client representation and sometimes this is possible only through the use of non-communitarian methods. I discuss this point at length in Robert J. Condlin, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 MD. L. REV. 1, 78-86 (1992).} Academics tend to see this as a failure to recognize one’s own best interests, another example of “what’s the matter with Kansas,”\footnote{See THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA (2004). Professor Fisher’s “clarification of areas of disagreement [with]” rather than “response to” Professor James White is a good example of this attitude in operation. As Fisher sees it, “White is more concerned with the way the world is, and I [Fisher] am more concerned with what intelligent people ought to do . . . . I want a student to negotiate better than his or her father.” Roger Fisher, Comment, 34 J. LEGAL EDUC. 120 (1984). (Professor Fisher presumably used the “his/her” pronoun construction to avoid sexist phraseology but, if alphabetical order is the default sequencing rule, the decision to place the male pronoun first is an instance of considered rather than habitual sexism. It also makes the sentence more cumbersome. In Professor Fisher’s (and others’) hands, this familiar linguistic gesture is an example of that oft-alleged but, in reality, rare phenomenon of a “politically correct”—in the pejorative sense—response. Also, why just fathers? Mothers never negotiate? See e.g., LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE 12 (2003) (“I negotiate with my kids all the time,” quoting women subjects in the study)). One could feel sorry for Professor White. He may be the most under-appreciated figure in modern legal bargaining scholarship. His review of Fisher and Ury’s Getting to Yes, for example, contains one of the most sophisticated and realistic descriptions of legal bargaining anywhere in the literature. See James J. White, The Pros and Cons of “Getting to YES,” 34 J. LEGAL EDUC. 115 (1984) (reviewing ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 11-12 (1981)). See also James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 AM. B. FOUND. RES. J. 926 [hereinafter Machiavelli]; James Freund, Bridging Troubled Waters: Negotiating Disputes, 1985-86 LITIGATION 43-46. Yet his views are routinely caricatured and vilified by proponents of communitarian methods, principally for not anticipating the communitarian ascendance. He deserves much better. His writing has more to teach modern bargainers than most of the communitarian panegyrics combined. He and Judge Edwards had the first major negotiation course book and almost the first one altogether. See HARRY T. EDWARDS & JAMES J. WHITE, THE LAWYER AS NEGOTIATOR (1977); CORNELIUS J. PECK, CASES AND MATERIALS ON NEGOTIATION (1972).} but in fact it may indicate that lawyers understand something about real-life bargaining that legal academics do not. They understand that legal disputes are about real, not just perceived, conflicts and that the often relevant object of judgment . . . will be evaluated more negatively as a consequence of its linkage to a negative source.”
legitimate feelings of entitlement, disappointment and anger they evoke make bargaining stakes worth fighting over.\textsuperscript{14} Bargaining theory at its best, communitarian theory included, informs bargaining practice, but it also must be tested against it\textsuperscript{15} and it is in this latter regard that communitarian theory frequently falls short. There is room for communitarian maneuvering in legal bargaining, of course. Bargaining is a complex social phenomenon in which the need to trust co-exists with the need to deceive, influence and trade (“create” and “claim” in Lax and Sebennius’ felicitous terms),\textsuperscript{16} but an exclusively, relentlessly, or unqualifiedly communitarian approach to bargaining is another name for eleemosynary behavior and lawyers usually want to make deals rather than gifts.

I will illustrate the objections to the communitarian conception of bargaining by analyzing the behavior of a set of lawyers conducting a pre-trial settlement conference in a hypothetical Title VII employment discrimination lawsuit.\textsuperscript{17} I choose a story about bargaining to present my argument not because of any strong belief in the efficacy of story-telling as an empirical method,\textsuperscript{18} but because a story shows most graphically how the communitarian

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\textsuperscript{14} Describing lessons learned from his father, John Stuart Mill once explained why this is so:

Those, who having opinions which they hold to be immensely important, and their contraries to be prodigiously hurtful, and [who] have any deep regard for the general good, will necessarily dislike, as a class and in the abstract, those who think wrong what they think right, and right what they think wrong . . . .

Mill, supra note 5, at 57. Such an aversion to error, continued Mill, partakes “in a certain sense, of the character of a moral feeling.” Id. This does not mean that one should be a “fanatic,” or “insensible to good qualities in an opponent,” but one should “throw [one’s] feelings into [one’s] opinions” since it is “truly difficult to understand how any one, who possesses much of both, [could] fail to do [this].” Id. This can be true even when the differences between contending positions are small. See e.g., Bart Ehrman, Lost Christianities: The Battles for Scripture and the Faiths We Never Knew 160-61, 181-202 (2003) (describing the “vitriolic attacks,” “polemical treatises,” and “personal slurs” used by early Christians in factional arguments over which particular Christian beliefs and practices to affirm). Professor Ehrman’s book as a whole shows how the two-thousand-year history of Christianity may fairly be characterized as one never-ending fight over the nature of orthodoxy.

\textsuperscript{15} Professor Menkel-Meadow seems to agree. See Menkel-Meadow, supra note 9, at 347 (“I have long been concerned with how our grand theories operate in the empirical world.”).


\textsuperscript{17} The story of one pre-trial conference, a single data point if you will, ordinarily would be a fairly skimpy basis on which to rest an argument for the inefficacy of any bargaining method. A single set of bargainers might use tactics and strategies not representative of bargainers generally, have its own distinctive interactional dynamic and produce unrepresentative results and effects. But the particular conference I will use here did not have any such idiosyncratic or unusual behavior and the participants used the full range of moves and maneuvers the negotiation literature suggests is effective in promoting one’s claims. On the whole, the conference looked like the type of conference one sees regularly in federal and state courts and that was the impression of the participants as well. A videotape of the conference has been shown to hundreds of lawyers and judges in more than a dozen states and two foreign countries, and while they often disagree about the appropriateness of particular moves and maneuvers, they also agree that the conference as a whole presents a realistic, some even say exemplary, picture of court-supervised pre-trial settlement. The bargaining story told by the conference is a common one, therefore, even if it is not the only story one could tell about pre-trial conferencing in general, and that is enough for purposes of my analysis. But so there is no doubt, I will provide much of the detail of what the participants said to one another during the conference so that readers will be able to judge for themselves what they think about the conference’s representativeness.

\textsuperscript{18} For my reservations about storytelling as a method, see Robert J. Condlin, Learning From Colleagues: A Case Study in the Relationship Between “Academic” and “Ecological” Clinical Legal Education, 3 Clinical L. Rev. 337, 349-50 n.29 (1997) (The use of “stories . . . is always an advocacy move, used as much to make a point as
approach does not work in many real life contexts. A story situates one in the bargaining world face to face with the tactical and strategic choices lawyers and clients confront and the consequences attached to making those choices in different ways. From this vantage point it will be apparent that much of the time bargainers are better off pursuing individual rather than common ends and that they are more likely to do this successfully if they are secretive as well as open, argumentative as well as accommodating, suspicious as well as trusting, stubborn as well as flexible and combative as well as cordial. From the perspective of a skillful bargainer, the frequently self-defeating properties of an exclusively communitarian approach will be difficult to miss.

II. Communitarian Bargaining Theory

Parts of communitarian bargaining theory simply codify consensus cultural norms and, as such, have always been part of the practical wisdom of lawyer bargaining. “Go along to get along” is an ancient, if crude, example. But the first systematic attempt in legal scholarship to articulate a communitarian theory of bargaining dates to the late 1970s and the work of Gerald Williams. Williams argued that “the most effective [legal] negotiators [are] characterized by positive social traits and attitudes and by the use of more open, cooperative and friendly negotiating strategies.” Elaborating, he explained that effective bargainers characteristically avoid insulting, rude, threatening and belligerent behavior, share information freely and unguardedly, value their own and their adversary’s interests and needs equally, assess claims objectively and realistically and do not seek any special advantage for themselves or their clients. Collectively, these qualities define an approach I once described as “cordial
bargaining." It was unfortunate for Williams that his research data did not support the claimed link between cordiality and effectiveness. Lawyers responding to his surveys indicated that the most important quality of effective bargaining was not cordiality but, instead, a kind of legal astuteness that enabled lawyers to make convincing arguments to others. Bargainers were effective, Williams’ subjects reported, to the extent they were “perceptive, analytical, realistic, convincing, rational, experienced and self-controlled” in the presentation of legal claims. These responses did not shake Williams’ faith in the importance of cordiality, but they did send other defenders of communitarian bargaining back to the drawing board for more refined conceptions of the communitarian approach. The first such refinement, developed by Roger Fisher, William Ury and their colleagues at the Harvard Negotiation Project (now called the Project on Negotiation), combined the ideas of cordiality and legal astuteness to produce what came to be called the theory of principled bargaining.

Principled bargaining asks lawyers to “separate the people from the problem,” “focus on interests, not positions,” “invent options for mutual gain,” and “insist on [basing agreement] on objective criteria.” The first three of these directives come as no surprise. They reduce to the common sense suggestion that in bargaining it is useful to “see the situation as the other side sees it,” or put another way, to avoid over-interpretation and projection in deducing another bargainer’s motives, meanings and purposes. But the fourth directive, the injunction to base settlement on objective criteria, added an important and non-intuitive element to the communitarian conception of bargaining and gave the theory of principled bargaining its jurisprudential bite. Anticipating John Roemer’s criticism of the “informational poverty of
bargaining,”29 this directive made a start on justifying bargaining’s place in a system of
adjudicatory justice by showing how bargained for results could be legitimate as well as final.
Analogizing to a kind of bilateral, private adjudication, the idea of basing bargained-for
outcomes on objective criteria built on Williams’ idea of legal astuteness and transformed legal
bargaining theory from a theory of strategy and manners to one of morality and politics. For
many commentators, however, who thought that individual interest-based bargaining, no matter
how qualified, was destined to fail, principled bargaining’s reluctance to jettison adjudicatory
methods completely and its incorporation of some features of adversary advocacy, prevented it
from being the final word. For these commentators, a radically new approach was needed, one
that defined bargaining in exclusively communal rather than individualistic terms and that did
not get sidetracked, however well-intendedly, in the destructive quest for correct answers to
substantive questions. This is where the theory of problem-solving bargaining came in.30

The most comprehensive statement of the problem-solving model, that of Carrie Menkel-
Meadow’s, also was developed at about the same time as the theories of cordial and principled
bargaining. Problem-solving bargainers satisfy the “real,” “underlying,” “basic,” or “actual,”
needs that parties bring to negotiation, rather than their legal needs expressed in the proxies of
money or goods.31 They consider multiple proposals for resolving disagreements simultaneously
and do not get locked into patterns of argumentation and concession over single demands.32
They articulate “reasons why a particular solution is acceptable or unacceptable rather than
simply reject an offer or make a concession.”33 While they sometimes discuss the legal merits of
particular arguments, one of the “primary advantages” of problem-solving bargaining “is that no
judgment need be made about whose [legal] argument is right [and whose is] . . . wrong.”34
Problem solvers also seek out shared interests, explore value differences, look to third parties for
contributions, aggregate and disaggregate resources, seek substitute goods and exploit the long
and short term values of the parties,35 until they reach agreements that satisfy everyone. They
distribute bargained-for material fully among the parties rather than waste it on argumentative
wrangling or leave it on the table because of an inability to agree and they reconfigure

29 John Roemer, The Mismarriage of Bargaining Theory and Distributive Justice, 97 ETHICS 88, 90, 97-102
(1986) (arguing that bargaining theory lacks the sophistication necessary to consider questions of distributive
justice).
30 Problem-solving bargaining has both a warm and fuzzy version grounded in the literature of humanistic
psychology (CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST’S VIEW OF PSYCHOTHERAPY (1961)), and a
hard and scientific version grounded in the literature of economics and game theory (ROBERT AXELROD, THE
EVOLUTION OF COOPERATION (1985)). There are major differences between the two versions, though each believes
it is better to coordinate than fight, but for different reasons.
31 Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving,
31 UCLA L. REV. 754, 794 n.155, 795 (1984). Professor Menkel-Meadow has written quite a bit more about the
problem-solving model since this early piece but to the extent that anything has changed it has been in the direction
of making her model less distinctive. Compare Id., at 826 (not necessary to argue the substantive merits of the
parties’ claims to settle a dispute) with Menkel-Meadow, supra note 9, at 600 (arguing substantive merits of the
parties’ claims can advance settlement).
32 Id. at 822.
33 Id. at 825.
34 Id. at 826. Not all individual variants of the method share this agnosticism about the role of argument on
the merits in bargaining. See e.g., John S. Murray, Understanding Competing Theories of Negotiation, 2 NEGOT. J.
35 Id. at 813.
agreements until it is no longer possible to make them more efficient. Collectively, they focus
attention on “solving the problem . . . rather than winning the argument.”

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

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36 Id. at 822.
37 Id.
38 See FISHER, URY & PATTON, supra note 6, at 4-5, 12, 82-83, 91, and 152, for a description of positional
or adversarial bargaining.
39 One also might see this as a difference among the various metaphors each uses to visualize the nature of
bargaining interdependence. See Greenhalgh, supra note 16, at 236 (“The choice of metaphor can make a big
difference in a negotiator’s definition of the relationship [with another negotiator]).
40 Proponents of problem-solving bargaining may have backed away somewhat from this aversion to using
substantive principles to settle disputes and, if so, they have effaced the difference between themselves and the
proponents of principled bargaining even further. See Menkel-Meadow, supra note 9, at 600 (extolling the
“‘substantive’ problem-solving possibilities of negotiations that are conducted through analysis, rational thinking,
and coordination, rather than power-plays, competition and deception.”)
41 See, e.g., CHARLES E. OSGOOD, AN ALTERNATIVE TO WAR OR SURRENDER (1962) (describing the
“graduated reciprocation of tension reduction” method of negotiation, in which bargainers make unilateral
concessions as a means of inducing their adversaries to reciprocate); Joseph P. Forgas, On Feeling Good and
Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies, 74 J. PERSONALITY AND
SOCIAL PSYCHOL. 565, 574 (1988) (describing how negotiators in an experimentally induced good mood have a
kind of “emotional contagion” that induces cooperative behavior in others); Leigh Thompson et al., Some Like it
Hot: The Case for the Emotional Negotiator, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF
KNOWLEDGE 139, 142 (L. Thompson et al. eds., 1999) (hypothesizing that the trusting attitude implicit in
cooperative behavior may stimulate reciprocal behavior in others); Leigh Thompson & Janice Nadler, Negotiating
as “the spread of affect, attitude, or behavior from Person A (‘the initiator’) to Person B (‘the recipient’) where the
recipient does not perceive an intentional influence attempt on the part of the initiator;” and describing the form
most relevant to the study of legal negotiation as echo contagion, “which occurs when a social actor imitates or
reflects spontaneously the affect or behavior of an initiator.”); Clark Freshman, Adele Hayes & Greg Feldman, The
Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful
Negotiation, 2002 J. DISP. RESOL. 1, (2002) (describing how negotiators in a positive mood get significantly larger
joint gains); Chris Guthrie, Principles of Influence in Negotiation, 87 MARQ. L. REV. 829 (describing the natural
urge to reciprocate as the “fourth principle of influence that a lawyer might use” to “induce her counterpart to settle
on terms that are advantageous to her [the lawyer’s] client.”).
This burst of bargaining scholarship in the late 1970s and early 1980s established the general analytical framework for communitarian bargaining theory and Professors Williams, Fisher and Ury and Menkel-Meadow legitimately may be thought of as the theory’s parents, at least legally. 42 Like all good parents, of course, they have had precocious, dutiful and unruly children but, for the most part, their successors in interest have not so much changed the original communitarian model as combined it with other bodies of scholarship, or rearranged its various components, to produce hybrid rather than competitor variations. Since the mid-1980s, in fact, there has been such a steady stream of refinements to, or modifications of, the communitarian model that the debate over its content now often seems to be the only scholarly bargaining game in town. 43 Noteworthy among these efforts is Professor Riskin’s pairing of communitarian


43 See Peppet, supra note 8, at 484-97 (describing debates among the various communitarian models of bargaining). Perhaps the best evidence of the dominance of the communitarian (and cognitive and social psychological) model in bargaining scholarship is found in the second edition of the Wiggins and Lowry anthology. See WIGGINS & LOWRY, supra note 4. Fewer than a dozen (out of one hundred and sixteen) article excerpts in the book are critical of the communitarian model, for example, and each of these is usually buried at the end of a chapter in which the other excerpts extol various features of the communitarian approach. In addition, the anthology’s section on bargaining advocacy, the central component of an adversarial or positional method, is the weakest and second shortest in the book. Id., at 363-83. It does not include a single excerpt from the vast literature on Rhetoric dating from Aristotle to the present, for example, and it treats the issue of bargaining “fairness” as a purely social psychological phenomenon, leaving the philosophical literature out of the picture altogether. For philosophy based discussions of bargaining fairness see e.g., David Luban, Settlements and the Erosion of the Public Realm, 83 GEO. L. J. 2619 (1995); David Luban, Bargaining and Compromise: Recent Work on Negotiation and Informal Justice, 14 PHIL. & PUB. AFF. 397 (1985); Roemer, supra note 29. One of its article excerpts even limits discussion to perceptions of fairness, seemingly on the belief that it is no longer possible to get the real thing, see Welsh, supra note 3, at (“People often disagree . . . whether an outcome is fair . . . The definition of distributive fairness is, therefore, inevitably subjective.”), and another confuses perceptions of fairness with fairness simpliciter. See Leigh Thompson and Janice Nadler, Judgmental Biases in Conflict Resolution and How to Overcome Them, in MORTON DEUTSCH AND PETER T. COLEMAN (eds.) THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 213, 224-25 (2000). Typically, the book depicts bargainers as programmed agents at the mercy of their tacit heuristics, biases and urges and easily manipulated by framing tricks, salience concerns, and other social-psychological forces and maneuvers. See Craig Lambert, The Marketplace of Perceptions, 108 HARV. MAG. 50 (No. 4, March-April 2006) (describing the development of the field of behavioral economics, “the study of how real people actually make choices”). There are few self-conscious, evaluating and deciding actors in the bargaining universe described by Wiggins and Lowry and seemingly no one who has read Kahneman and Tversky. This might be explained, in part, by the fact that much of the social psychological literature on which Wiggins and Lowry draw is based on experiments using law and business school students as subjects and students are less fully socialized bargainers than are seasoned practitioners. See e.g., Jeffrey Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 SO. CAL. L. REV. 113, 127-128 (1996) (describing the influence of “framing effects” on Cornell law students’ decisions of whether to accept settlements in a hypothetical bargaining exercise). It is sad that Kahneman
bargaining with mindfulness meditation (“a method of non-judgmental, moment-to-moment attention developed some 2500 years ago by the Buddha”), to create a bargaining method that permits the “thoughtful negotiator” to escape the “egocentric cravings” that dominate the lawyer’s “Standard Philosophical Map.”

Professors Korobkin and Guthrie, among others, have mined the rich social-psychological literature on “prospect theory” produced by Daniel Kahnemann, Amos Tversky and their colleagues, to flesh out the communitarian skeleton in sophisticated and subtle ways, as well as provide a more substantial defense of the theory’s effectiveness than that previously in place.

Scott Peppet has constructed a contractarian version of the theory that encourages lawyers to bargain self-consciously over the nature of their bargaining as well as the particulars of their disputes, while Robert Cochran has grounded a similar view in religious belief and Donald Gifford has combined adversarial and communitarian methods into a single, context-dependent hybrid. Clever and thoughtful as these (and other such) variations are, however, they remain as untested against the reality of actual bargaining practice as the original communitarian model and this is a serious concern.

and Tversky have suffered this fate. In the hands of legal bargaining scholars the useful concepts of “heuristics and biases” have become another “paradigm,” an interesting idea ground into near unintelligibility by overuse. (Perhaps authors whose last name begins with K should not do seminal work.) All of that said, however, the anthology is still the most important anthology on legal bargaining both because it is the only one and because, in areas where it is expert, it is quite good. Negotiation textbooks generally evidence the same tacit biases. Of all the books in the field, for example, few show any real sympathy for the adversarial model and those that do qualify that sympathy in numerous ways. See e.g., CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (5th ed. 2005); JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG & THOMAS STIPANOWICH, RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 43-53, 69-70 (2005). Among the commentators, Donald Gifford, Gerald Wetlaufer and Scott Peppet are particularly good at blending communitarian and adversarial methods in an intelligent and sophisticated manner. See e.g., Donald G. Gifford, A Context-Based Theory of Strategy Selection in Legal Negotiation, 46 OHIO STATE L. J. 41, 82-88 (1985) (describing how competitive and cooperative bargaining strategies can be used in combination depending upon situational factors); Gerald B. Wetlaufer, The Rhetorics of Bargaining (July 23, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770545; Peppet, supra note 8, at 535 (“[C]ollaboration does not mean revealing all of one’s information, preferences, interests, and litigation strategies”). Not all legal bargaining scholarship is social-psychologically based. There is an older body of literature grounded in economics that remains influential though it is usually concerned more with the incentive and constraint structure of bargaining practice than with individual bargainer skill. See e.g., Samuel R. Gross & Kent Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 MICH. L. REV. 319 (1991).

44 Riskin, supra note 4, at . See also Freshman, et al., supra note 41, at (describing how cognitive-behavioral techniques based on mindfulness meditation have been shown to promote long term mood management). These various approaches to bargaining can be seen as vectors of the so-called “comprehensive law movement,” the principal subdivisions of which are therapeutic jurisprudence, preventive law, creative problem-solving, holistic law, alternative dispute resolution, and collaborative law. Each of these views shares a common concern for client personal needs and emotional well being in addition to legal rights. See SUSAN S. DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 169-202 (2004).


46 See Peppet, supra note 8.


48 Gifford, supra note 43. Perhaps the best work has been done outside the legal academy. See LAX & SEBENIUS, supra note 16.
The usefulness of any bargaining theory ultimately depends not just on the elegance of its design but on its ability to explain and inform the practice of bargaining. If it’s “not in the rocks,” as geologists say, it should not be in the theory. Most attempts to determine whether communitarian bargaining theory is “in the [legal] rocks” have been indirect and artificial (i.e., simulated student bargaining exercises conducted as part of law and business school courses), and the limited data available from actual bargaining practice usually consists of lawyer opinions rather than direct observations on how lawyers bargain. Opinion evidence is notoriously suspect, however. Lawyers are not trained empiricists and they have strong incentives to tell stories that are better than the reality they purport to describe. With many of these opinions, in fact, often, the price is the only thing that is right. One must analyze communitarian bargaining methods in their natural habitat, so to speak, to learn if they truly work, and to do that we turn to the Drillco case.

III. Paine v. Drillco: A Story of a Negotiation

A. The Case

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

Upon arriving in Venezuela, Paine and his family were assigned mobile home housing. He was the only employee with children not given a fixed foundation house. Paine was African-American and the other employees were Caucasian. Paine complained about the housing assignment to his Venezuelan supervisors, arguing that the mobile home was not what he had been promised and that it was not comparable to the housing given to white employees. The company made a subsequent offer of a fixed foundation house, but it was in the nearby town of Judibana and not on the company compound. Paine concluded that the Judibana house was inferior to the mobile home so he declined the offer.
In November, three months later, Paine decided to return to the United States to resolve problems associated with his home mortgage and to assist his mother-in-law while she was undergoing surgery. He testified that he asked his Venezuelan supervisors for permission to make this trip and they granted it. He left Venezuela with his family to go to the United States on December sixteenth and returned to Venezuela the following January first. Upon his return, Paine’s Venezuelan supervisors ordered him to return to the Sampson Refinery, alleging that he had “left Venezuela without permission.” During the course of an investigation by officials at Sampson Paine claimed that he had been given permission to leave Venezuela, but when the Sampson officials checked with Paine’s Venezuelan supervisors they denied this. The Venezuelan supervisors also said that when they checked with the travel agent Paine used to book his trip, they learned that he had made his reservations in September long before he claimed to have learned about the mortgage problem and his mother-in-law’s surgery. Based on this information, Drillco fired Paine for leaving Venezuela without permission and for lying to the company about the circumstances surrounding his leaving.

Paine filed a complaint in federal district court for the Eastern District of Virginia alleging that his housing assignment and firing were racially motivated in violation of Title VII of the Civil Rights Act of 1964,49 and section 1981 of the Civil Rights Act of 1866.50 He asked for a jury trial under the § 1981 claim. In his prayer for relief he asked for forty-two thousand dollars in damages, six thousand dollars a month for the seven months of his assignment he had not been allowed to complete and for attorney’s fees. Subsequently, he found new employment as an electrician with another company but at a greatly reduced salary (eleven hundred and twenty dollars a month). He started the new job one year to the day after the commencement of his Venezuelan assignment. Drillco denied that it discriminated against Paine. It said that the Venezuelan housing assignments were made on a random basis and that if any particular employee did better than any other, good fortune rather than malevolence was the cause. It also argued that Paine left Venezuela without permission in December of his year there and that he lied to company officials about having permission to make the trip. He was fired, according to Drillco, because of this lie and because he breached the company’s travel policy and not because he was black.

A pre-trial order filed with the District Court identified the contested facts in the dispute as whether “the working conditions at Drillco Refinery Venezuela and the facts surrounding Paine’s request to return to the United States [were] the reasons for Paine’s termination.” The legal question in dispute was described as whether there was any discrimination against Paine on the basis of race.” The pre-trial conference was presided over by an experienced and highly regarded federal magistrate who was soon to become a federal district judge. The defendant was represented by a senior Title VII partner at one of the country’s (now world’s) largest law firms and the plaintiff was represented by a former staff lawyer for the United Auto Workers and a former Assistant United States Attorney for the Northern District of California, both of whom had extensive Title VII litigation experience. All of the participants were highly successful lawyers and were regarded as leading practitioners in their respective areas of concentration. The conference lasted two and one-half hours.51 By the time it was over the Paine lawyers had

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51 The conference was videotaped and the tape was transcribed. The Drillco problem and the case materials
modified the magistrate’s understanding of the substantive issues in the case and his corollary
evaluation of what the case was worth and he, in turn, had imposed that changed view on the
Drillco lawyer. One would not have expected such a one-sided result in a negotiation among
such evenly matched lawyers, but understanding how it happened will help illustrate the limits of
a communitarian approach to legal bargaining.

1) The Full Group Meeting

The conference began quietly, with the participants sitting around an octagonal able in a
modestly furnished room. The magistrate spoke first, explaining the purpose of the meeting,\textsuperscript{52} and telling the parties that another judge would try the case should settlement efforts fail.\textsuperscript{53} He

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

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

There is a sense in which the Drillco conference is not representative of legal dispute bargaining generally.
It bears little resemblance, for example, to one of the most common forms of legal bargaining, the bureaucratized
negotiation of criminal pleas that takes place between prosecutors and defense attorneys in the corridors of court
houses while cases are waiting to be called. Plea bargaining is a truncated, to-the-point, and limited process that is
based on an elaborately developed and jointly held set of internalized categories designed to dispose of most cases
routinely and reserve true bargaining for genuinely new problems. The format and time frame of the Drillco pre-
trial conference are luxuries plea-bargaining rarely enjoys. Such conferences usually are limited to large civil
disputes that cost a great deal to try and that involve great risk for both sides (so that settlement is preferable). It is
easier to study lawyer bargaining technique in the formal pre-trial conference context, however, because the moves
and maneuvers lawyers use are out in plain sight, in larger than life proportions, for all to see. Moreover, tactics and
strategies that work in these conference also work in the lesser included case of bureaucratic bargaining once they
are appropriately downsized and "arranged" (in the musical sense). I limit discussion to a single, final-meeting
version of the pre-trial conference because I want to discuss the effects of face-to-face bargaining technique, rather
than those of structural or time constraints, on bargaining outcomes, but I do not mean to minimize the importance
of the latter. When one builds extended breaks into the bargaining conversation (in the form of multiple meetings
spaced over time), and gives bargainers an opportunity to reflect on how things are going, techniques that work
when there is limited time to react often do not work as well, and sometimes do not work at all.

\textsuperscript{52} “So that we could talk about the prospects of settlement of the case.” Transcript of Drillco Pre-Trial
Conference at 10.

\textsuperscript{53} “Judge T will be trying this case.” Id. Having different judges for settlement and trial has important
consequences for how settlement is conducted and the type of information the parties are willing to share. This
topic has been the subject of quite a bit of discussion in the scholarly literature. See, e.g., Harold Baer, Jr., History,
introduced himself to the Paine lawyers, whom he did not know and asked if there had been “any settlement discussion among counsel.” When both sides answered no, in effect, he summarized their answers as “then . . . there's no demand that's been made or offer on the table.” He concluded this opening segment by describing the nature of the proceeding and the extent of Paine’s claims. Very few pleasantries were exchanged, there was almost no small talk and all of the parties seemed very serious. It was a civil, businesslike, somewhat perfunctory beginning and otherwise unremarkable in every way.

Once the parties began to discuss particular issues in the case, however, a controversy arose almost immediately over whether Paine was entitled to more than economic damages. Both the magistrate and the Drillco lawyer assumed that the pre-trial order limited Paine’s recovery to damages for economic loss, but the Paine lawyers believed that it also permitted damages for emotional trauma. This was an important issue, since its resolution would change the dollar value of the case substantially. A lengthy, but un-spirited discussion ensued, with the magistrate emphasizing the fact that local rules required damages to be itemized and pointing out that Paine had failed to plead any non-economic loss in his complaint and the Paine lawyers arguing that the pre-trial order was ambiguous and that a plaintiff is entitled to “all damages flowing from [his] . . . wrongful discharge.” The discussion might have ended when the magistrate seemed to reject this argument, but the Paine lawyers persisted, and the conversation continued for an additional few minutes. This pattern would prove prophetic. The discussion eventually died out more than ended when the Paine lawyers shifted the conversation to a discussion of Paine’s income from his new job and never returned to the question of whether non-economic damages were recoverable. This half-hearted exchange would turn out to be a warm-up for more robust things to come.

At that point the parties raised the first major liability issue in dispute, that of whether Paine was assigned substandard housing because he was black. The entire discussion took about eight minutes. The magistrate asked the Paine lawyers to describe the facts that “essentially

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54 “Mr. B I know you well of course, and I’m afraid I haven’t encountered either of you before.” Transcript of Drillco Pre-Trial Conference at 11.

55 Id. at 10.

56 Paine: “some modest;” Drillco: “nothing of real substance” Id.

57 Transcript of Drillco Pre-Trial Conference at 11.

58 “The entire case will be tried to a jury.” Id.

59 “The two claims are Title VII and 1981” and “pendent state civil rights act claims, wrongful discharge, breach of contract.” Id.

60 The pre-trial order itself was silent on the issue, stating only that “the issue of damages will not be tried separately from that of quantum.” Pre-Trial Order in Paine v. Drillco, at 3.

61 Transcript of Drillco Pre-Trial Conference at 13.

62 “There is nothing in the pre-trial order about [non-economic] damage . . . . Now if you want to try to amend that you can talk to Judge T about it . . . but I’m just pointing out that it may be a little late for that kind of stuff.” Id. at 14. This comment revealed a private fear of the magistrate’s that the Paine lawyers would benefit from, albeit unselfconsciously.

63 “I’m not at all certain that any amendment is required.” Id. at 15.
make out that there was racial motivation in the assignment of housing. The lawyers had just begun to answer when the magistrate interrupted to argue with them. The next three exchanges were similarly truncated, with the Paine lawyers giving short answers to narrow, leading, almost rhetorical magistrate questions and never fully explaining why the assignment was discriminatory. The magistrate then turned to the Drillco lawyer, asking “what kind of documentation [does Drillco have] with regard to how that housing decision was made?” The magistrate asked narrow, leading questions and the lawyer gave short, incomplete answers. In the transcript, the magistrate appears to be cross examining the lawyer, though on the video tape his demeanor and tone seem curious and inquisitive more than controlling.

It took almost two minutes for the Drillco lawyer’s argument to emerge fully, and another four minutes for the Paine lawyers’ rebuttal to come out. Midway through the exchange, before the Paine lawyers had finished making their argument, the magistrate seemed to take sides, arguing in an unusually long statement that Drillco’s position was “pretty strong.” As in the discussion of damages, however, the Paine lawyers continued to press their position, arguing from a “series of . . . prima facie cases” and this seemed to cause the magistrate to back away slightly from his “pretty strong” view. Neither party’s arguments were developed much

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64 Id. at 16.
65 “Well, other employees similarly situated . . .” Id.
66 “Yes, but the other two had four children, didn’t they?” Transcript of Drillco Pre-Trial Conference at 16.
67 MA: In terms of the plaintiff’s situation, how long was he without work altogether?
P1: He was without work, if I remember correctly, for a month or two, but he has been severely underemployed compared to the pay he was earning both prior to the trip to Venezuela, and certainly during the trip to Venezuela.
DA: Well, as I recall, his training is mostly on the job training, isn’t it? That he got with this employer, with the previous employer that he’s suing now?
P1: I’m not so sure that’s . . .
MA: [Interrupting] I don’t think he’s got a whole lot of technical education [does he]?
P1: He was in maintenance – electrical maintenance, which is very technical. I would think that is highly skilled. And he was a supervisor in fact.
MA: Right. Is he in the same line?
P1: Yes, but not at the supervisory level.

Id. at 15.
68 Id. at 16.
69 “The problem was that the availability of these houses was not what Drillco had anticipated it would be.” Id. at 17.
70 “The McDonnell-Douglas inference is strengthened when one has not one but two or three series of McDonnell-Douglas prima facie cases.” Id. at 20.
71 “Well you’d qualify! It doesn’t say if you got three families with three more children and two houses to put them in, obviously somebody’s going to get left out. Now if you put the plaintiff in one of them that means one of the families that’s got four kids is left out. So, I mean that, somebody is going bear the brunt of a family living in a trailer. And of course, the bottom line is that you all have to prove that it was racially motivated, and they’ve got a pretty strong—It seems to me—if you look at this in a McDonnell-Douglas context, which I think you’ve got to, I don’t know anything precisely in the Fourth Circuit that deals with this, but I think that you use that same kind of burden shifting prima facie. The prima facie case is that the families who were put in family housing were white, he is black, he was not. Then there comes up his burden to articulate whichever non-discriminatory reason, which is four kids v. three, as to both of the families, and then you’ve got the burden of proving that by preponderance to be a pretext. Isn’t that right?” Id. at 18.
72 “I would agree with that assessment with two qualifications . . . .” Transcript of Drillco Pre-Trial Conference at 18.
73 Id. at 20.
beyond their initial formulations, probably because the magistrate's relentless, short-answer questioning made elaboration difficult.

Near the end of this discussion the Paine lawyers made an oblique reference to two additional claims, one pleaded (breach of contract) and the other not (assignment to a lower job status). The magistrate seemed to dismiss the claims peremptorily, and counsel did not pursue them, at least not at that time. But immediately after the mention of the second of the two claims, the magistrate asked the Drillco lawyer “to address the idea that all these things sort of build up?” When the lawyer responded flippantly the magistrate gave his first indication that he thought there might be something to Paine’s case. The parties then concluded the housing assignment discussion with a short and inconclusive examination of whether Paine was situated similarly (i.e., had the same size family) to white employees assigned fixed foundation housing, the proper interpretation to be given the “working in a foreign country” provisions of the Company's housing brochure and whether Paine’s seniority should have been taken into account in making his housing assignment. The magistrate remained uncharacteristically inactive throughout most of this discussion, betraying little commitment to, or approval of, the arguments of one or the other side.

Up until now, when the magistrate participated in the discussion he usually sided with Drillco, supporting the Drillco lawyer’s arguments directly and challenging the arguments made by the Paine lawyers. It is difficult to be sure from these early comments, however, just how much of a preconceived view the magistrate brought to the conference. At some points he seemed genuinely curious, asking open-ended questions about evidence, testimony and the parties’ respective theories of the case. Yet, at other times he controlled the conversation with leading, short answer questions, unilateral topic shifts and strong statements in favor of one or the other party (almost invariably Drillco), suggesting that he already had made up his mind. This pattern presented an interesting question of how to respond. The Paine lawyers seemed to assume that the magistrate meant what he said only when it was favorable to them and disputed negative points vigorously, while the Drillco lawyer usually agreed with the magistrate’s views whether favorable or not. In retrospect, the Paine lawyers’ approach turned out to be the wiser course.

74 With respect to the breach of contract argument, the magistrate responded: “You’re going to turn this into a three week trial instead of a two day trial, if you start contract, because then they’re going to bring in the contractor to testify as to why the thing wasn’t finished, and then you’ll say the contractor breached his contract, and we get into a monumental brouhaha.” In response, plaintiff’s attorney agreed, for the moment, to “leave aside the breach of contract point.” With respect to the assignment to a lower status argument, the magistrate responded: “Was that part of your claim? I haven’t seen that articulated as a claim. I mean that’s sort of floating around in the deposition, but I didn’t gather [plaintiff] is very upset about that.” In response, plaintiff then re-characterized the significance of job assignment, arguing only that it was one of “the series of several discrete instances which are mutually corroborative of the racial motive that one can infer under the prima facie case.” Id. at 19-20.

75 Id. at 21.

76 “Yes, your honor, I would like to. It seems to me that this is, plaintiff’s argument here is zero plus zero plus zero equals something.” Id.

77 “Problem is, if there’s one tenth of something there . . . “ Id.

78 The Drillco lawyer argued that seniority was an important factor. As he put it, “as a practical matter you just don’t—it doesn’t do much for getting the job done as a whole if you are putting subordinate employees in better housing than management.” Transcript of Drillco Pre-Trial Conference at 23.
After a brief and unproductive aside about Paine’s claim that he was “assign[ed] to a lower job status” than he had with the company in the United States, which the magistrate rejected because it was not pleaded, the parties discussed “the whole thing about the vacation and all that stuff.” First, was the issue of whether Paine’s December trip to the United States was authorized by the company’s written policy on leave. The written policy restricted leave to emergency situations but because “other employees were allowed vacation type leave” (according to the depositions of company supervisors), the magistrate viewed the policy as “more honored in the breach than the observance.” The Drilco lawyer agreed, but argued that even if Paine was entitled to vacation leave he was required to “have permission” before he could leave Venezuela. The Paine lawyers’ counter, that Paine’s Venezuelan supervisors (Nunez and Hernandez) told him he could go, turned the issue into a swearing contest between Paine and the Venezuelan supervisors.

The magistrate intervened to ask whether the supervisors would appear Black to the jury and thus be believed because not likely to testify falsely against another Black employee. This discussion took a surprisingly long time given that none of the lawyers had met the supervisors and eventually it ended in an impasse. The Paine lawyers tried to break the impasse by arguing that, Black or not, a jury would understand that employees who were “afraid of getting fired if they . . . [told] the truth,” would say whatever the company wanted them to say, truthful or not. This provoked a heated exchange over the supervisors’ employment status and their vulnerability to being fired. The magistrate agreed with the Paine lawyers that “there [was] some practical . . . company control over [the supervisors],” and the topic was dropped. The Drilco lawyer tried to extend the point by arguing that Paine’s testimony about asking for permission to go to the United States was inconsistent with company records, but the Paine lawyers dismissed the testimony as evidencing only an understandable mixup about confusing dates and the Drilco lawyer did not pursue the topic. The discussion of the vacation trip then ended, seemingly without any effect.

The discussion of the vacation trip was a good deal livelier than the discussion of the assignment to sub-standard housing. The lawyers seemed to be warming to the task. Their comments were sharper, more confrontational and faster paced than in the earlier discussion and the overall tone of the discussion was more intense. Even the magistrate was quicker to argue points and not always willing to wait, as he had earlier, for the parties to present their views first. The lawyers argued with one another directly as well as through the magistrate. They debated the meaning of statutes and case law, the significance of deposition testimony and documentary

79 “Yeah, but you haven’t got a claim for that . . . .” The Paine lawyers responded by arguing that the evidence was relevant to their other claims. “Case law suggests that matters that may not be plead [sic] for recovery in damages may nevertheless be highly probative in the motive with regard to another decision.” Id. at 24.
80 Id. at 26.
81 The Drilco lawyer described an emergency as, “only if your mother or your wife’s mother is dying, something in that line.” Id.
82 Id.
83 Id. at 26-27.
84 Transcript of Drillco Pre-Trial Conference at 29.
85 The Drilco lawyer argued that the supervisors worked for the independent “Venezuelan governmental entity that ran the refinery” and the Paine lawyers argued that they worked for the company. Id. at 31.
86 Id. at 32.
evidence and the credibility of witnesses, all with the skill and enthusiasm one would expect of lawyers this good. Most of the debates ended in impasse, usually when one or another lawyer gave an unresponsive answer, repeated a familiar point, or sat silently with nothing new to say. When this happened the magistrate would intervene to shift the topic. The conversation as a whole looked more like a test of advocacy skill and energy level than a bi-partisan effort to figure out what had happened to Paine, or what the law required be done. The Drillco lawyer seemed to have slightly the better of the argument, though there is no indication that the Paine lawyers thought this to be true, or that their resolve weakened to any noticeable degree.

Next, the full group considered Paine’s claim that he returned to the United States to resolve a problem with his mortgage. The Drillco lawyer took the lead and never relinquished it, arguing, somewhat more sharply than he had until then, that Paine was a liar. His opening statement is representative.

DA: I think that this is a very interesting aspect of the case. One of the principal reasons, aside from Paine’s mother's varicose veins for him coming back to the United States around Christmas time, was this business with his mortgage. He got a letter from his bank saying that there was a problem with his mortgage and they were going to foreclose. He goes into [his supervisor’s] office, uses the long distance telephone back to the United States, tries to get it worked out. And he goes back and tells his wife, “Gee, I hope we will be able to get this thing worked out.” Well, then suddenly they haven't gotten it worked out and he says, that is Paine says, “The banker told me that I had to personally come back to the United States and sit down in front of a bank officer and sign that form and therefore I had to come back and do that because they were going to foreclose on my mortgage.” That makes a damn good story. The only problem is it's not true. Because [the officer] from the bank, who is independent and could care less about this lawsuit, testified he never told Paine any such thing about having to come back to the United States. It's totally . . . would not be necessary. The papers could be sent down to him and as a matter of fact, a couple of days after that conversation on the nineteenth of October, [the bank officer] sends a letter down and says “Here's what you can do. Fill out this card and send it in.” Now whether or . . . [Paine’s lawyer interrupted at this point to argue that the "letter never got there." plunged]

This statement was a good deal longer and louder than any until then and when combined with the sarcasm and belligerence in the lawyer’s voice ratcheted up the attack on Paine. In a

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87 I once described argument of this sort as having the form of “salvo-salvo-truce.” See Condlin, supra note 7, at 112 n.81.
88 I will use the following identifying designations when quoting from the transcript of the conference: DA – Drillco Attorney; P1 – First Paine Attorney; P2 – Second Paine Attorney; and MA – Magistrate.
89 Transcript of Drillco Pre-Trial Conference at 35.
90 The reasons for this change in strategy are not obvious. Perhaps the Drillco lawyer was unhappy with how he was doing under a polite format and thought a more adversarial approach would improve his fortunes (though it is unclear why he would have thought this since the magistrate had favored his position almost every time there was a dispute). He also may have felt he had lost control of the conversation because the Paine lawyers were doing more talking; the “bank situation” may have been the first issue about which he had strong feelings; or it just
sense, it was an aggressiveness test for the Paine lawyers and they accepted the challenge. They argued that there were “two different banks and a real estate agent involved” in the efforts to straighten out the mortgage and that each of these parties sent contradictory and confusing messages to Paine, who was “not a financial wizard” to begin with. As such, his understanding that he had to return to the United States was reasonable under the circumstances. The magistrate interrupted to ask whether Paine got his mortgage “straightened out when he was up there in December,” and when the Paine lawyers answered that it was “a little bit unclear,” the Drillco lawyer renewed his attack with another long soliloquy.

DA: Your Honor, I don't think that's unclear at all. I think it goes right to the heart of this case. He came up here . . . in December and supposedly was going to get this thing all straightened out. January the 26th, which is over a month after he came up here and he's long gone back to Venezuela and he's been relieved of his duties and sent back up here and it's now January the twenty-sixth and the bank is sending the loan to their attorneys for foreclosure. Payments due: November first, December first and January first and he did not make those payments even though he had two thousand dollars, at least, in his account in the Trust Bank, the other bank that counsel has spoken about.

Perhaps to prevent another heated exchange, the magistrate asked a series of narrow, almost rhetorical questions reminiscent of the earlier discussions about Paine’s sub-standard housing assignment. After a few minutes of filling in the blanks in the questions the lawyers agreed to “let the jury decide” what Paine had done on his trip. The topic was dropped and the conversation moved on to other issues.

The full group meeting ended shortly after this when a magistrate question about what “[the company supervisors] say [were] the reasons conveyed to them by [Paine] for wanting vacation time” provoked a sharp disagreement over Paine’s motives for going home. The issue of motives had been discussed earlier, but this was the first time the Drillco lawyer argued his “home for holidays” theory of the case. At the end of this exchange the magistrate concluded the meeting to caucus privately with each of the individual sides.

DA: Well, when he talked to [his supervisor] . . . Paine denies that he talked to [his supervisor], but [the supervisor] will testify that Paine did talk to him and indicated he was having trouble with his mortgage and he needed to go up and

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91 Id. at 37-38.
92 Id. at 37.
93 Id.
94 The questions were: “. . . weren’t they demanding the full . . . using the acceleration clause?” [sic] “And they dissolved the deposition on that?” “But it would have to be everything that was due? “But what about how long he was up there, have we got any evidence as to just what he did while he was up there?” Transcript of Drillco Pre-Trial Conference at 37-38.
95 Id. at 39.
96 Id.
97 Id. at 40.
have something, to try to settle it out. But interestingly enough, that this problem with the mortgage originally came up in mid-October and it was on the nineteenth of October when Paine had his long-distance conversation with the fellow at the bank and it's not until late in November when Paine suddenly decides, gee, I've got to run up there and do something about it. I assume that the phone in the office still worked back to the United States. He had talked to the guy at the bank once and I'd like to know and I'm sure the jury will want to know why the guy didn't go back and pick up the phone and call the bank again and say “Hey, what's happening?”

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

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

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

DA: [Interrupting] Well, they got there at Christmas time, didn't they?

P2: They got there a week before Christmas, if I am not mistaken. It's true that they were there during that period. It's also true . . .

MA: [Interrupting] The first time they've all been away from home, I mean they're homesick . . .

P2: Well, that's a motive that is as much a figment of defense counsel's imagination as anything I've ever seen.

DA: Yeah, but the difference is I don't have to . . .

P2: [Interrupting] There's nothing in the record to suggest that that's real.
DA: I don't have to prove that that's why he did it. You have to prove that he did it for discrimination. I can offer that as an alternative to the jury as to perhaps . . . it's not discrimination. Maybe the guy is lying to him as to why he wants to come up here. If he's lying about that, he's probably lying about something else.

P2: Why would somebody want to come home for Christmas when their entire family is down there with them in the first place, assuming . . .

MA: [Interrupting] His entire family is homesick.

P2: Assuming. Well I think that's a little iffy . . .

MA: [Interrupting] Bring the whole crew home with him. Didn't cost him a nickel did it?

P2: Would one jeopardize one's job in order to do that? If, on the contrary . . .

MA: [Interrupting] Maybe he felt he had more secure tenure.

P2: Everyone around him was asking permission to go home and being allowed permission to go, under circumstances involving less emergency than his family situation, coupled with his mortgage situation . . .

MA: [Interrupting] Well, is that in fact the case. Can you prove that?

P2: And he's told . . . well that's been his testimony . . . and he's told when he consults with [his Venezuelan supervisor], he's told that it may be a little slow during the last couple of weeks in December, so that he times it at the company's convenience, rather than his personal convenience for the holidays.

MA: The bottom line is that it's not a situation where he is footing the bill for all of this himself. The company is paying the bill for him to come home, paying for his vacation and paying to fly the whole crew back.

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

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

The discussion continued in this fashion for several minutes, covering such charged questions as “how in the world the company paid the bill for Paine’s trip if Paine had not gotten permission,” and whether “Paine’s attitude [was] I don't care whether I've got permission or not,

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98 Id. at 39-42.
I'm going to go.”  

By the end of the discussion relations among the lawyers were strained. Even in transcript form it is obvious that the exchanges had become longer, more pointed and more personal than earlier in the meeting and on tape, it is apparent that they also had become louder and more sarcastic. At times, in fact, the lawyers literally shouted at one another. Unresponsiveness, interruption and speechmaking, all absent at the outset of the meeting, now were routine. Neither side seemed interested in listening to or joining issue with the other. The magistrate's decision to end the meeting was easy to understand.  

Figuring out why the conversation became so unproductive is not easy. There was no obvious first cause of the conflict, no single gratuitously insulting or personally offensive comment that drew first blood and set off a series of self-defensive recriminations. None of the lawyers had fragile egos or weak personalities and while their areas of practice overlapped, none was a long-standing competitor of, or had a history or past struggles, with the other. Going into the conference each of the lawyers expressed respect for the others and while all of them thought that discussion was likely to be challenging (which it was), they also thought it was likely to be congenial. None of them had qualms about arguing forcefully for points they believed in, but neither did they believe that it was productive to argue for the sake of arguing, or to punish others gratuitously. Each knew that scoring debater's points had the potential to antagonize and that adversarial histrionics did not play well with this particular magistrate. Yet they turned the meeting into a form of stylized combat. Why, is hard to understand.  

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

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99 Id. at 42, 43.
101 “I’ll tell you what, I think we’ve been through the discussions here pretty thoroughly, unless there’s something else we can settle, I would want to meet with you privately for some more discussion. Let’s do this. Why don’t you [to the Drilco lawyer] come into my office over here, and we’ll leave the conference room, and you all [to the Paine lawyers] can just relax for a little while.” Id. at 42–42, 45. The lawyers’ behavior helps explain the popularity of the private caucusing model of pre-trial settlement. Judges often believe, and reasonably so, that lawyers will posture as long as they are face to face and that they must be separated if any progress is to be made. Private caucusing comes with its own set of problems, however, as it relegate the parties to a private, sometimes lawless world of shuttle diplomacy in which deception is rampant and strong arm tactics abound.
also has a certain appeal, particularly to practitioners whose threshold for contentious discussion is a good deal higher than citizens (or legal academics) generally.102

Whatever the cause, the fact that the lawyers treated the discussion as a kind of orchestrated fight prevented them from achieving any of the objectives commonly ascribed to the pre-trial conference.103 They did not narrow the issues in dispute to the serious, contested few, for example, invent “win-win”104 solutions that accommodated their respective interests and needs, identify objective criteria against which to measure the strength of their respective claims, or come to understand and respect the differences between their substantive legal views. They would have had to listen more carefully to what each other was saying, but listening carefully was difficult under the circumstances. Many of their comments seemed designed to avoid unintended, unilateral concessions while buying time to determine how to challenge their adversary’s position further. The simplest way to avoid conceding is to dismiss statements peremptorily, planning to return to them once their implications are clear. But having views dismissed peremptorily can upset others, who will believe, understandably, that they are not being treated with respect. And if they respond in kind, which would not be unreasonable, it is not surprising that a fight would break out.

This is the kind of adversarial bargaining that communitarian methods were designed to replace. Lawyers can hammer out agreements behaving in this way, though the relationship between the agreements and the parties’ respective substantive rights may often be only coincidental. But even when they do, they leave interactions of this sort in a foul mood and use subsequent negotiations to pay other lawyers back for slights and insults, real and perceived. It would be better if this process could be more social, not only for the psychic health of individual lawyers but also for the rights of parties and the effectiveness of the dispute settlement system as a whole. One way to bring this about is to build structural mechanisms into adversarial bargaining that reduce lawyer defensiveness and posturing and take some of the perceived risk

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


104 This expression is incoherent if read literally using a consistent definition of “win,” but I use it because it seems to have meaning for so many people. See Condlin, supra note 12, at 43 n.120 (win-win reminds one of the Dodo in Alice in Wonderland – “Everybody has won and all must have prizes.”).
out of acting in a sociable and forthright manner. The private caucus is one such mechanism. Meeting privately with a judge or magistrate permits lawyers to share their intentions and beliefs candidly and at greater length than would be prudent in the more heated full-group discussion. If the magistrate reveals their comments for what turn out to be ill-advised reasons, the lawyers are still in a position to disavow what was said. At least that is how private-caucusing is supposed to work. Whether reality follows theory is something we will now investigate.

2) First Caucus with the Drillco Lawyer

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

The caucus started innocuously enough. After exchanging pleasantries the magistrate and the Drillco lawyer discussed, in order, the strength of Paine’s substantive claims, the extent of his economic damages and the offer Drillco would make. The first of these topics might have been avoided. Repeating one of his group meeting points, the magistrate began by stating that the evidence “pretty well [comes] down in Drillco’s favor, unless Mr. Paine gets a pretty quirky jury;” then he asked “[w]hat kind of authority do you have in this thing?” Perhaps taken by surprise, the Drillco lawyer responded somewhat flippantly, “How much do I need?” Seemingly irked by the fact that the lawyer was not willing to “evaluate the case [for himself],” the magistrate responded somewhat flippantly, “How much do I need?” Seemingly irked by the fact that the lawyer was not willing to “evaluate the case [for himself],” the magistrate spent the next four minutes, or half of the caucus’, making five separate arguments against Drillco’s position. While not vehement or overwhelming, the

105 Scott Peppet describes several proposals for constructing such structural features. See Peppet, supra note 8, at 486-97.
106 “Obviously you’ve got some settlement authority. What kind of authority do you have in this thing?” Transcript of Drillco Pre-Trial Conference at 45.
107 Id. at 45.
108 “Well that says it all. I mean . . . I don’t know . . . you’re going to have to evaluate the case yourself.” Id.
109 The arguments were: 1) “It’s going to cost you a lot of money to prove it . . . .”; 2) “I’m sure Mr. Paine makes a good appearance . . . .”; 3) “They never had any problems with him before . . . and I think that certainly is a
arguments were more than perfunctory and collectively they seemed to express doubts about the magistrate’s earlier statements in support of Drillco. The Drillco lawyer realized almost immediately that he had made a mistake in not responding directly to the magistrate's question and tried to interrupt to start the sequence over again, but it was too late; he had to defend himself against each of the magistrate's arguments. Not until he returned to his “Paine lied” theory of the case did the magistrate let him off the hook, probably because the magistrate did not believe Paine either.

After brief asides on the “cost . . . to try this thing,” and the concern that “Mr. Paine will want to amend the pre-trial order,” discussion moved to the subject of Paine’s damages. The magistrate took the lead. Arguing that Paine “[hadn't] had very good earnings since he left [the] company,” the magistrate calculated lost back pay [from the lost opportunity to work in Venezuela], as “maybe one hundred and fifty, one hundred thousand dollars, just in the economics . . . .” These figures were larger than they should have been by a factor of almost six, principally because the magistrate counted hardship and overseas bonuses as salary and failed to take into account that the Venezuelan assignment was for only one year. The Drillco lawyer saw the mistaken assumptions immediately and in a careful and respectful manner, over a period of a couple of minutes, explained them to the magistrate. Both parties then agreed that

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110 “Exactly, but . . .” The magistrate interrupted at that point to say: “It’s going to cost you money to prove it, that’s one thing, and furthermore, it’s the only black fellow that’s worked for the company, and he’s worked his way up, and I’m sure he makes a good appearance, and I think that’s something that’s going to be taken into account. I mean they never had any problem with him before until he winds up down there in South America, and I think that certainly is a circumstantial indication that this may be the result of some kind of discrimination. Certainly they’ll argue that to the jury.” The Drillco lawyer responded: “Well, sure they will, but Judge, I think that cuts both ways, because a company that’s going to discriminate against somebody is not – they would have done it long ago.” And the discussion went off for a couple of minutes on the topic of whether the company discriminated. Id. at 46.

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

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

113 The Drillco lawyer will hear this is as a one hundred thousand dollar offer. The magistrate made the common mistake of framing the offer in terms of two choices, one wishful and the other bottom line, and another bargainer always will hear it as the more favorable of the two.

114 Transcript of Drillco Pre-Trial Conference at 48.

115 This is true for only the one hundred and fifty thousand dollar figure. The factor is four if one uses the one hundred thousand dollar figure.

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

MA: You mean that’s a wash?

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

MA: But he might have stayed there indefinitely if he hadn’t been canned. How long was the assignment? One year?
“even so, Paine is about eighteen hundred a month under what he was stateside,” and this “nets out to somewhere around twenty-seven thousand” in total lost back pay.\textsuperscript{117} The problem of front pay was mentioned twice but not discussed because of the difficulty of determining “how long Mr. Paine will be underemployed.”\textsuperscript{118} This was a mistake, given the way events were to develop.

After agreeing on the amount of damages, the magistrate and lawyer turned their attention to the question of what Drillco would “feel comfortable recommending to close this thing.”\textsuperscript{119} This was an important moment in the caucus. Because it was invited by the magistrate the offer had to be serious, anything less would be insulting and this made it difficult for the lawyer to suggest a figure that was aggressively, or even plausibly, high.\textsuperscript{120} The lawyer began to calculate out loud by explaining that “it's going to cost us at least ten thousand to try it,” and the magistrate agreed.\textsuperscript{121} Before he could continue, however, the magistrate interrupted to describe Drillco’s “exposure [as] probably in the, maybe the top range, seventy-five thousand or so, maybe a hundred, if they go for . . . if they allow . . . if the judge lets them amend the pre-trial order . . . .”\textsuperscript{122} Surprised and perhaps a little confused, the Drillco lawyer acknowledged that “while I think we've got definitely the upper hand on the case, we've got to allow for the fact that there is always a risk factor. So I, you know . . . if we can go fifteen thousand, or something.”\textsuperscript{123} The magistrate accepted this figure instantly and it would become the offer he took back to the Paine lawyers. In language he would soon repudiate, he stated, “Yeah, that's what I was thinking. I was thinking in the fifteen to twenty thousand range . . . would probably be a pretty reasonable settlement.”\textsuperscript{124} After another brief aside on the question of whether Paine “might be thinking about cash register numbers,” the magistrate ended the caucus by saying “Well I've got some idea of what your range is. Let me bring them in here and talk with them a little bit.”\textsuperscript{125}

Fifteen thousand dollars was a surprising first offer for the Drillco lawyer to make. He had said prior to the conference that fifteen thousand was about as much as he thought Paine could recover at trial, but once he began the bargaining at that figure there was no possibility he

\begin{verbatim}
DA: One year.
MA: Just one year?
DA: A one year assignment.
MA: All right.
\end{verbatim}

Id. at 49.  
\textsuperscript{117} Id. at 49-50.  
\textsuperscript{118} Id. at 48.  
\textsuperscript{119} Id. at 50.  
\textsuperscript{120} A plausibly high first offer is the best (from the perspective of the offeror) offer an adverse bargainer will agree to take the smallest acceptable percentage of the time. As long as there is some possibility, however small, that the offer will be taken, a lawyer can defend it sincerely and in good faith, in the hope that the present case is that situation. See Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 HARV. NEGOTIATION L. REV. 1 (1999) (describing the ideal first offer as one that is as “extreme . . . as can be gotten away with, but not so extreme that the offeror appears to be negotiating in bad faith”).

\textsuperscript{121} Id.  
\textsuperscript{122} Transcript of Drillco Pre-Trial Conference at 50. This suggests that the magistrate’s earlier concern about the Paine lawyers increasing Drillco’s exposure by amending the pre-trial order was having an effect.

\textsuperscript{123} Id. at 51.  
\textsuperscript{124} Id.  
\textsuperscript{125} Id.
would end there. He might have changed his mind about expected outcome, of course, but
since almost everything had gone his way in the conference up until then it is not clear why he
would have. The reasons he gave for making a fifteen thousand dollar offer also were curious. He
explained the offer as a combination of the ten thousand dollars saved if the case was not
tried and five thousand dollars to compensate Paine for his expected chance of success at trial.
But why he would offer Paine both the results of a successful trial and the savings realized from
not having to go to trial, is not clear. Paine would save his own costs in avoiding trial and
without the same inducement it is not clear why Drillco would want to settle. If the Drillco
lawyer’s prediction about trial outcome was wrong and there was a risk Drillco would have to
pay Paine more than five thousand dollars, the company still had no reason to offer Paine the ten
thousand dollars saved by avoiding trial. There was no necessary correlation between an
increased risk of losing at trial and the cost of trying the case. Such a risk might justify an offer
of more than five thousand dollars but if so, the size of the offer would depend upon the
percentage increase in the risk of losing, not the cost of trial. In effect, the Drillco lawyer bid
against himself here by making two offers instead of one and both his second offer (the savings
realized by avoiding trial), and the combination of the two, were unduly generous.

Perhaps the combination of Paine wanting “cash register numbers,” the magistrate’s
mistaken estimate of Drillco’s exposure (as seventy-five to one hundred thousand dollars), and
the Paine lawyers’ possible threat to amend the pretrial order to ask for non-economic
damages, spooked the Drillco lawyer and pushed him to his bottom line prematurely. The
eighteen thousand dollar offer was made quickly, without much explanation and in response to the
magistrate's first serious application of pressure. But if the Drillco lawyer panicked this would
be surprising. He was an experienced bargainer (and litigator), and not likely to make an
impulsive, ill-considered offer. Instead, he may have interpreted the magistrate's request for a
offer as a directive to get right to the point and not waste time bargaining. He knew the
magistrate well, had worked with him extensively in the past and trusted him not to take
advantage. Perhaps he spoke more candidly about the case than he would have otherwise
because of these factors. In other words, the fifteen thousand dollar offer may have been a
truthful (and communitarian) response to the question of how much authority he had and not a
bargaining move.

Being candid with the magistrate made sense, however, only if the Paine lawyers would
be candid in return and this was a questionable assumption to make. The Paine lawyers had

126 Expecting to have a first offer accepted is a form of “take-it-or-leave-it” bargaining—a refusal to
bargain, in other words—and that is why it rarely works. It also is an unfair labor practice. See NLRB v. Gen. Elec.
Co., 418 F.2d 736 (2nd Cir. 1969), cert. denied, 397 U.S. 965 (1970). Bargaining anticipates that there will be at
least one concession by each side. Without the possibility of counteroffers there can be no bargaining.
127 For an explanation of the need to justify offers in terms of some substantive or practical principle, see
SCHELLING, supra note 42, at 24-27 (describing the process of demonstrating commitment to offers); GARY BELLOW
& BEA MOUTON, THE LAWYERING PROCESS 555-61 (1978) (same); KOROBKIN, supra note 45, at 156-71 (same).
128 Five thousand dollars was approximately one fifth of Paine’s out of pocket damages (as calculated by
the magistrate and the Drillco lawyer), and the Drillco lawyer had said before the conference that he thought his
client had a twenty-five percent chance of losing on the merits. He was giving himself a little room to add to the
fifteen thousand dollar figure, therefore, if that turned out to be necessary.
129 While the magistrate generated most of the force of this threat on his own, it is fair to call it the Paine
lawyers’ threat since it can be traced to an off-hand comment by the lawyers in the full group meeting. See supra
note 61 and accompanying text.
disclosed little if any private information unilaterally in the full group meeting, for example, had argued both large and small issues aggressively and had made exaggerated demands, often causing the magistrate to appear to have second thoughts about his initial Drillco-favoring views. The lesson of the full group meeting, as far as the Drillco lawyer was concerned, should have been that the Paine lawyers were aggressive, maximizing bargainers and that there was considerable risk in exposing his true bottom line to them unilaterally, (even if through the magistrate). Admittedly, this risk would have been easier to appreciate had the order of the caucuses been reversed. No doubt, the Drillco lawyer would have changed his approach had the Paine lawyers’ demand been on the table before he made his own first offer. But given the Paine lawyers’ strategy waiting in the wings, we now know that the negotiation was almost over after the first Drillco caucus. On the surface, however, things looked just the opposite and the Drillco lawyer had every reason to be optimistic. Apart from having to re-argue part of the case on the merits, the meeting seemed to have gone very well. The magistrate had agreed that the evidence “came down in Drillco’s favor,” and also had evaluated the case for settlement in a dollar amount nearly identical to Drillco’s. While he might have to come up with another five thousand dollars or so, the Drillco lawyer could have expected that he would be able to settle on satisfactory terms. All that remained was to bring the Paine lawyers on board and with the magistrate as his ally that ought to be easy to do.

3) First Caucus with Paine’s Lawyers

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

The magistrate began by asking the Paine lawyers “what kind of authority” they had to

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

131 It does not matter whether the Paine lawyers’ aggressiveness was a defensive reaction to the Drillco lawyer or a default style. If they bargained aggressively with the magistrate the Drillco lawyer had to counter in kind, if only to neutralize the effects of their approach. This also should have been the lesson the Paine lawyers drew about the Drillco lawyer and they did.

132 Transcript of Drillco Pre-Trial Conference at 45.

133 The magistrate’s reaction to the offer was qualified and, as such, signaled to the Drillco lawyer that he (the lawyer) probably would have to pay slightly more to reach a final agreement. But the magistrate was telling the lawyer that he was in the right range and that his offer was reasonable. Given the speed with which he agreed, the magistrate also was probably telling the lawyer that he had offered too much. See Bazerman, supra note 10, at 224 (describing “The Winner’s Curse”).

134 Id. at 51.

135 See Condlin, supra note 7, at 89 (describing relationship of advocacy to trading in bargaining).
settle, but as he explained, he meant “are you all pretty well in the driver's seat or is the client calling the shots?” Put in this way, the question asked whether Paine was greedy and out of control more than how counsel evaluated the case for settlement and as such, it probably reflected the magistrate’s continuing concern about Paine wanting “cash register numbers.” The lawyers’ answer, that they “were fairly well in the driver's seat, with some parameters,” seemed to invite the follow up question of what they wanted to settle, but the magistrate did not ask that question for some time to come. Instead, also repeating an earlier point, he challenged the strength of Paine’s claim on the merits, arguing at length and in several different ways, that Paine was “going to have a hard time” proving discrimination. These arguments were important, not so much for what they said, they contained little that was new, but for the overall impression they conveyed of the magistrate solidly on the side of Drillco. These opening comments seemed to give the Paine lawyers little reason to be hopeful.

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

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136 Transcript of Drillco Pre-Trial Conference at 52.
137 Id. at 51. While this literal concern may have been overblown – the threat to amend was made off-handedly by the Paine lawyers at the beginning of the conference, with no serious intention of carrying it out – the magistrate’s propensity to raise it at various points in the discussion provided clues as to his view of the potential outer limits of Paine’s recovery. For example, in discussing whether the trial judge would allow an amendment to the pre-trial order, he described the Drillco lawyer’s evaluation of the case as one “that maxes out at forty or fifty thousand bucks, max.” Id. at 54. This amount was considerably higher than the lawyer’s stated value of the case but the Paine lawyers did not pick up on the amount and discuss it. Later, when discussing the binding effect of the pre-trial order, the magistrate continued, “. . . still, the point is you don’t have any surprises there. And if you start talking about a couple of hundred thousands of dollars to assuage his mental suffering, I don’t think you’re going to be allowed to do that.” Id. at 55. The Paine lawyers planned to make a two hundred thousand dollar demand under the right circumstances but didn’t expect it to be taken seriously. The magistrate’s willingness to mention such a number, and then to say only that he did not “think” it was attainable, encouraged them to proceed with their plan.
138 Id. at 52.
139 Id.
140 The arguments were: 1) success in proving intentional discrimination by circumstantial evidence is directly proportional to the non-minority composition of the witnesses for the defense, and the defense witnesses are “going to look black to the jury,” to which plaintiff’s counsel replied, “Well, I’m not so sure they’re going to look black . . . The dominant impression . . . is going to be that these are foreigners”; 2) “The one independent witness . . . who has no axe to grind . . . comes down pretty much against your client,” to which the Paine lawyers replied, “. . . there’s a lot more ambiguity here than we might be lead to believe;” 3) “You’ve got an uphill row . . . with Title VII cases . . . . The track record in this Circuit . . . does not favor plaintiffs,” to which the lawyers made no reply; 5) the jury will be all or almost all white and not be sympathetic to a race discrimination claim by a black plaintiff, to which the lawyers made no reply; and 6) the judge trying the case will not allow amendment of the pre-trial order and as written, that order freezes Mr. Paine “on the low end of the damage scale,” to which the lawyers replied, “[we] have a very different view of the rules about pre-trial orders.” Transcript of Drillco Pre-Trial Conference at 52-54. Of these arguments, only the pre-trial order discussion consisted of more than two statements by either party.
141 Id. at 55.
142 See discussion supra Part III.2.
143 Transcript of Drillco Pre-Trial Conference at 56. This was the first mention of reinstatement in the conference. It had not been discussed in the full group meeting and was not mentioned in the pre-trial order.
case, but probably to give himself time to digest this new demand for reinstatement. Following a brief, pro forma discussion of the diversionary problem, he returned to the reinstatement issue by saying, “anyway, go ahead on to . . . you talked about the ways you have evaluated the case . . . go ahead, I interrupted you.”

Here, the Paine lawyers made their first formal offer. It was probably the most important move of the caucus.

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

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

P2: Yes sir.

MA: He does want it?

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

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

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

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

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


P2: [Another company officer] did the investigation. [This officer] is the one person

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

145 Id. at 57.
Mr. Paine had bad blood with. It's very peculiar that he was picked to do the investigation under those circumstances.

P1: Yes.

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

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

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

But reinstatement also had its downside. It was a new and complicated item, its strategic implications were unknown and it was introduced at a time when there was already a lot of water over the dam. Adding it to the settlement package might require re-negotiating the preliminary agreement with the Drillco lawyer after he had agreed to what he was told were reasonable terms. He might view such a move as low-balling, conclude that he could not trust the magistrate, rescind his original offer and break-off negotiations altogether. Reinstatement also might conflict with the provisions of Drillco’s collective bargaining agreement with its union, or cause morale problems with other Drillco employees over whom Paine was promoted. If the magistrate thought these or other such risks were substantial it is understandable that he would be unsympathetic to the request for reinstatement. Given this backdrop, the Paine lawyers had to be encouraged by the magistrate's somewhat tepid response.

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146 Id. at 57-58.
147 See supra note 104.
149 While the magistrate might have said there was “no way” Paine could be reinstated (it is not clear whether “no way” refers to the demand for one hundred thousand dollars or the demand for reinstatement), he also asked if Paine “want[ed] it (i.e., reinstatement),” and “how much money” he wanted “if” reinstatement was granted. Transcript of Drillco Pre-Trial Conference at 57. These questions were unnecessary if there was truly “no way” reinstatement could be granted. He also qualified the “no way” assertion itself four sentences later when he said “I don’t think they’ll reinstate him because they are convinced he lied.” Id. Finally, while “no way” is strong and
The reinstatement demand also was noteworthy for the different understanding of the pre-trial conference and the different approach to bargaining, that it reflected. The Drillco lawyer’s offer of fifteen thousand dollars was a genuine bottom-line figure that left little room for further negotiation. It was what he hoped to pay to settle the lawsuit and was designed to end the bargaining process as much as start it. It did not contemplate much in the way of further concessions. The Paine lawyers’ request for reinstatement plus one hundred thousand dollars, on the other hand, was the proverbial inflated, opening demand. It asked for more than Paine reasonably could have hoped to pay even if completely successful at trial and left plenty of room for future concessions. It pushed one end of the bargaining range\textsuperscript{150} out as far as possible, in an attempt to define the range in terms that were imbalanced in Paine’s favor.\textsuperscript{151} In old fashioned terminology, the Paine lawyers were “maximizers,” and the Drillco lawyer was a “fair and reasonable” bargainer. In a one-time relationship, maximizers usually beat fair and reasonable bargainers and they would again here.

The defense of a demand and not its size, is what gives it force, however, and the Paine lawyers’ defense was skillful. They expressed the demand calmly and matter-of-factly, not arguing for it before it was challenged and when challenged, not filibustering with long soliloquies that delayed or prevented the magistrate’s reaction. These latter tactics signal a defensiveness that undercuts any attempt to be convincing.\textsuperscript{152} When the magistrate said “no way,” and seemed to reject the demand out of hand, the Paine lawyers ignored that statement and responded instead to the easier-to-rebut claim that Paine had lied.\textsuperscript{153} There was no look of panic on their faces, no nervousness in their tone. Their voices did not rise and their pace did not speed up. They acted as if nothing particularly significant had happened and stood ready to discuss the demand, as if they expected the magistrate to agree with it once he came to understand it. In short, they looked like people who believed in what they had asked for and who thought that the magistrate would come to believe in it also. In the discussion that followed, not particularly noteworthy in its own right, one could see the intensity of the magistrate’s resistance unequivocal, the tone with which it was said was not. The magistrate raised his voice and increased his pace only slightly, and looked more surprised than angry. He seemed to be saying, “I don’t want to hear this,” rather than “I have already thought about what you say and have rejected it.”

\textsuperscript{150} Condlin, \textit{supra} note 7, at 68 (describing concept of bargaining range). \textit{See also} Korobkin, \textit{supra} note 3, at \textit{(describing the concept of “bargaining zone”).}

\textsuperscript{151} Parties typically split a bargaining range somewhat evenly once it has been identified. Winning and losing is obvious otherwise and this always will be unacceptable to one of the parties. Thus, it is easier (though not easy) to construct an imbalanced range in the first instance than it is to bargain for a disproportionate share of a fair range once constructed and maximizing bargainers try to do this. \textit{See Id., at \textit{(describing the process of constructing the bargaining range as “zone definition”); RAIFFA, supra note 42, at 47-50 (illustrating the relationship between concession pattern and bargaining range).} It is not enough just to make up inflated demands, however, one also must successfully challenge an adversary’s efforts to do the same thing in response and successfully defend one’s own demands. A demand becomes a serious offer only when arguments in support of it convince an adversary that there is some possibility one will refuse to settle unless the demand is met. In this way, successful trading always is a corollary of successful advocacy.

\textsuperscript{152} Arguing for a point before it has been challenged evidences a defensiveness that can undercut credibility. A listener might wonder, privately of course, why he/she should believe the point if the speaker feels the need to defend it before it is clear that anyone disagrees. Solid arguments are expected to hold up under scrutiny and persons making them do not try to pre-empt attempts to challenge them. They realize that listeners are more easily convinced by the give and take that follows a challenge than by a lecture.

\textsuperscript{153} Transcript of Drillco Pre-Trial Conference at 57.
begin to ebb.154

The discussion reached an impasse on this point, so the magistrate shifted gears and asked, “On the basis that they are not willing to reinstate him, what . . . how do you evaluate it?”155 Paine’s lawyers replied, “We double the monetary figure.”156 This seemed to startle the magistrate, as he asked, incredulously, “And that's for settlement, or maximum award?”157 The liveliest discussion of the caucus followed. More agitated than at any other time in the entire conference, the magistrate attacked this escalation move158 in several ways. At first, he asked the lawyers how they justified doubling their demand.

P2: That's for settlement. Let me . . .

MA: [Interrupting] Two hundred thousand?

P2: It seems to me, your honor, we're talking about a differential per month of eighteen hundred dollars right now and we ignore inflation and all of those things . . .

MA: [Interrupting] What's to say that tomorrow he won't get . . .

P2: . . . and this is a gentleman in his thirties . . . he's got another thirty years of working life.

MA: He doesn't have another thirty years of working at a low salary job. You can't base this on speculation.

P2: Well, you certainly can't base it on the speculation that in this job market he's going to find a comparable . . .

MA: [Interrupting] He's also got a duty to mitigate.

P2: Well, he is mitigating. That's why it's only two thousand a month, not three thousand a month.

MA: Well, what authority have you got . . .

P2: [Interrupting] That doesn't even include fringe benefits. We threw that by the wayside as part of our settlement offer.

154 The fact that the magistrate once thought Paine’s back-pay damages were in the vicinity of one hundred thousand dollars and that such an award was still possible if Paine was allowed to amend the pre-trial order, might have made the offer seem less shocking than it should have. See discussion supra Part III.2.
155 Transcript of Drillco Pre-Trial Conference at 58.
156 Id.
157 Id.
158 Literally, the magistrate challenged the two hundred thousand dollar demand and not the fact that the lawyers made an escalation move. See KARRASS, supra note 149, at 60-62 (describing “escalation tactics”). But see Bazerman, supra note 10, at (describing “The Nonrational Escalation of Conflict”).
MA: That's awful nice of you. 159 What kind of authority . . . what do you have that says that the front pay in these Title VII situations, or under nineteen eighty-one, goes on for the rest of his working life?

P2: Well, your honor, there are not a lot of Title VII . . .

MA: [Interrupting] It's not a personal injury kind of thing.

P2: No.


P2: Well, your honor, there are not a lot of Title VII cases where indeed the ordinary, usual customary and generally mandatory remedy of reinstatement is denied, or . . .

MA: [Interrupting] Oh, there are zillions of them . . .

P2: [Interrupting] No actually, there . . .

MA: . . . where they don't want to be reinstated.

P2: There are relatively few and there's a great body of case law that says that the make-whole, ordinary, preferred remedy is reinstatement.

MA: That's right.

P2: In the unusual cases, there is always the question of the jobs that they have found. A great many of them find jobs during the pendency of the case that eliminates the problem of the likelihood that they will be permanently in a lower tier position. The cases I am most familiar with where that is not true are not Title VII cases, but age discrimination cases, which is, after all . . . 160

Using an age discrimination analogy as a justification for the inflated demand seemed to surprise the magistrate. The Paine lawyers had not made such an argument anytime in the case up until then and thus, there was no reason for the magistrate to have read age discrimination cases in preparing for the conference. After a one-line response, that age discrimination cases were different “because nobody get younger,” 161 the magistrate abandoned the topic by agreeing

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159 Ironically, this sarcasm was a positive sign. The magistrate’s ability to joke about the situation indicated that he had not been pushed beyond his limits. He was not really mad, in other words, though he was irked, and this meant that Paine’s lawyers could continue to press him. Cf. Allred, et al., supra note 101, at (describing the nature of genuine anger in negotiation); Morris, supra note 101, at (same).

160 Transcript of Drillco Pre-Trial Conference at 58-59.

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

P2: Yes, but age discrimination act cases are brought under a statute modeled under Title VII, whose
that “it [the age discrimination analogy] is worth a little bit in terms of the front pay kind of remedy,” as long as Drillco does not have “to foot the bill . . . for the rest of [Mr. Paine’s] life.”162 The Paine lawyers accepted this half-way concession and dropped the argument. In retrospect, they might have pushed the point a little further, but going into the conference they did not think the age discrimination analogy was strong and had planned to abandon it in the face of any substantial resistance. At the time, they were more than happy to accept the concession of it being worth “a little bit” in return for not pressing the argument.

The Paine lawyers then turned the discussion to another “body of precedent” that they argued also authorized front pay damages. It consisted of the “great many cases where reinstatement . . . isn’t possible immediately and may not be possible for two years, or five years, or ten years.”163 In such cases, they argued, “the typical make-whole . . . order” requires a defendant to “reinstate as soon as possible and in between now and then pay the differential [in salary], whatever that differential may be.”164 Paine’s situation was not different in any significant respect from the delayed full employment case, the lawyers argued and thus the same kind of order could be entered here. At this point, the magistrate may have blinked slightly. Perhaps concerned about the growing number of “bodies of precedent” the Paine lawyers were able to muster and that he was not prepared to discuss, he acknowledged, albeit indirectly, that reinstatement might be a possibility.165 Compared with its increasingly unattractive alternatives, it no longer looked so bad.

The Paine lawyers then reversed roles on the magistrate, asking, “Well, your honor, how

prohibitory language is identical to Title VII, and the situation arises more commonly there because when they get reduced out in force their chances of getting employed elsewhere are often demonstrably very slim. And the usual . . .

MA: [Interrupting] Well, that’s true, but the whole idea is they’re being fired because they’re too old to work, according to the employer. The reason they are being fired is because they are too old to fit the employer’s needs, and Congress has said that’s unlawful, but if that’s the case, their employability is diminished. And I don’t see anything in this case that says that Mr. Paine can’t go out next month get a job that pays what he had.

P2: Actually, your honor, I hesitate to correct your last statement, but they’re fired because the employer thinks they are too old.

MA: That’s what I said.

P2: They don’t necessarily . . . but they don’t necessarily think that they are too old.

MA: Right. I understand that.

P2: They may very well not be too old to perform.

MA: I understand.

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

Id. at 60.

162 Id. at 60-61.

163 Id. at 61.

164 Id.

165 This time he made no attempt to respond substantively to the Paine lawyers’ argument. His actual words were, “Well, let me make this clear. I haven’t broached the reinstatement idea by [sic] [the Drillco lawyer] and maybe he’d be more receptive to that than I judge he would be. I don’t know. It seems to me they’re a little bit vituperative here in terms of they don’t want anything to do with Mr. Paine. They don’t like him because they think he lied.” Transcript of Drillco Pre-Trial Conference at 61.
do you see this thing in terms of settling?”166 The move was timely. In a long, sometimes rambling and often disjointed response, the magistrate expressed a set of contradictory commitments and beliefs that revealed a person beginning to have doubts about his evaluation of the case and perhaps beginning to change his mind.

MA: Well, I don't know. I think it probably has a . . . I've got some idea what [the Drillco lawyer’s] line of authority is. I think he probably is coming in telling me a little low. The company realizes that it's going to be out-of-pocket a certain amount to try the case to begin with, so that's already in the loss column and they think that there's some prospect that you could recover if you get a sympathetic jury, sympathetic to your client and convince them that everybody else is lying. This is an uphill struggle. You know that. A plaintiff's always got that problem. I think, and I've got to tell you, I think the facts come down more on the company's side than on your side in this case. I don't see any smoking gun. I don't see any real hard evidence. It's entirely circumstantial, proof of intent. And the independent witness . . . does not really corroborate your guy. The thing about the mother-in-law and varicose veins, if that's an emergency, I don't know. Can you bring some doctor in here who will testify as to the life-threatening nature of varicose-veins? I think you'll have a hard time finding one.167

The Drillco lawyer would have been surprised to learn that the magistrate thought he “[was] coming in . . . a little low.”168 In the first caucus, the same magistrate described the lawyer’s fifteen thousand dollar offer, which took both the “amount to try the case” and the “prospect . . . [of recovery from] a sympathetic jury” into account, as “pretty reasonable.”169 In fact, it was the dollar value the magistrate had in mind himself. Yet, now he was beginning to have second thoughts. While he had not yet changed his mind completely and still believed that “the facts come down more on the company's side than on Paine’s,”170 the magistrate’s conviction had begun to weaken.

A moderately long but only semi-serious discussion of “the life-threatening nature of varicose vein” surgery followed,171 at the end of which the magistrate made another interesting comment.

MA: In any event, you've got a tough time convincing the jury of this. Not to say that

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166 Id. at 62.
167 Id. at 62-63.
168 Id at 62. If “little” is read to mean five thousand dollars then nothing has changed. In the first caucus, the magistrate characterized the Drillco lawyer’s fifteen thousand dollar offer as a fifteen to twenty thousand dollar offer and thus signaled that it would have to be increased by five thousand dollars. See discussion supra Part III.2. But in the present context the magistrate seemed to be saying that the Drillco lawyer may have to re-evaluate the case in its entirety, that if Paine got a sympathetic jury the lawyer’s understanding of what the case was worth was fundamentally mistaken.
169 Transcript of Drillco Pre-Trial Conference at 51, 52.
170 See discussion supra Part III.2.
171 Transcript of Drillco Pre-Trial Conference at 63. Recall that one of the reasons Paine gave for returning to the United States was to assist his mother-in-law during the period of her varicose vein surgery. The legal question was whether the surgery was an “emergency” within the terms of the Drillco employee handbook and thus an authorized reason to leave.
your advocacy won't do the trick, 172 but I see this as more likely than not a defendant’s verdict and that diminishes the settlement value the case . . . . I think, if I push [the Drillco lawyer], this is above the line of authority he has given me, I think maybe he can come up with thirty thousand dollars, maybe somewhere in that ballpark, but I don't think you're going to get anything higher than that. And I'd have to push him to come up with that. This, after your fee is deducted, would give . . . 173

This was the second time in the caucus that the magistrate acknowledged, albeit indirectly, that Paine might win at trial, this time because of the Paine lawyers’ advocacy skills. Ordinarily, a comment praising lawyer advocacy skill would be just so much stroking, but the magistrate started the conference never having met the Paine lawyers and the comment praising their skill had to be based on what he had seen in the conference itself. Seen in this light, the comment seemed to signal a weakening of the magistrate’s resolve and encouraged the Paine lawyers to press for more. More significantly, the magistrate also put a number on his changing evaluation of the case, in effect, by offering the lawyers thirty thousand dollars174 to settle. This was less than they had asked for to be sure, but twice as much as what he had told the Drillco lawyer he thought was reasonable. The magistrate had started to negotiate (in the sense of trade proposals) with the lawyers and as with all trading, the relevant question was where he would stop. The ensuing discussion provided more clues.

PI:  This is without reinstatement?

MA:  Oh, yeah, without reinstatement . . .

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

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

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

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

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

173 Id. at 64.

174 Literally, he offered to try to convince the Drilco lawyer to make an offer of thirty thousand dollars but both the magistrate and the Paine Lawyers assumed that the Drilco lawyer would go along.
P2: [Interrupting] Let me mention a couple . . .

MA: . . . I'll stand and fight.\(^{175}\)

While ostensibly still opposed to reinstatement ("Oh yeah, without reinstatement"), the magistrate’s protestations now had begun to ring increasingly hollow. He was protesting too much. He discussed reinstatement at length, hinted that the Drillco lawyer might accept it and did not explain why it would not work. All of this indicated that he took the option seriously, his comments to the contrary notwithstanding. His objections may have been sincere but they were not plausible and the Paine lawyers were right to ignore them. The lawyers responded with a variation of their escalation strategy.\(^{176}\) Each time the magistrate resisted their demands they added, or threatened to add, another item or argument to the bargaining agenda ("Let me add another item . . . . I should add a couple of . . . ;" "Your honor, I should have said a couple of other things . . . ," "Let me mention a couple of . . ."). The message, that new issues would keep appearing until he saw things their way, could not have been one the magistrate wanted to hear.\(^{177}\) His only choices were to flee (concede) or fight (argue), and since his arguments until then had not been all that effective, fleeing was beginning to look like the better option. Fleeing meant buying his way out of the discussion in the same manner he bought his way out of the similarly unsuccessful earlier discussions, by making a more generous offer.

The foregoing exchange contains an important clue as to the magistrate's private monetary evaluation of the case. While he told the Drillco lawyer he thought the case was worth fifteen to twenty thousand dollars and the Paine lawyers that he thought he could get them thirty thousand, here he indicated that a “big ticket” demand would be “anything above fifty thousand dollars.”\(^{178}\) Given his fear that the pre-trial order would be amended and the issues in the case expanded, fifty thousand dollars was not out of line as a value to place on the case. The Paine lawyers did not pick up on this clue, however, and the magistrate did not mention the fifty thousand dollar figure again. The lawyers’ failure to get a commitment to fifty thousand dollars would have repercussions in the next caucus when the magistrate presented Paine’s counter proposal to the Drillco lawyer. It was the Paine lawyers’ only serious error in the caucus.

Conversation then shifted to the attorney’s fees issue mentioned by the magistrate earlier in the caucus and the Paine lawyers proceeded to argue that it was not proper to negotiate for fees “in conjunction with settlement.”\(^{179}\) The magistrate objected, arguing that “[the Drillco lawyer] has got to know . . . the bottom line cost," otherwise he "is not going to settle."\(^{180}\) A moderately long discussion of this issue ended only when the Paine lawyers pointed out that they “were really talking about a relatively modest amount . . . five thousand all in.”\(^{181}\) This discussion lacked the fast-paced and confrontational qualities of the caucus until then, as each side seemed to be catching its breath and gearing up for the finish. Though the participants could

\(^{175}\) Id. at 64-65.
\(^{176}\) See discussion supra Part III.3.
\(^{177}\) That he kept interrupting the lawyers to cut them off before they could make the arguments is the best evidence of this.
\(^{178}\) Transcript of Drillco Pre-Trial Conference at 65.
\(^{179}\) Id.
\(^{180}\) Id. at 65-66.
\(^{181}\) Id. at 67.
not have known it at the time, this topic was to be to the caucus what a turnaround point is to an out-and-back road race. As the last new substantive issue to be discussed, it completed the list of obstacles needed to be overcome in reaching an agreement. All of the contested issues now were on the table and it remained only for the parties to figure out how to compromise and converge. At first, each side dug in its heels, sometimes arguing, sometimes inviting an offer, sometimes making one, as if in an elaborate game of chicken. ¹⁸² Each seemed to be testing the other’s will and stamina, professing unwavering support for its own positions while scrutinizing the other’s for signs of tentativeness or doubt. Yet, slowly, as the discussion wound on, each side also began to express flexibility and a willingness to compromise. These contradictory signals made the conversation complicated and subtle and an interesting study in endgame bargaining.

The following exchange is an illustration of this endgame bargaining, blending features of advocacy, concession and convergence into one seamless whole. The magistrate spoke first.

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

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

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

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

MA: Well, that happens sometimes, that's right, but I mean that's something that obviously is a weakness that doesn't add to the strength of your negotiating position. Well, suppose you realistically, suppose the ceiling on recovery going to Mr. Paine himself is about twenty-five thousand.¹⁸³ That would leave enough room to pay you attorneys fees and still keep it within what the company can stomach. How do you feel about that?

P2: Hardly pay us to settle.

MA: Why?

P2: Unless we're talking about reinstating Mr. Paine. Obviously his injury here, I mean he lost forty thousand off the top just in being sent back and not being able

¹⁸³ This seems to be a restatement of the magistrate’s thirty thousand dollar offer. The Paine lawyers had said earlier in the caucus that their fee would be five thousand dollars.
to complete that term in Venezuela, never mind his future prospects.

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

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

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

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

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

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

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

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

MA: Certainly, everything is a cost benefit kind of thing, but I mean, you know, the point is, that you've got to realize and you can't realistically, I know you're advocates, but in terms of the settlement process, you've got to realistically look at the case and realistically, you've got an uphill battle of proving intent by way of circumstantial evidence, where at least two of the people you claim are lying are, let's say, non-American, Caucasian racial group, which is a real hassle for you in this case.184

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

184 Transcript of Drillco Pre-Trial Conference at 67-69.
willingness to compromise. 185 While the literal content of their comments was mixed, the underlying point was clear. They were willing to settle.

The magistrate did not seem to pick up on the subliminal message right away, or if he did, he was not quick to acknowledge it. He responded to the lawyers’ comments as if they reflected intransigence rather than flexibility and four times within a single sentence appealed to them to be “realistic.” Appeal is the least effective of the negotiation advocacy strategies, 186 and it is rare to see an experienced bargainer use it at all. 187 But here it may have been just the right move. After a brief aside on whether the Venezuelan supervisors would be believed, 188 and

185 Id. at 67.

186 Bargaining advocacy takes the form of argument, threat and appeal and the three strategies are preferred in that order. See Condlin, supra note 7, at 69-70 (describing advocacy strategies in bargaining). By asking for a favor, an appeal tacitly concedes the point under discussion and asks for mercy from the adversary (like an animal in nature confronted by a more powerful enemy, the person goes “belly up”). Resorting to appeal is a situation most bargainers try to avoid.

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

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

P2: I don’t think it’s that hard to get the jury to believe . . .
MA: [Interrupting] It’s not like the typical big corporation where a whole . . .
P2: . . . that two poor Venezuelans who managed to luck into a job with a big American company are very fearful of being shipped back into . . .
MA: Suppose both have MSEE degrees.
P2: Is there anything in the record that says that?
MA: You haven’t deposed them. Suppose they are Ph.D.’s. You don’t know.
P2: Well, but we do know. They wouldn’t be operating at the level of Mr. Paine’s immediate supervisors if that’s what their credentials were.
MA: You never know. Maybe they’re management trainees or something.
P2: They’re at the level Mr. Paine was supposed to be at if he hadn’t been effectively demoted when he was officially assigned on his arrival in Venezuela.
MA: That’s another problem. But in terms of the settlement thing, I’ve got to tell you I think a jury around here, I think that the probability, the litigative probabilities, come out below fifty percent on Mr. Paine’s side. In view of that, I think that it might be penny wise and pound foolish if you say you’re going to go ahead to the wall for this unless we get a tremendous offer. I don’t think it’s going to be coming.

Transcript of Drilco Pre-Trial Conference at 69-70.

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

One might think of this argument as “filler” used to pass time while thinking of what to do next, or to create space between statements one does not want to be seen as related. Such argument usually is about issues already considered and resolved, and since it is not intended for its own sake, it need not be responded to. Perfunctory substantive argument between concessions in a negotiation end game and disjointed rambling at the point of a major substantive topic shift, are two of the most common examples. Such argument allows parties to catch up with and follow changes in the settlement conversation and to make concession-making look less arbitrary than it probably is. These perceptions, in turn, increase participant confidence in the rationality of the negotiation enterprise and make settlements more stable. See Condlin, supra note 7, at 101-02, for additional illustrations.
whether “the company [was] prepared to . . . pay Paine some money to go away,” the impasse broke. 189 The Paine lawyers asked if Drillco was “prepared to help [Paine] in his efforts to mitigate his damages and obtain comparable employment . . . [by] clear[ing] his record . . . [and] giv[ing] him an affirmative recommendation?” 190 This was a new request, but the strategy was familiar. At moments of impasse, the Paine lawyers would escalate their demands by introducing a new item into the bargaining conversation, hoping either that it would be the final straw that caused the magistrate to give up, or that it would provide a new perspective on the problem suggesting a mutually acceptable resolution. This time the strategy seemed to work, though for which reason is not clear.

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

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

P2: Absolutely.

MA: . . . and that is a non-monetary dynamic really, that I did not explore with [the Drillco lawyer] because I discussed money. But I can tell you right now, in terms of the money, there's just not a whole lot there. I don't think there's going to be. I think in terms of the money going right to your client, I would think again, although I don't have the authority from [the Drillco lawyer] to give you this, I would think I might be able to squeeze twenty-five or thirty thousand out of him, with the idea that there's going to be another few thousand for your fee, in terms of the hours that you've put in. 191 But, I haven't gone into these other inducements to settlement and I'll see what he says about them. That's certainly a thing to explore. I had just been looking at it as a money case because the pre-trial order didn't ask anything about the reinstatement. I assumed he was happy where he was. Did you have something to add? [The Paine lawyers were conversing privately.]

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

MA: No. In fact, he has told me that . . . he hasn't told me what finite limits on it are, but he has given me his evaluation of the case, which is below that figure. But that's not to say I can't goose him up a little bit. That's why we have the conference. 192

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189 Transcript of Drillco Pre-Trial Conference at 70.
190 Id.
191 This is a forty thousand dollar offer, in effect, thirty thousand for Paine and one-third on top of that for attorneys’ fees. The magistrate and lawyers had established earlier that the lawyers would take one-third of the recovery for their fee. The Paine lawyers did not hear this offer.
192 Id. at 70-71.
Tentatively and equivocally, the magistrate told the Paine lawyers that they had a deal if they wanted it. His equivocation was understandable. The lawyers had bargained aggressively until then and if their latest representations about non-monetary compensation were not trustworthy he wanted to be free to back away from his offer without seeming to contradict himself. But if the representations were trustworthy and Paine genuinely valued future employment more than money, there was an obvious middle-ground solution to the case. Each side would concede in the currency it valued least. Paine would take less money and Drillco would reinstate him, or help him find future employment (or perhaps both). By agreeing to explore non-monetary terms with the Drillco lawyer, or as the magistrate put it, “goose him up a little,” the magistrate, in effect, indicated to the Paine lawyers that their strategy of expanding the bargaining pie to include reinstatement had worked.

The lawyers’ success seems attributable mostly to the fact that they outlasted the magistrate. He had rejected reinstatement several times earlier in the caucus and appeared to be sincere. Yet, the principal basis for his rejection, that reinstatement was not included within the pre-trial order, was unconvincing; it did not explain why the remedy was a bad idea in and of itself, or why it would not work here. He probably rejected the demand because he was surprised by it and did not know what he thought about it, or because he did not want to complicate the bargaining process by introducing a major, new item this late in the game. Whatever his true motives, however, the Paine lawyers’ refusal to bargain against themselves by giving in to the magistrate’s non-substantive objections was the correct bargaining move. By pressing the argument for reinstatement in the face of the magistrate’s resistance, even to the point of stubbornness, they risked antagonizing him to be sure, but they also gave themselves the chance to learn that he was bluffing and that eventually he would concede the point. And the

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193 Only someone with a well developed sense of irony would describe this as a “problem-solving” solution. Discussion during this part of the conference resembled a head-butting contest more than a joint venture and the final resolution was based on an even split of a strategically distorted bargaining range more than the discovery of a natural middle ground between complementary interests. The introduction of the reinstatement option into the bargaining mix does suggest, however, that even adversarial bargainers can create value and that this does not have to be done from a perspective of “both parties’ underlying interests and preferences.” See Robert H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 OHIO ST. J. ON DISP. RES. 235 (1993).

194 Id. at 71.

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

196 Put another way, the Paine lawyers won a contest of will with the magistrate over the issue of whether to add reinstatement to the conference agenda. Some commentators advise against getting into tests of will with other bargainers, suggesting that it looks stubborn, polarizes relationships and increases the risk of deadlock. See Menkel-Meadow, supra note 31; FISHER, URY & PATTON, supra note 6. But see White, Machiavelli, supra note 13, at (describing how contests of will are inevitable in bargaining), Nyerges, supra note 27, at 26 (“negotiation is . . . a contest of will.”). Yet, if the Paine lawyers had followed this advice they would have come out of the conference measurably poorer. Their success suggests that it is not whether one gets into contests of will, all advocacy is such a contest to some extent, but how one does it, that is critical. Arguing points of disagreement does not polarize as long as the focus is kept on the reasons for the disagreement and not the disagreement itself. Because bargainers sometimes bluff, and at other times are slow to understand, calling bluffs and repeating arguments are necessary parts of good advocacy practice. One must be courteous in doing this, of course, but the Paine lawyers show that it can be done.
latter is precisely what happened.197

The Paine lawyers recognized the importance of the magistrate’s agreement to explore reinstatement and reinforced it almost immediately, both in a familiar and not so familiar way. First, they pointed out that they had “some flexibility,” which the magistrate interpreted as a signal that they could accept his offer.198 He began to speak as if the deal had been made.

MA: If we put together a package that you and I and [the Drillco lawyer] all agree is pretty reasonable, I certainly would be willing to talk to Mr. Paine. I do this frequently to indicate that gee, here's something that the lawyers and especially in Title VII cases, because there's a lot of emotion involved and here's something that the lawyers feel is reasonably objective and you've got to take into account: a) that the plaintiffs who get big verdicts are really as rare as hen's teeth unless they are walked into the courtroom on a stretcher and b) that you've got the chance that you may get zip for your efforts.199

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

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

Smiling, the magistrate recognized the problem immediately.

MA: [Interrupting] Is that right?

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

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

PI: The company, obviously.

MA: There goes another five thousand bucks.201

Co-counsel intervened to soften the point.

P2: If they have another division, it might be feasible for him to have a new start,

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

198 Transcript of Drillco Pre-Trial Conference at 71.

199 Id. at 71-72.

200 Id. at 72.

201 Id.
even under the same company's auspices for example.\textsuperscript{202}

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

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

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

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

MA: So you're . . . the company would have to be willing to say, well this was \textit{all a big misunderstanding}.\textsuperscript{203}

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

P2: I think that's a fair construction indeed to put on facts. If one accepts Mr. Paine's statement that he indeed consulted with [his Venezuelan supervisor] and gained permission, it seems altogether possible to me that what we have here is a lot of mutual misunderstanding, compounded by hostile attitudes by [the company supervisor] towards Mr. Paine based on his race. And on that construction, it would be fairly easy to restore the status quo ante by putting him in a somewhat different setting, where his prior record would not come back to haunt him.\textsuperscript{204}

The caucus then came to a close.

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

P2: [Interrupting] It's outrageous.

MA: . . . over something like this and that fact is something that the jury may think was, if not discriminatory in terms of race, maybe enough to give him at least some sort of compromise verdict, which the company certainly doesn't want. It doesn't help their image. All right. Let me get him in here and we'll explore these other sort of non-monetary things.\textsuperscript{205}

\textsuperscript{202} Id.
\textsuperscript{203} Id. (emphasis added).
\textsuperscript{204} Transcript of Drillco Pre-Trial Conference at 72-73.
\textsuperscript{205} Id. at 73.
The conference itself was not over. The Drillco lawyer still had to approve the agreement before it could become final and there was much in it that would surprise and perhaps shock him. But the magistrate was committed to convincing him to sign off on the agreement, however, and to see how he did this we must go to the next caucus.

3) Second Caucus with the Drillco Lawyer

There was no tentativeness, equivocation, or sense of mixed purposes in the magistrate's second caucus with the Drillco lawyer. Using strategies numerous and varied, some even borrowed from the Paine lawyers, he worked single-mindedly to convince the lawyer to accept the “thirty-thousand dollar plus reinstatement” package. Unlike in the first caucus, where he deferred to the lawyer, this time he took control of the conversation and argued directly for his new view of the case’s value. His revised assessment of the evidence (in some instances opposite to what he had said earlier), predictions of what the trial judge would permit and interpretation of Title VII, all combined to make Drillco’s prospects look bleak. And when the Drillco lawyer resisted, the magistrate asserted the authority of his position, almost instructing the lawyer to settle. His arguments were long, didactic and forceful and when the lawyer appeared ready to respond in kind the magistrate interrupted him to prevent that from happening. The magistrate emphasized selected points, over and over, sometimes returning to them five or six times, until the lawyer finally acquiesced. It was an about face from twenty minutes earlier. While the substance of what the magistrate said was fairly aggressive, therefore, his manner was not. He spoke in a soft tone of voice, smiled frequently and was never belligerent or rude. By controlling just the content and structure of the conversation he relegated the lawyer's arguments to brief asides, interspersed throughout his own potentially never-ending sermons on why the settlement proposal ought to be accepted. He suffocated the Drillco lawyer rather than pummeled him, outlasted him rather than beat him up. His performance was an object lesson in the power of quiet, low-key, even cordial methods for controlling conversation, the power of earnestly talking an issue to death, if you will, rather than beating it into submission.

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

MA: I think I've given them a realistic assessment of the money involved in the case. I don't think they liked it, but I've given it to them anyway. It's up to them now. What I told them, as I frequently do if all of us come to some agreement as to where the case ought to settle, is that I'd be willing to talk with their client. Sometimes it takes that push from the objective viewpoint to say, “Gee, everybody including me, who has no ax to grind, thinks that this is a reasonable place to come down.” But, I'll tell you very frankly . . . I think in order to settle the case there's going to have to be something within a dollar range that's reasonable and here I'm taking a little liberty, because I think what's reasonable may be a little bit higher than what you've come up with, or what you've indicated, but not much. I think you could probably go with that. But I think in order for him to take that, perhaps the company . . . has the company considered reinstating him in another division or another capacity, cause apparently there's
nothing wrong with his work? Has that been considered?

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

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

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

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

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

MA: Well, I would too. But there may be a different standard of review in connection with it when it gets to the Circuit. But that's another whole kettle of fish. Our job is to keep it from getting to the Circuit. But, he may decide that gee, look, this guy . . ., really, canning him was so far beyond the pale of what his punishment, what his sin called for, if in fact he sort of embellished it a little bit. They could have deducted the airfare from his salary, they could have demoted him in rank, reassigned him, done a million other things. Why was he canned for this thing? You've got to admit that was awfully harsh.206

The Drillco lawyer knew he had reason to worry when the magistrate began with self-serving comments about how hard he had been on the Paine lawyers. He had forced them to be realistic about money, he said, (it is interesting that he restricted this assertion to money), and to look at the case from an objective point of view. He did not say that the lawyers had accepted Drilleo’s fifteen thousand dollar offer, however, as the Drillco lawyer might have expected given the magistrate’s earlier approval of it as “reasonable.” The magistrate’s definition of reasonable seemed to have changed. Now, what was reasonable “may be a little bit higher than what you [i.e., the Drillco lawyer] have come up with.”207 More money was not the only surprise, however, the magistrate also indicated that Drillco should reinstate Paine. Before the conference

206 Id. at 73-75.
207 Id. at 74.
the Drillco lawyer had said that he thought reinstatement might become an issue, but he was surprised to hear it raised for the first time this late in the game, after a tentative agreement had already been reached (or at least so he thought). A demand for reinstatement had not been pleaded and the issue was not listed on the pre-trial order, so either the magistrate had been holding back waiting to spring it on Drillco, or Paine’s lawyers had changed the magistrate’s view of the case. Either way, it was clear that the Drillco lawyer now had to scramble to save his deal and quickly, before the magistrate became hardened in his views.

The lawyer’s first response gave a clue as to how his efforts would founder. He challenged the proposal for reinstatement in the abstract, generic reinstatement so to speak and not the reinstatement of Paine in this particular case. This made his objection more academic and less personal than was needed to make it credible and as a result it also made it easier to dismiss. The Drillco lawyer’s response also was notable for what it did not say. If reinstatement was truly out of the question one would expect that his reaction would have been more immediate and decisive. He would not have had to think about it even for a short period of time, because there would have been nothing to think about. He would have known instantly that he couldn’t agree to reinstatement. But there was nothing spontaneous, reflexive, unequivocal, or even lively, about his rejection of reinstatement. His manner was lifeless, his voice flat and unanimated and his tone lacking in conviction. It was as if he was describing an objection to reinstatement rather than actually objecting to it; as if he did not truly care much one way or the other about whether Paine was reinstated. Given the situational forces pressing for reinstatement (that it was a preferred remedy under Title VII, that it made the calculation of Paine’s damages easier and that it was a middle-ground alternative between two zero-sum solutions), the absence of a strong objection particularized to Paine told the magistrate that the lawyer would accept reinstatement if pressed to do so and the magistrate already had decided to press him.

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

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208 He expressed this concern in an interview before the conference.
209 Id.
210 Id. at 72.
211 The decision by the Paine lawyers to save reinstatement for their caucus with the magistrate contributed to the Drillco lawyer’s predicament. If the topic had been broached in the full group meeting the Drillco lawyer would have been able to respond to it and probably would have done a better job than the magistrate in pointing out its weaknesses. The magistrate did not have all of the data needed to show the difficulties with reinstatement and also did not have the necessary predisposition to challenge the idea aggressively. When the Drillco lawyer first heard about reinstatement the magistrate was already committed to the idea, it was no longer an open question, and
The rest of the discussion had a familiar ring to it. The Drillco lawyer parried the magistrate's “harshness” argument with his “plaintiff lied” rebuttal, but this time the magistrate was not so quick to accept the claim. The argument, he said, was grounded on the testimony of a single Drillco employee who, in conducting an internal investigation of Paine’s discrimination complaint, concluded that Paine had lied about being authorized to make his Christmas trip back to the United States. But the magistrate now thought that bad blood between Paine and that employee might have caused the employee to reach that conclusion.

Interspersing offers with argument, he suggested that Paine be separated from the employee by being relocated to another facility. The Drillco lawyer tacitly supported the suggestion by acknowledging that “there was no complaint about [Paine’s] work.” The parties repeated the “harshness/liar” cycle one more time, as the Drillco lawyer’s lukewarm responses seemed to encourage the magistrate to persevere.

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

MA: Is that . . . that's adamant?

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

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

MA: Well, I mean, you know, I think, I get the feeling that if you were to come up with a payment of maybe twenty-five thousand, thirty thousand, something like that and reinstate Mr. Paine, you could settle the case. Now, I don't know that that's outside the ballpark in connection with what's reasonable. I don't see a dollar, you know in terms of the dollar value of a verdict . . . . I don't see this as a high dollar value case for settlement purposes. It's essentially your cost, plus something to get him to settle. But I do see, if the verdict goes against you, I see a judicially mandated reinstatement as a real possibility here, given the fact that his prior work record was . . . , as you know it's an equitable remedy, but I think the Supreme Court has said it's pretty well inescapable. But even if it were escapable, a) you've got a great big corporation, it's not like reinstatement in a ma-and-pa grocery store, with world-wide operations and nationwide operations in this

the lawyer had to make his objections with the deck stacked against him.

212 “Maybe the guy wasn’t lying.” Transcript of Drillco Pre-Trial Conference at 76.
213 “I mean, you know, that’s your man’s assessment of Mr. Paine’s credibility.” Id. at 75.
214 “Well . . . have you . . . listen, have you talked to management about the chance of reinstating him somewhere else?” Id.
215 Id. at 76.
216 Id. at 76-77.
217 “I’m not sure. . . that your position is really that terribly strong that he outright lied.” Id. at 77.
country. You've got a guy who didn't do anything wrong until he hit Venezuela and ran up against this crew down there. And a guy who worked his way up through the ranks of the company and perhaps ought to be given another opportunity. I think the judge would feel, as I feel frankly, that firing him on account of this was pretty doggone harsh. I don't think they have looked at it in terms of disparate discipline here either. Now it may very well be – I don't want to give them any ideas – but maybe one of the things they should have done is to see what's happened to other employees, namely white employees, who got caught doing something similar to this. Now, if they do that you're in big trouble too. If they convene the court . . . if they could find anything.218

The magistrate was now out of patience. This was his most forceful attempt to convince the Drillco lawyer that his client might lose and it represented a complete reversal from his earlier view that the evidence favored Drillco.219 But more than a prediction of loss at trial, the magistrate’s statement also was a tacit threat. While professing not to “want to give them any ideas,” in fact, he was saying that if the present offer was not taken he would suggest to the Paine lawyers that they consider amending their complaint to add a disparate impact claim and this, in turn, would increase Drillco’s exposure exponentially.220 In his own quiet, low-key way, the magistrate had begun to be somewhat heavy-handed.221

Seizing the moment, the magistrate asked for the fourth time in five minutes, “Can you explore with your personnel people the possibility of reinstating Paine in another division . . . and if you are concerned about it, it may be that he would agree to a reinstatement on a one or two year probationary kind of thing and you could work out an arbitration.”222 Whether convinced, intimidated, exhausted, or whatever, at this point the Drillco lawyer expressed an interest in reinstatement for the first time and began to ask about how it would be done.223 The magistrate jumped at the chance to discuss specifics, even to the extent of advancing proposals he had not raised yet with the Paine lawyers.224 Relocation, in particular, posed difficult issues under Drillco’s collective bargaining agreement with its union and a discussion of those difficulties would prove to be the Drillco lawyer’s last stand.

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

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218 Transcript of Drillco Pre-Trial Conference at 79-80.
219 See supra Part III.3.
220 “I don’t think that they have looked at it in terms of disparate discipline here either . . . . Now, if they do that you’re in big trouble too.” Transcript of Drillco Pre-Trial Conference at 80. The magistrate was being a little disingenuous here. He had raised the disparate impact point with the Paine lawyers in their caucus and they had indicated that they did not intend to pursue it.
221 I say heavy-handed because the magistrate knew the Paine lawyers did not intend to raise a disparate impact claim and the suggestion that they might was made for its threat rather than informational value.
222 Id. at 80.
223 “What kind of . . . at what level job is he looking for reinstatement?” Id. at 81.
224 “Well, I think he’d be looking for reinstatement at something close to his supervisory level that he was at here in the States, but not with the Venezuelan salary.” Id.
DA: Yeah, this can create problems for us because, as you know, we're union shop . . .

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

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

MA: So, he's white collar now?

DA: He was when he left.

MA: He was when he left.

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

MA: You mean from outside the shop.

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

MA: It's not a company wide CBA?

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

MA: Don't you ever have transfer of supervisors?

DA: Sure, but you have to explain why somebody's being transferred into a particular shop. We don't have that much of it.

MA: Well, how . . . you have to explain it to the local union. Can't you just say that it's a simply a personnel decision to . . . does the CBA expressly cover this? I don't think it does, does it?

DA: It covers it as far as people having the opportunity to bid on supervisory jobs. We have to have a bid posting. Now, we don't have to choose somebody from the bargaining unit, but as a practical matter, when you don't choose somebody from the bargaining unit you really have to make some explanations. And that's . . . you know, I suppose theoretically, you could shove it down to the union's throat, but you don't do that.

MA: Well, I think . . . that's . . . these are practical problems that I don't think are
insurmountable. I think the important thing is to . . . why don't we do this, I'll bring plaintiff's counsel in here and talk to them about it in a minute. Can you explore with management the possibility of reinstatement in some other supervisory position, plus a relatively modest cash payment?225

Unable to deny or disprove an argument based on a collective bargaining agreement he had not seen, the magistrate pushed the argument aside. Dismissing the lawyer’s concerns as “practical problems that I don't think are insurmountable,” he asked for a fifth time, “Can you explore with management the possibility of reinstatement in some other supervisory position, plus a relatively modest cash payment?”226 Two minutes of rambling, disjointed and off-topic conversation followed,227 which the magistrate ended by asking for the sixth and final time, “Can you see your way to recommending something like this?”228 For whatever reason, the logjam broke and the Drillco lawyer accepted the offer in a burst of euphemistic virtuosity.

DA: I can recommend something like . . . let me put it this way. I can explore something like this in a positive tone with my client, because frankly, it needs a lot of explanation. There are a lot of tentacles hanging out there, but if it can be done, I would certainly make an effort to make it happen, provided the money comes down right. Now, if it's going to cost us that and a ton of money too, it's not worth it.229

Like the magistrate, the Drillco lawyer first fought the reinstatement demand reflexively, probably because he was surprised by it and not sure what implications it had for the case as a whole, but he was not quite able to pull it off. His arguments were too predictable and too few, were presented with too little enthusiasm and were undercut by his recurring admission (tacit and explicit), that he had recommended reinstatement in the past and if pressed hard enough could do it again.230 With no force to his assertions and an air of resignation about him, it seemed only a matter of time before he would accede to the magistrate's demands. For his part, the magistrate seemed to recognize this and did what he could to hasten the inevitable, ignoring the lawyer’s half-hearted efforts to resist. In the end, both sides accepted reinstatement, not because it was the wisest course, it may or may not have been, but because there was more said for it than against it in the limited information available to the parties for their discussion of this issue.

A big inning is not a ball game, however, and there still were other issues to discuss. The parties had not discussed money, for example, and the Drillco lawyer might use this issue to save the deal by demanding that Paine accept less than the fifteen thousand dollars previously offered. This would have been a reasonable demand given that the fifteen thousand dollar offer included money for lost front pay and reinstatement would eliminate that loss. When he qualified his acceptance of reinstatement with the condition that “the money comes down right,” the Drillco

225 Id. at 81-82.
226 Transcript of Drillco Pre-Trial Conference at 82.
227 This was more “filler” argument. See supra note 189.
228 Transcript of Drillco Pre-Trial Conference at 83.
229 Id. at 83-84.
230 In fact, he seemed to invite the magistrate to help him do so by saying, “Now, if a federal judge shoves somebody down your throat, that’s another matter . . . that’s easier for somebody to swallow.” Id. at 76.
lawyer seemed to understand this point but, unfortunately, he did not act on it.\textsuperscript{231} The discussion of money was shorter than the discussion of reinstatement and considerably more one-sided. The magistrate began by re-stating his monetary offer.

\textbf{MA:} Well, I don't think it would cost you a ton of money. Let's say you could get him for like that and maybe thirty all-in, which would be cash to him plus . . . they've got about thirty-five hours in it and if you figure . . . they're talking about one hundred and twenty-five an hour. They're not . . . they're loathe, as I can understand, ethically, to negotiate the whole thing as a package. But you've got to look at it as a bottom line.\textsuperscript{232}

Not only had the money not “come down right,” it had gone up. At the end of the first caucus the magistrate seemingly had agreed that Paine’s case was worth fifteen to twenty thousand dollars, without reinstatement. Now that reinstatement had eliminated part of Paine’s damages it seemed only reasonable to expect that he would be satisfied with less money; but thirty thousand was twice fifteen, not less than it. The Drillco lawyer could have been shocked, perhaps even angry, at this chain of events; at a minimum, he should have been curious about whether he had heard the magistrate correctly. But instead, he reacted calmly, in the same low-key, non-agitated manner as when first told about reinstatement.\textsuperscript{233} His first expressed concern, in fact, was about whether attorney's fees could be negotiated together with the merits, not whether thirty thousand dollars was a reasonable figure. When he got around to discussing the thirty thousand dollars his objections were surprisingly restrained.

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

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

\textbf{DA:} No. But we were talking fifteen thousand.

\textbf{MA:} Well fifteen to twenty.

\textbf{DA:} Well, I was talking fifteen, you were talking twenty.

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

\textbf{DA:} Well, I always deal all-in. When I talk money, I talk all-in.

\textbf{MA:} But they’re real antsy. Now, I heard . . . now I didn't know this. They said that

\textsuperscript{231} Id. at 84.
\textsuperscript{232} Id.
\textsuperscript{233} He leaned back in his chair, pulled it several feet away from the table, folded his hands behind his head, stared at the ceiling and had a completely blank expression on his face. He appeared to be at a loss as to what to do.
there's some case that the Supreme Court has got about whether it is ethical or not for plaintiffs attorneys to negotiate in a case like this where they've got a statutory fee. Do you know anything about this?

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

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

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

MA: Right, right.

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

MA: All-in. You figure it out.

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

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

DA: Too much.

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

DA: Even more than paying mine.

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

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

For all of their frequency, the Drillco lawyer's objections reduced to the simple proposition that he did not want to pay thirty thousand dollars. Twice he said this (“that's getting

234 This statement was gruesomely prophetic.
235 Id. at 85-86.
awful rich,"236 “too much”237), but in neither instance did he give reasons for his objections and when he finally agreed to recommend twenty-five thousand he did not give a reason for stopping there either. In bargaining theory parlance, he shifted his approach at this point from “reasoned elaboration”238 to “positional bargaining.”239 Unlike the stereotype of the positional bargainer, however, he was not rude or belligerent and he did not present his position in take-it or leave-it language. Instead, he seemed to say, in code he was confident the magistrate would understand, that he had already gone far enough and that it was the magistrate’s responsibility to force the Paine lawyers to take the final step. In a sense, he was appealing to the magistrate to do him a favor, but the turn to appeal, as we have seen, is never a good sign,240 and here it would save only nickels and dimes, the last five thousand dollars of a settlement that already was too generous. Whether he won this point or lost it did not matter much. He had lost the war.

After a brief aside on whether to include attorney's fees in the final package, the magistrate accepted the twenty-five thousand dollar counter-offer and agreed to present it to Paine’s lawyers.

MA: That's it. All-in, I know. It's going to be a take-it or leave-it thing. And what we'd have to work out . . . again if it can't be worked out amicably, which I think it can be because they're decent people, I don't think they're sandbagging . . . that there would be a settlement with a reinstatement along with it on some reasonable basis. Alright, let me get them back in here.241

It is somewhat surprising that the Drillco lawyer agreed to this proposal. He believed that Paine had only a twenty-five percent chance of winning his claim on the merits and yet he agreed to pay all of Paine’s attorney’s fees, seventy-five percent of his lost Venezuelan income and all of his future income (by reinstating him). Paine would have had a difficult time improving on these terms at trial. Talented as the Drillco lawyer was, this was not an exemplary performance and his failure took several forms. He did not exploit, or perhaps even recognize, the magistrate's lack of conviction in asking for both reinstatement and money, for example, instead he played out his pre-negotiation plan of paying up to twenty-five thousand dollars even after the premises on which that plan was based had been discredited. He allowed the bargaining process to be compressed into a offer-offer-agreement format that did not provide time for numerous, small and grudging concessions. He edited his expectations of possible recovery downward during the course of the bargaining conversation itself rather than break off discussion to think about such an adjustment under less pressured circumstances.

236 Id. at 85.
237 Id. at 86.
238 See Melvin Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. REV. 637, 669 (1976) (“Reasoned elaboration is that ‘area of rational discourse . . . where men seek to trace out and articulate the implications of shared purposes . . . [that] serve as ‘premises’ or starting points.’” (quoting LON FULLER, THE FORMS AND LIMITS OF ADJUDICATION 269 (1959)).
239 See FISHER, URY & PATTON, supra note 6, and Menkel-Meadow, supra note 31, for the best discussions of “positional bargaining.”
240 See supra note 188 and accompanying text.
241 Transcript of Drillco Pre-Trial Conference at 87.
If there was a single, strategic move which dictated the outcome of the conference, however, it was the Paine lawyers’ introduction of the reinstatement demand. The Drillco lawyer seemed truly surprised by this demand,242 and even though he had anticipated it he was unable to generate objections quickly enough to fight it off, or shift gears quickly enough to recoup his losses when the discussion turned to money. Reinstatement put him permanently on the defensive, one step behind the magistrate for the remainder of their discussion and the magistrate, in turn, was one step behind the Paine lawyers. The Drillco lawyer never seemed to see how the case divided naturally into two parts, one of which (reinstatement) was Paine’s payoff and the other of which (money) was Drillco’s. Nor did he seem to realize that he needed to alter his low-key, candid, among-friends, bargaining approach once he realized that the Paine lawyers were not bargaining in the same way. His approach might have worked in another conference, with different participants, where bureaucratic processing was the norm, but a more animated and aggressive strategy was called for here. The conference was not over yet, however, since the Paine lawyers still had to agree to the proposed deal and while it was similar to the deal they already had approved, the chance to think about it might have given them second thoughts. It was with that concern that the magistrate met with the Paine lawyers for the second and final time.

4) Second Caucus with the Paine Lawyers

The second caucus with the Paine lawyers should have been the shortest and most agreeable of all of the magistrate’s meetings since the offer he brought back included almost everything the lawyers had asked for. Paine would be reinstated and thus would have no front-pay damages and he would be given almost all of his lost back pay, subject only to a deduction for attorneys’ fees. Yet, the meeting took twenty minutes and the discussion was contentious. The magistrate opened the discussion with a long, rambling statement describing the several obstacles he purportedly had overcome to obtain the Drillco lawyer’s assent (e.g., fitting the agreement within the terms of the company’s collective bargaining agreement, finding an acceptable location for Paine to be reinstated and devising a probationary reinstatement period), and at the end of that statement he revealed the Drillco lawyer’s counter offer. Upon hearing the counter offer, the Paine lawyers took a short break and when they returned to the caucus they went on the offensive.

The lawyers started in a somewhat half-hearted manner, making numerous points but not dwelling on any of them, about the inclusion of attorneys’ fees in the settlement package and the length of the probationary period. Their first serious objection was directed at the offer to pay Paine twenty-five thousand dollars for his past economic harm. They wanted at least thirty thousand dollars, they said, and couldn’t, “in good conscience,” recommend anything less.243 But they were boxed in by their own past omission. They had authorized a thirty thousand dollar offer, in effect, by failing, in the first caucus, to challenge the magistrate’s calculation of back

242 While he was aware of the issue, he did not expect it to be raised once it was omitted from the pre-trial order. It was as if he “breathed easily” thinking that a statute of limitations on the issue had passed. See John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693 (1974) (describing the interest protected by a statute of limitations as the right of the litigant on whose behalf the statute has run to “breathe easily”).

243 “I cannot, we cannot, in good conscience, see our way clear to recommend anything less than $30,000 to our client. We are ready to go back and recommend that.” Transcript of Drillco Pre-Trial Conference at 90.
pay damages and letting him go back to the Drillco lawyer thinking that thirty thousand dollars was enough. When he returned with a counter-offer of twenty-five, the difference between the two numbers was not large enough to make an objection believable. No one in that situation would risk the loss of reinstatement and most of Paine’s back pay for the chance to add another five thousand dollars to the pot, no matter what they said they would do. The amount of money involved was simply too small to deadlock over. The lawyers tried to convince the magistrate (and perhaps themselves) that they needed thirty thousand dollars, but it was a half-hearted effort and he refused to believe them and said as much.

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

The lawyers’ persistence might have been more successful had they picked up on the magistrate’s suggestion in their first caucus that Paine’s past damages were worth more than thirty thousand dollars. The magistrate had indicated at one point that he thought fifty thousand dollars was an upper limit, but the lawyers did not pin him down to that higher figure and it dropped out of the conversation. When the magistrate went back to the Drillco lawyer for the second time, therefore, he presented the dollar figure he thought would be easiest for the lawyer to accept and that was thirty thousand dollars. In bargaining parlance, the Paine lawyers failed to expand the monetary bargaining range to provide room for more than one round of concessions. If fifty thousand dollars was still a possibility when they met with the magistrate for the second time, the objection to thirty thousand would have been more credible. Twenty thousand dollars would have been worth fighting over. But five thousand dollars was not. Recognizing their position was untenable, the Paine lawyers continued to argue for it anyway, probably to make their ultimate acceptance of the Drillco counter offer appear grudging. If the magistrate thought he had to force the agreement on the lawyers he would be less likely to have second thoughts about whether it was fair, or be concerned that he had been out-bargained. After several rounds of somewhat perfunctory and stylized argument, therefore, the Paine lawyers agreed to recommend reinstatement and twenty-five thousand dollars “with some caveats.”

The parties reconvened as a group for a feisty memorialization of the agreement. Each side hedged its bets somewhat, expressing the view that if the remaining logistical issues (e.g., the length of Paine’s probationary period, the location of his new assignment and the like), could not be worked out then the deal was off. While each of the lawyers was disappointed with the outcome, the Drillco lawyer perhaps described the agreement best when, in responding to a Paine

244 In addition to the “good conscience” argument, they also argued that “We’re not talking attorneys’ fees in this package. We’ve taken that off the table,” and “I’m very loath to go back to my client and tell him that the turmoil and difficult times he has had . . . .” Id. at 92, 93.
245 Id. at 90.
246 The Paine lawyers appeared to be of different minds at the end stage of this caucus, with one bemoaning the difficulty of convincing the client to accept the offer and the other eager to “discuss the offer with the client.” At one point, the more aggressive of the two lawyers placed her hand on the hands of the more conciliatory one as if to ask the latter not to speak. Id. at 91.
247 Id. at 93.
The magistrate offered to mediate any lingering disagreements, expressed pleasure at having had the chance to work with each of the lawyers and the conference ended.

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

Unfortunately for the Drillco lawyer, the Paine lawyers redefined the bargaining range for the magistrate by introducing an unexpected non-monetary demand (reinstatement) with substantial monetary consequences, asking for “cash register” compensatory damages and (unknowingly) exploiting the magistrate’s private fear that the pre-trial order would be amended to add new claims. The lawyers’ arguments may have convinced the magistrate that these demands were serious and the risks real, though it is more likely that they simply surprised him with their novelty and force and he was unable to recover in time to put the arguments in proper perspective. As a consequence, he deferred to them more than was warranted. The arguments were more numerous, more elaborately developed, more fully grounded in the evidence and more emphatically made than his own and he simply may have decided to avoid them rather than fight. It would not be unusual for a person trained in law to defer (even if privately) to what appeared to be a superior case but if this is what happened it is important to recognize that this appearance of superiority was misleading. The Paine lawyers’ age discrimination argument, for example, which seemed to stymie the magistrate’s efforts to challenge the front pay demand for two hundred thousand dollars, was not self-evidently correct, the lawyers did not provide any knock-down reasons to support it and even if it was correct, it did not justify a two hundred thousand dollar demand. These and other such problems notwithstanding, the magistrate seemed

248 Id. at 94.
to accept the Paine lawyers’ argument as true249 and then argue the case (describing it as his own) to the Drillco lawyer. The Drillco lawyer, in turn, seemed equally unprepared or unwilling to contest the arguments, acceded to the magistrate’s pressure and gave the Paine lawyers almost everything they asked for. In short, the Paine lawyers changed the magistrate’s mind (or at least his behavior), the magistrate changed the Drillco lawyer’s mind (or at least his behavior), and Paine won big.250

While this may explain the sequence of events in the conference it does not say much about why the Paine lawyers’ strategy worked, whether it was an exemplary one, or whether other bargainers should try to emulate it. To answer these questions we first need to know more about whether the settlement was likely to be stable. If the Drillco lawyer later would try to set the agreement aside, for example, or negate its effects in some other way,251 because he was angry at being manipulated, deceived, or surprised, the strategy was not effective, the agreement’s favorable terms notwithstanding. When asked if he would have tried to upset the settlement, however, the Drillco lawyer said no, that while he was not happy with it, he did not

249 I do not mean to say that the age discrimination argument (and others like it) was wrong – it might have held up under scrutiny (though the Paine lawyers did not think it would), and it might not have – but just that it was never fully tested. The magistrate was not ready for it, avoided it and thus, in effect, conceded it. The argument had the kind of influence traditionally reserved for demonstrably correct arguments even though there was no reason to believe it was correct. This phenomenon of deferring to an argument based on its circumstantial properties is a pervasive feature of negotiation, and lawyer conversation generally. One might say that lawyers should never concede to arguments that are not fully examined and tested and no doubt that is correct as a matter of general principle, but it is not always possible to anticipate every argument another bargainer might make in negotiation, hard to admit that an argument comes as a surprise, and bad form to keep taking breaks to do more preparation. Sometimes one must go forward on general knowledge and gut reaction and unfamiliar arguments can be powerful in these circumstances, even when weak. See GARY GOODPASTOR, NEGOTIATION AND MEDIATION: A GUIDE TO NEGOTIATION AND NEGOTIATED DISPUTE RESOLUTION 123-35 (1997) (describing the non-rational aspects of negotiator decision-making, drawing on Herbert Simon’s conception of “bounded rationality” and Daniel Kahneman and Amos Tversky’s work on “heuristics and biases”); Richard Birke & Craig R. Fox, supra note 121, at (same); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics, 88 CALIF. L. REV. 1051, 1084-1109 (2000) (same). The age discrimination analogy was the most important surprise argument in this particular negotiation but with different parties and a different dynamic it easily could have been something else. Effective argument always exploits surprise to some extent and all negotiators are vulnerable to this move some of the time. Mnookin and his collaborators misunderstand this point, claiming that adversarial bargaining must be based on the assumption that “those negotiate[d] against will be less skillful, intelligent, or sophisticated” than oneself, that such bargaining inevitably involves “fishing for suckers.” See ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TELUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 321-22 (2000). The Drillco lawyer was one of the best lawyers in his field, a highly respected and skilled practitioner with over twenty years of experience in Title VII litigation, and yet he was not prepared to respond to some of the Paine lawyers’ arguments (nor was the equally experienced and skilled magistrate.) Even the best negotiators are not ready to handle every eventuality a bargaining conversation might produce. For a cute illustration of the opposite phenomenon, a “true” (in the sense of economically rational) argument that did not work because it also did not take psychological factors into account, see Steven Lubet, Notes on the Bedouin Horse Trader or, “Why Won’t the Market Clear, Daddy?” 74 TEX. L. REV. 1039 (1996).

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

251 They might retaliate against the Paine lawyers in the future, in unrelated negotiations, by being excessively demanding, deceitful, belligerent, and the like.
think the Paine lawyers breached any moral, social or legal limits in making their case. He blamed himself and the magistrate more than the Paine lawyers for the one-sided outcome. He resolved to bargain more aggressively with the lawyers should they meet again in the future, but he did not question the legitimacy of their success here. He was an aggressive bargainer himself, as most lawyers are, and at some level he may have had a grudging appreciation of the Paine lawyers’ performance. His “given you the ranch” comment at the end of the conference seemed to indicate that he knew what had happened.

Drillco itself also was likely to be satisfied with the settlement since its opinion would be based principally on information provided by its lawyer and he would describe the agreement as achieving all that was possible. He would emphasize how the magistrate took Paine’s side in pressing aggressively for reinstatement, how it would cost almost as much to try the case as to pay Paine’s damages, how Paine had always been a good employee and now would be an even better one after the unpleasantness of the lawsuit and how Paine’s personality clash with the supervisor in Venezuela was probably an isolated incident that would not be likely to recur when Paine rejoined the company stateside. The lawyer would not say much about how the parties arrived at the agreement’s particular terms because he did not understand fully how that happened himself. He was confused by the magistrate’s abrupt shift in allegiance, for example, and not sure whether he had been misled all along or whether the shift was the Paine lawyers doing. Having agreed to the deal, however, he would sell it to the client to keep the case

252 That they are repeat players in bargaining even when their clients are not, permits lawyers to develop such “reputational” solutions to hard bargaining. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 522-27 (1994). In fact, it is now common in the bargaining literature to base arguments for the superiority of the communitarian approach on the “reputational effects” of bargaining style, claiming that the tangible benefits of an adversarial style in particular negotiations invariably are outweighed by the long term costs of being known as an adversarial bargainer. See e.g., Catherine H. Tinsley, Kathleen O’Connor & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORG. BEH. & HUMAN DEC. PROC. 621, 642 (2002) (“Having a distributive reputation, whether deserved or not, hurts negotiators”). The allure of this argument might be explained by the fact that much of the social scientific study of bargaining is based on experiments using business and law school students as subjects and students have both a lower threshold for being offended and a stronger interest in paying-back than do experienced practitioners. See e.g., Rachlinksi, *supra* note 43 (describing the results of an experiment based on law student bargaining behavior). The argument also fails to consider the extent to which bargainers control the construction of their bargaining reputations and makes the all too common mistake of comparing an exemplar of one approach (communitarian bargaining) with a caricature of another (adversarial bargaining), finding the exemplar preferable. Adversarial bargainers usually are depicted as “stubborn,” “headstrong, arrogant, egotistical,” “irritating, quarrelsome [and] hostile” persons focused on winning rather than resolving disputes, see e.g., Schneider, *supra* note 21, at ; Murray, *supra* note 34, at 182 (adversarial bargainers choose strategies as if in military maneuvers), and as persons who make take it or leave it demands and refuse to compromise. See Menkel-Meadow, *supra* note 31, at ; Murray, *supra* note 34, at 183 (“opponent cannot dislodge or defeat [competitive bargainer’s] preparation by any means of persuasion based on the merits”). One ought to be thankful, I suppose, that there is no mention of their drooling, or of polishing their fangs and claws. The Paine lawyers’ behavior presents a more realistic picture of adversarial bargaining and shows how being substantively aggressive can be socially acceptable without leaving any of the bad aftertaste communitarians decry.

253 See discussion *supra* Part III.4.

254 Appiah’s discussion of the malleability of desire (under the rubric of “soul-making”) illustrates nicely how shapeless a party’s interest in outcome may be and how many different outcomes could be satisfying. See *APPIAH, supra* note 10, at 170-81. “[D]esires can be characterized with various degrees of abstraction, with no obvious stopping point.” *Id.* at 176.

255 For descriptions of how this is done, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990), and JOSEPH S. LOBENTHAL, *POWER AND THE PUT-ON: THE LAW IN AMERICA* (1971). It is now common in
closed on his docket, the magistrate happy and his reputation intact. Similar to the Paine lawyers’ strategy in the conference itself, first he would convince himself and then he would convince the client.256

Once Drillco approved the settlement the case would drop off the radar screen of both the lawyer and client. It was not an intrinsically noteworthy case in any conventional sense. The money involved was not large, the issues were not unique, the time and energy invested were not great and the bargaining conversation itself left no lingering personal grievances or wounds that the Drillco lawyer would feel the need to vindicate down the road.257 Unless Paine revived the case’s memory by getting into a similar brouhaha in the future, other controversies would come along to replace it on both parties’ schedules, they would forget about it and the dispute would be “resolved.” There might be lingering questions about whether the agreement was fair, particularly to Drillco, but these would be of interest only to someone with a rights-based conception of legal bargaining. Communitarian bargainers would be satisfied that the dispute was over.

We then come to the question of why the Paine lawyers’ strategy succeeded. Bargaining competitively can be counter productive, particularly when it crosses over into, or is interpreted as, being belligerent, rude, insensitive and the like and yet the Paine lawyers’ arguments caused the magistrate to change his mind and agree with their position rather than become angry and reject it. The key to their success seems to lie in the combination of attitudes and maneuvers that made their arguments persuasive even when probably incorrect and a little bit pushy. The lawyers deceived the magistrate as to their true intentions, motives and beliefs, for one thing, surprised and impressed him with questionable claims he did not anticipate and could not rebut on the spur of the moment, convinced him of their sincerity and intransigence and wore him down. Each of these qualities is a mainstream feature of positional or adversarial bargaining and the sort of quality that communitarian bargaining theory advises against.

the negotiation literature to discuss this process of “cooling out the client” in the language of “frame analysis,” see e.g., Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 SO. CAL. L. REV. 113 (1996) (“The attorney can control the client’s frame, thereby influencing settlement decisions in either direction.”), though the examples given usually present agent-principal problems more than framing ones. For additional perspectives on the lawyer-client decision-making process in bargaining, see Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior, 1999 ILL. L. REV. 43 (1999); Donald C. Langevoort & Robert K. Rasmussen, Skewing the Results: The Role of Lawyers in Transmitting Legal Rules, 5 SO. CAL. INTERDISC. L.J. 375 (1997).

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

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

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

The two hundred thousand dollar demand, for example. See discussion supra Part III.3. The magistrate made the common mistake of testing the reliability of the Paine lawyers’ statements by trying to determine whether they were sincere rather than plausible. It is possible for bargainers to convince themselves of the most god-awful things and then communicate those beliefs sincerely to others. This does not mean that they will act on the beliefs. For that to be true, the beliefs must be plausible. See Condlin, supra note 12, at 6-10 (describing the contextual factors that make interpreting the predictive value of bargainer communication difficult).

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

See Welsh, supra note 3, at 765 (“If a negotiator perceives that the other negotiator gave her sufficient opportunity to speak, tried to be open-minded in considering what she had to say, and treated her with respect, she is more likely to view the outcome of the negotiation as fair . . . ”).

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

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The Drillco lawyer, by contrast, was a good deal more forthcoming, less rigid and easier to read. While he never told the magistrate the most that Drillco would pay to settle, he gave numerous indications that he would increase his offer and his comments about how he assessed the case were considerably more candid than those of the Paine lawyers. His fifteen to twenty thousand dollar offer, for example, was very close to his true bottom line and he did not try to decrease it when the opportunity presented itself (after reinstatement was added to the agenda). He also acknowledged, more than once, implicitly as well as directly, that he could recommend reinstatement even though he had good arguments for not doing so, and reinstatement radically reconfigured the dispute in favor of Paine. His comments, unlike those of the Paine lawyers, could be taken at face value most of the time. In effect, he reciprocated the presumption of candor the magistrate accorded the lawyers, even as the Paine lawyers routinely exploited it.

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

The Paine lawyers also were able to engage the magistrate in lengthy discussions of individual arguments, even weak ones, in a manner that helped breathe life into the arguments and give them a greater degree of influence than was warranted. The magistrate was partly responsible for this. He was habitually courteous, according lawyers a presumption of good faith

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

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

264 There was little risk that, in retrospect, the magistrate would discover that the Paine lawyers had deceived him and, as a consequence, approach them with greater suspicion in the future. He would have no reason to reflect on the conference, for one thing, it was just one of dozens of conferences like it, all of which would fade quickly into obscurity as others took their place. But even if he wanted to reflect on it, he did not have access to information about the lawyers’ true beliefs and intentions that would indicate that he had been deceived. He would know only that the Paine lawyers were inventive and tenacious and that they came well prepared, but that would cause him to make few, if any, adjustments in his approach to them in the future. Only the lawyers’ above-ordinary level of enthusiasm and energy was something he could not have predicted and these qualities told him nothing about the extent to which their public representations deviated from their private thoughts. Bargaining aggressively, as long as it does not become personal, rarely offends other lawyers or judges in any lasting sense. They will blame the outcome on the situation, or the weakness of their case, more than on the other lawyer. Belligerent and rude bargaining carries such risks, but belligerent and rude behavior is easily avoided.
whether justified or not and deferring to them in the presentation of their cases. He would have
given the Paine lawyers a great deal of leeway no matter what they said, but the lawyers helped
themselves in this regard by presenting their arguments in ways that made them seem more
substantial than they were. They made many more individual arguments than the magistrate and
Drillco lawyer, for example, so many more, in fact, that the sheer number at times seemed to
overwhelm the magistrate and make it difficult for him to understand and evaluate them. The
lawyers also surprised the magistrate on several occasions with unexpected arguments based on
seemingly irrelevant case law, unusual perspectives on issues raised by the pre-trial order and
non-obvious but defensible expansions of issues raised by the order. They seemed to be one
argumentative frame of reference ahead of the magistrate much of the time.

These arguments were influential for several reasons. Almost invariably, they were
based on entitlement claims more than power or leverage (e.g., that Drillco should pay because it
would be cheaper to settle than to litigate),265 and thus avoided the antagonism that goes with
telling someone he must do what you say because you will punish him if he does not. The
lawyers also were careful not to resort to name-calling, ridicule and other types of ad hominem
tactics (e.g., describing the magistrate’s responses as silly, ridiculous, or the like), popular with
lawyers when listeners do not agree. They were unfailingly courteous and respectful, channeling
expressions of intensity and commitment into tone and demeanor more than language. They
gave the magistrate room to respond to their arguments, listened without interruption when he
did, and countered his points with substantive rejoinders, never dismissing them out of hand or
ridiculing them as not worthy of a response. They did not use long soliloquies to filibuster points
that were difficult for them, or otherwise try to prevent the magistrate from challenging their
views, nor did they deny weak points in their arguments by refusing to talk about them altogether
(though, in fairness, they also did not dwell on such points and tried to shift discussion away
from them as quickly as possible). They exhibited none of the defensiveness typically associated
with lawyers who are bluffing or posturing.

Perhaps the lawyers’ most powerful attribute, however, was their tenaciousness or ability
to persist in the face the magistrate’s seemingly sincere dismissal of their arguments and
rejection of their demands.266 More than once they refused to take no for an answer when the
magistrate seemingly rejected an argument out of hand. They assumed that the magistrate did

265 While the Paine lawyers’ entitlement claims were suspect, the fact that they were entitlement claims
made it more difficult for the magistrate to be offended by them, or dismiss them as not worthy of serious
consideration. The categories of entitlement and power break down at the margin, of course. Every well-reasoned
argument draws on psychological leverage for its force as much as on principles of logic and evidence. A listener
who cannot rebut a point often will concede it, for example, not solely because he believes the point to be true but
also because he does not want to take the chance of being embarrassed by a discussion of it that makes his ignorance
clear for all to see. See Condlin, supra note 7, at 69-79, for a discussion of the different characteristics of different
advocacy strategies and the risks in using each type. Threat-based bargaining, on the other hand, is one-dimensional
and unambiguously offensive.

266 This quality was particularly helpful to the lawyers’ novel but weak arguments. When the magistrate
dismissed these arguments peremptorily the lawyers continued to assert them in different forms rather than abandon
them as one might have expected. When the magistrate did not continue to rebut with the same insistence the
arguments began to look stronger, since even weak arguments can look good if unrebuted. Even if the arguments
did not convince, the fact that the Paine lawyers continued to assert them made the lawyers’ protestations appear to
be sincere and this meant that when the lawyers eventually abandoned the argument they would have to be given
something in return, since they were giving up something that, for all outward appearances, was real.
not understand and pressed their points again and again, sometimes in as many as five distinct
versions, until they either convinced him that the points had merit, weakened his conviction to
the contrary, increased his perception of the costs of beating back their claims, or exhausted
him.267 Equally important, they accompanied this argumentative persistence with signals of
open-mindedness and willingness to compromise that helped ameliorate the impression that they
were just being intransigent or stubborn. They kept the magistrate dangling on the end of a line,
in a sense, just short of the point where it would seem hopeless to continue the discussion and
avoided conceding points until it was absolutely necessary to do so.268 In short, through a
combination of substantive cleverness and forceful yet flexible demeanor they managed to be
confident without being arrogant, articulate without being glib and assertive without being
belligerent. They made it seem as if their case did not depend upon rhetorical tricks and as if
they were motivated by a commitment to client interests more than a desire to win. While their
relentless combativeness sometimes was annoying, it was a substantive kind of combativeness,
expressed in what was said rather than in how it was said and substantive combativeness is hard
to fault, at least on reflection, because it is just another form of sticking up for oneself.269

The Paine lawyers’ strategies had some of the outward features of communitarian
bargaining but the lawyers themselves were not problem-solvers in any ordinary sense of the
term. They were unfailingly polite and respectful, for sure, in a manner Williams would have
approved and argued from principle rather than power in the manner advised by Fisher and Ury,
but they also treated the conference as an exercise in self-interested maximizing. They were
deceptive, competitive, concerned almost exclusively with Paine’s interests and intent on coming
away from the conference with as much as they could get (and more than Drilco), more than
finding a mutually beneficial middle-ground solution. They were willing to exploit all of the
leverage available to them, including personal qualities of the magistrate unrelated to the

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

268 The lawyers were so good at this process of adversarial conversation that at times the magistrate even
finished their arguments for them, convincing himself of what they had to say. See discussion supra p. 203 and
accompanying text.

269 As one might expect, the Paine lawyers’ behavior often produces strong reactions in those who watch
the tape of the conference, and many describe the lawyers’ behavior in unflattering terms but this is a mistake. The
lawyers were not mean-spirited or obnoxious, all or even part of the time; they were just substantively aggressive.
They were not “sharpies” in Scott Peppet’s caricatured re-deployment of William Simon’s quaint term. See Peppet,
supra note 8, at 481-84. They were hard but fair bargainers, forceful but not overbearing, the kind of bargainers one
would hire to protect important interests one didn’t want compromised. Theirs was a kind of “on the merits”
aggressiveness, not one of personal force, an aggressiveness motivated by a sense of integrity and loyalty to the
client more than a sadistic desire to beat someone up or a megalomaniacal need to aggrandize oneself at the expense
of another. See Roger Fisher and Wayne H. Davis, Six Basic Interpersonal Skills for a Negotiator’s Repertoire, 3
Relationship”). Their claims appeared reasonable at the time (or the magistrate would not have given in to them),
and it was only in retrospect that some of the things they said seemed excessive. Lawyers don’t like bargaining with
such people, but they also don’t dismiss them as unreasonable or hold grudges against them after negotiations are
over either. Only mean-spirited strategies, those based on personal attack and those intended to threaten rather than
persuade, leave lingering grievances. There is a fine line between being substantively aggressive and mean-spirited,
of course, and many lawyers fail to walk it successfully, usually because their attitudes (rather than motor skills) are
all wrong. But being able to walk this line, as the Paine lawyers did, not avoiding it altogether, is the hallmark of
skillful bargaining.
substantive issues in the dispute, if that’s what it took to produce this result. They rejected strategic options on grounds of ineffectiveness but only infrequently on grounds of sociability. Beneath their outward appearance of reasoned elaboration lay an unvarnished desire to win and this took them outside the camp of communitarian bargaining.

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

Bargaining in this manner even benefits the system of informal dispute settlement itself in the sense that it encourages lawyers to base agreements on the outcomes of arguments over

270 The “age discrimination analogy” argument, for example, owed its success as much to the fact that it surprised the magistrate and caused him to back away from discussing it to avoid the embarrassment as it did to the fact that it was intrinsically convincing.

271 On the role of saintliness in negotiation, see Scott R. Peppet, Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining, 7 HARV. NEGOT. L. REV. 83 (2002). The emphasis here should be on the “possibility” of winning more than the adversary since in any given case most lawyers will not be as successful as the Paine lawyers were here. Some will, however, and all might, so it is not surprising that individual lawyers regularly would indulge in the assumption that they could win big by playing out a facsimile of the Paine lawyers’ strategy, expecting to revert to communitarian methods if a more competitive approach did not work. Some argue that bargainers can never go home again, that relationships once defined as competitive cannot be reformed as cooperative, but that will depend, as do almost all interactional issues, on what form the competitive behavior takes. Compare Morris, supra note 101, at (describing how bargainers commonly turn away from a fully cooperative tone toward more contentious tactics at the endgame stage of negotiation). Bargainers who are mean-spirited and nasty will not be able to revert convincingly to warm and cuddly social styles, but bargainers who are only assertive and forceful will be able to revert to cooperative ones. There is a principled inconsistency between the first two approaches that is missing between the second two.

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

273 See THE MARYLAND JUDICIAL TASK FORCE ON PROFESSIONALISM: REPORT AND RECOMMENDATIONS 41 (Hon. Lynne A. Battaglia, Chairperson, & Norman L. Smith, Reporter, November 10, 2003) (describing how “all participants [in the study] expressed [a concern for ] the lack of recognition of [their] accomplishment[s]”). The drive to achieve practice skill distinction can be seen as a response to the “quiet desperation” problem. See HENRY DAVID THOREAU, WALDEN, at ch. 1-A, ¶ 9 (Everyman’s Library 1993) (1854) (“The mass of men lead lives of quiet desperation.”). The development of the communitarian conception of bargaining itself might even be explained in this way, as an instance of legal academics searching for a theoretically distinctive niche in a world where all of the (overtly) adversarial variations are taken.
entitlement claims and this in turn makes these agreements more substantively legitimate. Legal dispute settlement must be normative as well as instrumental, legitimate as well as final. The legal system promises this and parties caught up in the system are entitled to it. Legal rights should mean the same thing however and wherever vindicated, whether a boardroom or a courtroom. As I argued several years ago:

[Persons who] use the legal system . . . are entitled to presume that their disputes will be resolved according to law. They may choose to waive this entitlement for non-legal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and this decision is not troublesome if it represents the free choice of one value over another, when both choices are known. But the selection of a negotiated outcome over an adjudicated one, by itself, should not be seen as a waiver of this entitlement.274

In a reasonably just legal system, therefore, “the justice of negotiated outcomes exists, at a minimum, to the extent the parties’ competing legal claims are competently raised, debated and resolved.”275

Argument over legal rights of the sort prominent in the Drillco conference is one of the principal ways normative factors make their way into informal dispute settlement. Legal argument improves the legitimacy of bargained-for agreements by resolving the substantive conflicts at the base of most dispute-negotiation, and if conducted in the manner of the Drillco conference, does so without rupturing relationships or sending conversations off-track. A failure to resolve such conflicts subordinates the client interest in legitimate outcomes for the lawyer interest in cordial and predictable social relations, and often results in resentment, anger and a refusal to accept settlements as legitimate. Argument can produce conflict, of course, sometimes more readily than splitting differences or looking for shared interests, but conflict is not one of the circles of hell. It results in learning and growth as much as impasse and helps separate important considerations from unimportant ones in determining where to settle. The excesses of belligerence, rudeness and mean-spiritedness must be avoided, of course, but arguing over differences, even robustly, is a major part of what principled life is all about.

Communitarian bargaining theory seems to assume that lawyers and clients will put aside concerns of individual entitlement and systemic legitimacy for what are principally aesthetic reasons,276 but it is not clear why they would, or what evidence suggests that they ever have. Perhaps in an Hegelian spirit world, or one of Platonic forms, there would be no tendency to prefer one’s own projects (though it is not clear why they would then be one’s own projects) or to do the right thing, but bargaining does not operate (in fact, it wouldn’t be needed so far as one can tell) in a spirit world. The desire to do as well as possible is as much a feature of legal bargaining as it is of social life generally and as such, it is a feature that any viable theory of bargaining must recognize and take into account.277

274 Condlin, supra note 7, at 81-82. See also Wetlaufer, supra note 43 (discussing the role of substantive argument in bargaining).

275 Condlin, supra note 7, at 83.

276 Peppet, supra note 8, at 516, 531 (describing the motives behind communitarian bargaining reforms).

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

They operate on an unsophisticated, if not naïve, psychology that sees self-interested competition over scarce and valuable resources as an optional feature of social and political life. They should read more Madison, *The Federalist No. 51* (James Madison) (“If men were angels, no government would be necessary.”), or De Waal.

Francis de Waal, *Peacemaking Among Primates* 269-71 (1989) (describing how “human societies are structured by the interplay between antagonism and attraction [and how the] disappearance of the former is more than an unrealistic wish, it is a misguided one. . . . Aggression . . . cannot be fully understood without taking the biological component into account . . . [The] countermeasures [of forgiveness and reconciliation also] evolved along with aggressive behavior . . . [and] are a shared heritage of the primate order.”). Richard Nisbett’s remarkable book on the “geography of thought” shows how an individualistic and competitive view of bargaining has its greatest explanatory power for American (or Western) bargaining practice. See Richard Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently . . . And Why* 73-77 (2003). Summarizing decades of social science research, much of which he conducted himself, Nisbett shows how an individualistic focus on particular events in isolation from their context and a belief that one can know the rules governing such events and control the way the events unfold is a characteristic of Western culture. See also Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L. J. 29, 43-48 (1982) (describing this view as the American lawyer’s “standard philosophical map”). He contrasts this way of thinking with a broad, contextual view characteristic of Asian culture that sees events as highly complex and determined by interdependent factors requiring joint action. Cultural institutions are not fungible, however, and the fact that bargainers somewhere in the world could negotiate in a communitarian fashion is not evidence that American legal bargainers can as well. See David Luban, *Lawyers and Justice* 93-103 (1983) (describing the cultural barriers to transferring features of German dispute settlement to the American legal system). It is possible, of course, that Francis Fukuyama is correct (and Samuel Huntington wrong) when he claims that world economic and political systems are converging on the Western democratic and capitalist model. See Francis Fukuyama, *The End of History and the Last Man* (1993); but see Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1998). (Fukuyama recently seems to have backed away somewhat from this Hegelian vision. See Francis Fukuyama, *America at the Crossroads: Democracy, Power and the Neoconservative Legacy* (2006).) If this is true, and economic and political systems are converging in this way, then psychological and cultural characteristics of peoples will not be far behind and the adversarial bargaining model will be everyone’s preferred approach. It also is possible, however, that this convergence will be on a hybrid set of characteristics taken from both Eastern and Western cultures. See Nisbett, supra, at 225-29.

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

See Condlin, supra note 7, at 83-89 (describing the qualities of effective argument that can produce these surprise effects).
arguments need not be true to work. It is enough that they are too difficult to see through on short notice and give listeners doubts they did not have coming into the negotiation and doubt is leverage in negotiation. But surprise argument also can be an instrument of manipulation and deception and, like the Paine lawyers’ age discrimination argument, can be used to convince a bargainer to concede a point he or she does not need to. Communitarians disapprove of such argument for much the same reason practicing lawyers embrace it: it often works.

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

Finally, lawyers know that adversaries can be unprepared for negotiation, lack experience with the issues or procedures involved in a case, or not like the clients or positions they have been asked to defend. Successful bargainers notice these attitudes when they are present and exploit them. The Drillco lawyer, for example, was a highly skilled and experienced negotiator but he lacked the Paine lawyers’ enthusiasm for the task at hand (as did the magistrate), and the Paine lawyers used this lack of commitment to their advantage. Their success, in part, was an illustration of the familiar sports maxim that whoever “wants it more,” often gets it. These and other such strategies work just as well against problem-solving bargainers as competitive ones, perhaps even better. In using such strategies bargainers must keep their true purposes hidden, of course, but this usually can be done by avoiding rudeness and belligerence and by supporting demands with reasons and arguments. A bargaining approach is known best by its definition of success (maximize, split the difference, or satisfice), however, not its social style or tactical choices and the Paine lawyers’ behavior is a case study in bargaining competitively without appearing to.

Conclusion

The last half of the twentieth century saw a series of withering and unrelenting criticisms of both the institutions and practices of the American adversary system.280 Philosophers objected
to the system’s crude empirical assumptions (about finding truth), its armchair psychologizing (about motivating lawyers and preventing decision-maker bias), and its propensity to dehumanize lawyer social relations. Judges criticized it for its tendency to “beat every plowshare into a sword,” and legal academics found it inefficient, error-prone and wasteful in comparison with civil law and inquisitorial alternatives. Cultural critics also weighed in, suggesting that lawyer adversary behavior was a retrograde social phenomenon responsible for the decline in American civility and productivity generally. With such an across the board consensus that lawyers and legal institutions had become too antagonistic and antagonizing it was only a matter of time before a more caring and nurturing pretender to the dispute settlement


282 Luban, supra note 278, at 68-74. Luban, supra note 282, at 93-97. For an illustration of the Bar’s “armchair psychologizing,” see Lon Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1160 (1958) (“Any arbiter who attempts to decide a dispute without the aid of partisan advocacy . . . must undertake not only the role of judge, but also that of representative for both litigants. . . . The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.”). But see David Luban, Rediscovering Fuller’s Legal Ethics, 11 Geo. J. Legal Ethics 801, 822 (1988) (describing how the Fuller-Randall argument “begs the question”).


284 Marvin Frankel, Partisan Justice 18 (1980).

285 John Langbein, Comparative Criminal Procedure: Germany (1977); John Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985); John Merryman, The Civil Law Tradition 139 (1969) (“For those who are concerned about the relative justice of the two systems, a statement made by an eminent scholar after long and careful study is instructive: he said that if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. This is, in effect, a judgment that criminal proceedings in the civil law world are more likely to distinguish accurately between the guilty and the innocent.”). Langbein’s arguments did not pass without objection. See Ronald J. Allen et al., The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, 82 Nw. U. L. Rev. 705 (1988); Samuel R. Gross, The American Advantage: The Value of Inefficient Litigation, 85 Mich. L. Rev. 734 (1987). Deborah Rhode has an excellent summary of the criticisms of the adversary system and citations to most of the relevant literature. Deborah L. Rhode, Frivolous Litigation and Civil Justice Reform: Miscesting the Problem, Recasting the Solution, 54 Duke L.J. 447, 450-59 (2004).

throne would emerge. That pretender, now known by the collective rubric of alternative dispute resolution, or ADR, has become a many-headed monster of its own, with manifestations in all aspects of legal and social life, but the area in which it has had perhaps the greatest influence is in the academic scholarship on legal bargaining.

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

It is more than a little ironic that a communitarian perspective on bargaining would come to view the world in such either-or (one might even say competitive) terms. The reflexive tendency to dichotomize was one of communitarian theory’s principal objections to adversarial bargaining. Communitarian bargainers were supposed to reject bipolar conceptions of options, see connections where others saw divisions and synthesize hybrid resolutions out of stand-alone alternatives. It was not thought very communitarian, in other words, to see the world as “us” versus “them,” but that seems to be what has happened in communitarian theory’s attempt to separate itself from the world of adversary advocacy. Obviously, this will not do. To be taken seriously by lawyers and ultimately even by academics, communitarian bargaining theory must make room for and incorporate the sort of adversarial maneuvering the Paine lawyers used so

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287 See SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING (2d ed. 2005); ALTERNATIVE DISPUTE RESOLUTION (Michael Freeman ed., 1995). At the University of Oregon School of Law the A stands for “Appropriate,” as in Appropriate Dispute Resolution, though it is not clear whether appropriate modifies dispute, or resolution, or both. See University of Oregon School of Law, Appropriate Dispute Resolution Center, http://www.law.uoregon.edu/org/adr/ (last visited Nov. 7, 2005).
288 The Wiggins and Lowry anthology is the best collection of such pieces and the collection is now quite large. See WIGGINS & LOWRY, supra note 4.
289 Professor Menkel-Meadow’s UCLA article is a good example. It was one of the first major ADR articles in the legal academic literature and at least two-thirds of it is a critique of adversary practices rather than a description of communitarian alternatives. Menkel-Meadow, supra note 31.
290 WILLIAMS, LEGAL NEGOTIATION, supra note 19.
291 See FISHER, URY & PATTON, supra note 6.
292 Peppet, supra note 8, at 517 (“The Problem Solving Critique has been too sweeping in its condemnation of the standard conception of lawyer [bargaining] role”).
293 See Menkel-Meadow, supra note 9, at 348 (arguing for the superiority of the “new institutions [and] more ad hoc processes” of communitarian theory over the outdated “older conceptions and institutions of dualisms and binary thinking” associated with adversarial bargaining theory).
effectively in the Drillco pre-trial conference. It must explain how deception, aggressive argument and self-interested trading fit within a complete conception of bargaining behavior and concern itself more with the issue of how to keep such maneuvering in check than with how to eliminate it altogether. All bargaining, even its communitarian form, is a lying game to some extent, and one in which adversarial behavior plays an inevitable role. To pretend otherwise is to deny reality, actual and imagined. It is a little like trying to convince a runner not to drink before a road race on the theory that a dehydrated person can run as far as hydrated one and will be able to do so faster because he does not have to carry all that extra fluid. Advice of this sort always will be a bystander in the world of real life bargaining (and running).

294 There is an immense body of literature discussing the appropriateness of deception in bargaining, much of it thoughtful and sophisticated and much of it hand-wringing. For one of the best examples of the former, see Gerald R. Wetlaufer, The Ethics of Lying in Negotiation, 75 IOWA L. REV. 1219 (1990). I think of the appropriate limits on deception in roughly the same way as does the ABA in its Model Rules of Professional Conduct. Under the Model Rules, for example, lawyers may not make up evidence (i.e., “false statements of material fact”), but they may convey false levels of enthusiasm for particular arguments (i.e., “a party’s intentions as to an acceptable settlement), allow others to draw false inferences about what they will do (e.g., the magistrate’s fear that the Paine lawyers would seek to amend the pre-trial order), and make demands they think have only a small chance of being satisfied (e.g., one-hundred thousand dollars for Paine’s past economic harm). For different perspectives on the Model Rules’ restrictions on deception in bargaining, see Geoffrey C. Hazard, Jr., The Lawyer’s Obligation to be Trustworthy When Dealing With Opposing Parties, 33 SO. CAR. L. REV. 181 (1981); Gary Lowenthal, Truthful Bargaining by Lawyers, 2 GEO. J. LEGAL ETHICS 411 (1988); Robert Gordon, Comment: Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics, 18 J. OF LAW REFORM 503 (1985); Walter W. Steele, Jr., Deceptive Negotiating and High-Toned Morality, 39 VAND. L. REV. 1387 (1986); Geoffrey M. Peters, The Use of Lies in Negotiation, 48 OHIO ST. L. J. 1 (1987); Steven Hartwell, Understanding and Dealing With Deception in Legal Negotiation, 6 OHIO ST. J. ON DISPUTE RES. 171 (1991); James J. Alfini, Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1, 19 N. ILL. U.L. REV. 255 (1999). Scott Peppet would permit lawyers and clients to contract out of this system of rules and create their own private ethical norms. See Peppet, supra note 8, at 519-29.

295 See White, Machiavelli, supra note 13, at 928 (“On the one hand the negotiator must be fair and truthful: on the other hand he must mislead his opponent. Like the poker player . . . he must facilitate his opponent’s inaccurate assessment. The critical difference between . . . successful negotiators and those who are not lies in this capacity both to mislead and not be misled. . . . To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”). Cf. Nyerges, supra note 27, at 24 (“Negotiation is a fight.”). There is no way to prove this claim empirically, of course, short of examining all bargaining interactions for evidence of such behavior and that would be an impractical if not impossible task. The fact that proponents of communitarian bargaining use a full complement of adversarial tactics and maneuvers (e.g., selective disclosure, overstated beliefs, unsupported assertions, claims based on taste, and the like) in defending their views, however, can be taken as some evidence of the bipartisan appeal of adversarial bargaining methods. I will discuss these issues in a future article on the “polemics of communitarian bargaining.”