

# “Every Day and in Every Way We Are All Becoming *Meta* and *Meta*,”<sup>1</sup> or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)

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## I. Introduction

*Meta* argument<sup>2</sup> goes beyond the frame of reference of another person to a conversation to trump that person’s claims with those from an ostensibly more sophisticated point of view. A speaker paraphrases the other’s argument, usually in a slightly caricatured form, and then rejects the newly paraphrased argument as simplistic, beside the point, or incomplete, judged from the speaker’s more fully developed perspective.<sup>3</sup> Argument of this sort is properly thought of as *meta* because it attempts to reconfigure discussion from a “higher”<sup>4</sup> or overarching vantage point, one that takes more relevant data and ideas into account. It disposes of opposing contentions without

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<sup>1</sup> The original, “Every day and in every way I am becoming better and better,” comes from Émile Coué, a French pharmacist who in 1920, at his clinic in Nancy, introduced a method of psychotherapy characterized by frequent repetition of the above statement. This method of autosuggestion (or self-hypnosis) came to be known as Couéism. See ÉMILE COUÉ, SELF-MASTERY THROUGH CONSCIOUS AUTOSUGGESTION (1997). Hypnosis and suggestion had a long and venerable history in psychotherapeutic method prior to Freud. The Nancy School, for example, where Coué studied, dates back to the 1860s when it was founded by Ambroise-Auguste Liébeault. The version of the statement used in the title is commonly attributed to John Wisdom, a twentieth-century, British, ordinary-language philosopher and philosopher of the mind (not to be confused with John Minor Wisdom, a well-known former Fifth Circuit judge). See Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, in COLOR CLASS IDENTITY: THE NEW POLITICS OF RACE 11 (John Arthur & Amy Shapiro eds., 1996); Paul Greenberg, *How an Obscure Brown Concentration Trained Graduates to Crack the Codes of American Culture—and Infiltrated the Mainstream*, BOSTON GLOBE, May 16, 2004, at E2, available at [http://www.boston.com/news/globe/ideas/articles/2004/05/16/the\\_semio\\_grads?pg=full](http://www.boston.com/news/globe/ideas/articles/2004/05/16/the_semio_grads?pg=full) ; MetaTheatre, <http://instruct1.cit.cornell.edu/Courses/engl327/327.meta.html> (last visited Oct. 23, 2006). The argument for communitarian bargaining theory has many of the same hypnotic properties as Coué’s mantra and, also like the mantra, has customers who swear that it works.

<sup>2</sup> *Meta* argument is not to be confused with *meta* analysis, a quantitative method in social science for synthesizing entire bodies of research and identifying the variables that might have affected the research’s outcomes. See Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars* 5-6 (Syracuse U. Sch. of Law Working Paper Series 2006), available at <http://ssrn.com/abstract=910962> ; see also ROBERT ROSENTHAL, META-ANALYTIC PROCEDURES FOR SOCIAL SCIENCE RESEARCH (1991). The method is beginning to appear in legal bargaining scholarship. See Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597 (2006).

<sup>3</sup> See, e.g., ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 287 (2000) (“By naming the strategic problem created by . . . a question, you can sometimes dissuade the other side from pursuing an answer to it. And you show that you understand the strategic landscape and their motivation for asking. This can take the power out of such inquiries.”).

<sup>4</sup> See, e.g., STEVEN J. BRAMS & ALAN D. TAYLOR, THE WIN-WIN SOLUTION: GUARANTEEING FAIR SHARES TO EVERYBODY, at ix (1999) [hereinafter BRAMS & TAYLOR, WIN-WIN] (“Since the publication of . . . *Getting to Yes* . . . it has been widely recognized that there is a . . . ‘high ground’ . . . between winning and losing in negotiations.”).

responding to them directly, or as they were expressed originally, shifting the ground on which conversation is based to take it off in a slightly (and sometimes greatly) different direction. In the process, it tells another person something new about the nature of both his<sup>5</sup> own views and the subject about which those views make a claim, and implies that he should have thought about the subject from this more complete perspective before he spoke. It says, tacitly, “I understand this topic in more dimensions than you and because of that you should defer to me.” *Meta* argument has special force in the academy because academics do not like to be told that they have missed something. Not being aware of all of the ideas necessarily in play in a conversation is deflating for people who more frequently are enamored of conceptual sophistication than practical consequences. When told they “don’t get it” academics often clam up, even when they are not certain the charge is warranted, to avoid the perceived risk of intellectual embarrassment. To the extent this is a victory it is a pyrrhic one, of course, since in academic discourse silencing an adversary is almost as noteworthy as convincing him.

The communitarian<sup>6</sup> challenge to the adversarial<sup>7</sup> conception of legal dispute bargaining, perhaps the most important development in the legal bargaining literature in the last twenty years,<sup>8</sup> is, in its basic nature and in many of its specific manifestations, a form of *meta* argument.<sup>9</sup> It expands the frame of reference against which conceptions of bargaining are to be judged and shows how the adversarial conception falls short measured against this expanded frame of reference. Ironically, however, *meta* argument itself is an adversarial technique and in using it communitarians adopt an approach they profess to reject, emulating their adversarial counterparts more than providing an alternative to them. Communitarians also believe in openness, candor, respect, and

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<sup>5</sup> Substitute opposite-gender pronouns throughout the article wherever desired. I have randomized the selection process except where context did not permit.

<sup>6</sup> See Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Theory of Legal Dispute Bargaining* (U. Md. Sch. of Law Legal Stud. Res. Paper No. 2006-1, 2006), available at <http://ssrn.com/abstract=873468> [hereinafter Condlin, *Bargaining with a Hugger*] (describing communitarian bargaining); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 151 (2002) (describing frequently used synonyms for communitarian, including cooperative, problem-solving, integrative, value-creating, soft, principled, accommodating, and collaborative).

<sup>7</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 756 n.3 (1984) (describing adversarial bargaining). Frequently used synonyms for adversarial include positional, competitive, hard and distributive. I prefer adversarial because it has a longer history in legal scholarship and because it describes the essential nature of the bargaining style in question more accurately and evocatively. Positional is probably the most popular alternative but it is particularly inapt. It is not possible to converse at all without taking positions. Even the statement of an interest is simultaneously the statement of a “position” (i.e., “my position is that it is in my interest to . . .”). It’s probably not position-taking that communitarians object to but intractability, that is, the unreasonable refusal to reconsider and revise a position under any circumstances, and the term adversarial seems to capture this idea better. Professor Schneider provides additional detail on this vocabulary issue by comparing adversarial and communitarian methods against a set of descriptive adjectives, bipolar characteristics, and strategic goals. Schneider, *supra* note 6, at 162-85.

<sup>8</sup> See Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections*, NEGOTIATION J. 485-87 (2006) (describing how communitarian bargaining theory has “revolutionized how negotiation is taught in law schools”).

<sup>9</sup> BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at ix (describing communitarian theory as representing the “high ground” in the debate over competing conceptions of negotiation).

collaborative approaches to work relationships, and are against deception, dishonesty, belligerence, and exclusively self-interested behavior. Yet, many communitarian criticisms of adversarial bargaining are themselves gratuitously combative, disingenuous, exclusivist, and manipulative, both in tone and content, and they exploit ignorance and insecurity as often as they identify and correct analytical error. All too frequently, these arguments look like stealth strategies for competing successfully in a contest for academic stature and influence more than collaborative overtures to colleagues to work out problems of bargaining theory together. Surprisingly, communitarians often seem more interested in ruling the world of bargaining theory than simply improving it.

The communitarian use of adversarial methods, self-consciously or otherwise, is a strange phenomenon, a sort of behavioral violation of the principle of non-contradiction and its prominence in the bargaining literature should give one pause in judging the merits of the communitarian argument. A person's actions are often a better indicator than his talk of what he truly believes, of course, and when someone says one thing and does another one takes him literally at one's peril. Besides, if adversarial methods are needed to demonstrate the ineffectiveness of adversarial methods, one wonders whether the point has truly been made. In a limited sense, the scholarly debate over the relative merits of communitarian and adversarial conceptions of legal bargaining is a negotiation in its own right, with each side advancing arguments and making proposals in response to equivalent moves by the other side. Seen in this light, it is fair to say that communitarians often bargain in a manner more representative of their adversaries' alleged<sup>10</sup> views than their own. This makes the communitarian argument an example of "Do what I say, not what I do," advice, when "what I say" is ideologically and aesthetically derived.

I discuss the foregoing claims in the following manner. In the first part of Section II, I describe the communitarian critique of adversarial bargaining – that it is gratuitously belligerent, polarizes relationships, wastes resources, retards social development, and prevents settlements that might otherwise be achieved – and show how the manner in which this critique is expressed often exemplifies the very behaviors it seeks to criticize. I take the communitarian critique from articles reproduced in the principal texts used to teach bargaining in American law schools.<sup>11</sup> I limit discussion to these articles, all the work of highly regarded scholars, both because they present the best case for the communitarian method and because they are likely to have the greatest influence on law students' and lawyers' understanding of legal bargaining.

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<sup>10</sup> Communitarians claim that adversarial bargainers believe in such principles but, as subsequent discussion will show, many of these claims lack support.

<sup>11</sup> I have used CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* (2005); ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (3rd ed. 2002); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed. 2005); CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: PROCESSES FOR PROBLEM SOLVING* (2006); JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* (2006); and the new *Negotiator's Fieldbook* from the ABA Section on Dispute Resolution, *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter *NEGOTIATOR'S FIELDBOOK*].

In the second part of Section II, I describe the other side of the coin, the normative and empirical case for communitarian bargaining. I show how these arguments, perhaps even more so than their critical counterparts, employ sophisticated re-workings of familiar rhetorical tricks to make the communitarian case. It is as if, unknowingly, communitarians set out to refine adversarial methods rather than replace them, to develop more effective strategies for competing successfully in an adversarial world rather than reconstruct that world along communitarian lines. In a sense, they identified the enemy and it was they.<sup>12</sup>

## II. Is Communitarian Bargaining Theory Truly Communitarian?

By its own account, communitarian bargaining is nothing if not communal.<sup>13</sup> From its conception of the nature of legal disputing, to its definition of proper and effective bargaining technique, it looks at bargaining from the perspective of what is good for the social group rather than the single individual and from the time frame of a lifetime in bargaining rather than a single encounter. In a communitarian world the only good settlement is a lasting one, and for any single member of a group to succeed all must succeed. As a consequence, communitarian theory gives the highest priority to working in unison with others, creating hybrid strategies for solving common problems and pursuing shared objectives. In theory at least, it combines, incorporates, shares, and joins rather than divides, destroys, conceals and controls. It builds bridges rather than barriers. It is against competitive, secretive, deceptive, and manipulative behavior of any kind and in favor of openness, candor, generosity, respect, and kindness. It is the opposite of the adversarial or positional approach that dominates modern American legal bargaining practice, or at least that is what it says about itself.

Let us suppose for a moment that all of this is true. It would then seem fair to expect that a bargaining theory of this sort would follow its own principles consistently in all aspects of its existence, including the manner in which it engaged other bargaining theories in an attempt to understand and explain the nature of effective bargaining. If working jointly with others is the best way to settle differences generally, then presumably it also is the best way to settle differences in the lesser included case of bargaining theory. One would expect communitarian theory to reach out to adversarial theory, therefore, proposing to add to and build upon the best parts of the latter rather than to dismiss it out of hand. It would respect a conception of bargaining that had remained influential over several decades of bargaining practice and assume that such a view must have something to contribute to a unified theory of bargaining. It would see adversarial theory as a partner in the process of understanding and explaining bargaining

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<sup>12</sup> Apologies to Walt Kelly. See WALT KELLY, WE HAVE MET THE ENEMY AND HE IS US (1987). For the history of the expression, see Marilyn White, I Go Pogo, [http://www.igopogo.com/we\\_have\\_met.htm](http://www.igopogo.com/we_have_met.htm) (last visited Oct. 20, 2006).

<sup>13</sup> For a quick summary of the distinctive properties of communitarian bargaining, see Menkel-Meadow, *supra* note 7, at 491-92 (“Among the most important contributions of [communitarian theory] was the focus on ‘joint’ or ‘mutual,’ rather than individual, gain”). For a grandiose paraphrase, see *id.*, at 492 (communitarian theory “turned negotiation into a deontological Kantian project of treating all people as ends, not means, for mutual benefit, not self-interested Hobbesian coexistence.”).

generally, rather than as a competitor in a struggle for control of the bargaining theory universe. It would approach the scholarly enterprise in a collegial frame of mind, in other words, expecting to supplement and refine prevailing views rather than replace them, to be one more piece in the bargaining puzzle rather than the final word.<sup>14</sup>

It seems fair to ask, therefore, whether communitarian bargaining theory meets these standards. Does it blend with adversarial bargaining, for example, to create a new, hybrid alternative that is stronger than communitarian or adversarial theory standing alone, or instead, does it challenge adversarial theory to a kind of Wild West shootout, a winner take all gunfight in which the ultimate prize is exclusive control over the world of bargaining theory. Sadly, if the manner in which communitarian theory is presented in the scholarly literature is the best evidence, the answer is all too clear. Communitarian theory has opted to be the new fast gun in town, to knock off its long established elder and reconfigure the world of bargaining theory from the ground up.<sup>15</sup> This attitude is evident in two distinct parts of the communitarian literature. The first is its critique of adversarial bargaining and the caricatured and ungenerous description of the adversarial approach on which that critique is based, and the second is its statement of the normative and empirical case for communitarian bargaining and the misleading, disingenuous and manipulative ways in which it uses data and makes arguments to support that case. I will provide examples of each.

#### A. The (Non) Communitarian Indictment of Adversarial Bargaining

The communitarian indictment of adversarial bargaining is all-encompassing, rejecting adversarial technique in all of its manifestations, effective and not, along with adversarial bargaining's foundational commitment to the pursuit of individual self-interest. Communitarian theory is a total and exclusivist view. It treats the distilled lessons of decades of adversarial bargaining practice as misguided and speaks as if communitarian theory presents the first true understanding of effective legal bargaining. The earliest, most highly regarded and enthusiastic statement of this particular view is Professor Carrie Menkel-Meadow's important mid-1980s article *Toward a Theory of*

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<sup>14</sup> I do not suggest that it is necessarily unprincipled or contradictory for communitarians to fail to find good in everything. That is a question of metaphysics and this article is not about metaphysics. When views are indisputably wrong presumably communitarians are free to reject them out of hand just like anyone else. Moreover, if the views also are dangerous, communitarians should be free to use the full complement of rhetorical techniques, communitarian and otherwise, to suppress them. My point is simply that communitarian theory's confrontation with adversarial bargaining did not and does not present such a case. Adversarial methods have much to contribute to a unified theory of bargaining as even the *sub rosa* communitarian adoption of such methods described in this article shows. The two conceptions of bargaining have a common objective (the construction of a unified theory of bargaining), and distinctive contributions to make to the pursuit of that objective. The situation called and calls for communitarian behavior from all sides, even the communitarian one.

<sup>15</sup> Professor Menkel-Meadow may indirectly acknowledge this purpose of communitarian scholarship, even when she does not accept it as legitimate. See Menkel-Meadow, *supra* note 7, at 495 ("I sometimes wonder if [communitarian scholarship illustrating cognitive distortions in bargaining] gets in the way of using the simpler, if more positive, principles of 'principled negotiation.'").

*Problem Solving Bargaining*.<sup>16</sup> Not only was Professor Menkel-Meadow's article the first systematic statement of the theory of problem solving bargaining, it also was the first comprehensive indictment of the adversarial alternative,<sup>17</sup> and to this day it remains the article upon which most subsequent criticism of adversarial bargaining is grounded. It is the Bible of communitarian bargaining and its Ninety-Five Theses as well.<sup>18</sup>

Professor Menkel-Meadow reduced all types of adversarial bargaining to a single "unidimensional conception"<sup>19</sup> characterized principally by parties who "want[] as much as [they] can get,"<sup>20</sup> and who "focus[] on 'maximizing victory.'"<sup>21</sup> These characteristics determine both the way adversarial bargainers think bargaining should proceed and dictate the types of behaviors they use.<sup>22</sup> Adversarial bargaining, in this view, is a "stylized linear ritual of struggle," made up of "high first offers, leading to a compromise point along a linear field of pre-established 'commitment and resistance' points,"<sup>23</sup> often resulting in a "split-the-difference" resolution.<sup>24</sup> It proceeds by demand, threat and bluff

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<sup>16</sup> Menkel-Meadow, *supra* note 7. Menkel-Meadow's latest discussion of bargaining illustrates the extent to which communitarians have learned to express their inhospitality to adversarial methods in a more indirect manner. Now, rather than attack adversarial bargaining directly, Menkel-Meadow simply leaves it out of the bargaining universe. For example, in summarizing the twenty-five year old debate between adversarial and communitarian methods she neglects to mention the work of many of the most important proponents of adversarial (and communitarian) methods (Gary Bellow & Bea Moulton, Charles Craver, Harry Edwards, Donald Gifford, Dwight Golann, Cornelius Peck, Scott Peppett, Edward Sherman and many others). See Menkel-Meadow, *supra* note 7, *passim*. James White gets mentioned, of course, this time as someone who sees "the world as dark, competitive, and brutish." *Id.*, at 491. Professor White is a favorite whipping boy of communitarian commentators, see Condlin, *Bargaining With a Hugger*, *supra* note 5, at n.13, perhaps because he grounds his views in actual bargaining practice rather than idealized models.

<sup>17</sup> The widely-read first edition of *Getting to Yes* by Roger Fisher and William Ury predates Professor Menkel-Meadow's work by a few years but Fisher and Ury incorporated aspects of adversarial bargaining into their theory of principled bargaining; unlike Menkel-Meadow, they did not reject it completely. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981). For a discussion of the differences between the principled and problem solving bargaining, see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 39-41 (1992) [hereinafter Condlin, *Bargaining in the Dark*].

<sup>18</sup> *The Disputation of Dr. Martin Luther on the Power and Efficacy of Indulgences*, popularly known as Luther's Ninety-Five Theses, is the prototypical critique. A translation is available at the Project Wittenberg site. *Disputation of Dr. Martin Luther on the Power and Efficacy of Indulgences*, in 1 WORKS OF MARTIN LUTHER 29 (Adolph Spaeth et al. eds., & trans. 1915), available at <http://www.iclnet.org/pub/resources/text/wittenberg/luther/web/ninetyfive.html>. See Helmar Junghans, *Luther's Wittenberg*, in *THE CAMBRIDGE COMPANION TO MARTIN LUTHER* 20 (Donald K. McKim ed., Katharina Gustavs trans., 2003).

<sup>19</sup> Menkel-Meadow, *supra* note 7, at 767.

<sup>20</sup> Menkel-Meadow, *supra* note 7, at 765.

<sup>21</sup> Menkel-Meadow, *supra* note 7, at 764. I take it this means "maximizing the likelihood of being victorious." Menkel-Meadow explains that "'maximizing victory' includes two separate goals . . . to 'maximize the likelihood the client will prevail,' and the other is to maximize the amount the client receives upon prevailing." *Id.* at 764 n.33 (citation omitted).

<sup>22</sup> Menkel-Meadow, *supra* note 7, at 769.

<sup>23</sup> Menkel-Meadow, *supra* note 7, at 767.

<sup>24</sup> Menkel-Meadow, *supra* note 7, 770. "Linearity" is a recurring adjective in Menkel-Meadow's criticism of adversarial bargaining, though it is not exactly clear what she means by it. Perhaps she means to say that negotiation is a form of stylized dance to a middle, with both sides moving toward one another

and eschews reasoned analysis of substantive differences based on consensus background norms. Adversarial bargainers outlast, intimidate, and deceive foes into making ill-advised concessions and agreeing to unfavorable outcomes, rather than teach colleagues something new and true about the issues in dispute. Recast in terms of a popular communitarian metaphor, adversarial bargaining is a kind of pie-throwing contest in which each side throws and ducks in reverberating sequence until one or the other concedes, with the cleanest (or dirtiest, depending upon one's perspective) bargainer winning.<sup>25</sup> It is a process of all form and no substance,<sup>26</sup> a kind of alpha male head-butting, the embodiment of vestigial, atavistic impulses lingering in the gene pool from a more primitive developmental period.<sup>27</sup> Menkel-Meadow finds acceptance of this approach to be "remarkably uniform" throughout the legal bargaining literature,<sup>28</sup> and argues that while it might work in disputes over single issues it is "clearly insufficient when the issues in a negotiation are many and varied."<sup>29</sup>

This description is overdrawn, of course, perhaps to sharpen the contrast between adversarial bargaining and Professor Menkel-Meadow's problem-solving alternative. Whatever the motive, Professor Menkel-Meadow has constructed a straw man and not a picture of real life bargaining. When her description is compared to more sophisticated depictions of actual bargaining,<sup>30</sup> in fact, it becomes clear that her true bogeyman is incompetent bargaining, not adversarial bargaining. To support the claim that her description is representative, she cites to a somewhat infamous *Clearinghouse Review* article on hardball negotiation tactics for legal services lawyers and a tongue-in-cheek

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symmetrically and relentlessly and neither going off on side issues or unrelated topics, though it would possible to do this in a loop (or whatever) as much as a straight line.

<sup>25</sup> Think of an out-of-control job interview between a self-important law student and a posturing Biglaw associate, in which each person expresses fully and candidly what ordinarily would remain in the cartoon bubble over each's head.

<sup>26</sup> Interestingly, the problem-solving conception of bargaining Professor Menkel-Meadow would substitute for adversarial bargaining is a process rather than ends based conception as well. It just emphasizes different processes. See Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purpose of Legal Process*, 94 GEORGETOWN L. J. 553, 554 (2006) (describing the priority of "process pluralism" over "substantive commitments" in dispute settlement). Menkel-Meadow's substantive commitments are to "fairness, equality, reduction of human pain and suffering, care for all human beings, tolerance . . . peaceful coexistence wherever possible, and justice." This list captures the diffusiveness of her Chettel Lecture perfectly. In a somewhat thin rendering of the themes of Democracy and Distrust, the lecture reminds one of the architect who had ten ideas and put them all in the same house without developing any. Menkel-Meadow also uses the architect metaphor to describe the lecture, see id., at 553, but she gives it a somewhat more positive spin.

<sup>27</sup> The idea that adversarial bargainers are insufficiently socialized brutes appears in even the most recent communitarian literature. See e.g., Editors' Note, Catherine H. Tinsley, Jack J. Cambria & Andrea Kupfer Schneider, *Reputations in Negotiation*, in Andrea Kupfer Schneider & Christopher Honeyman (eds.), *THE NEGOTIATOR'S FIELDBOOK* 203 (2006) (describing adversarial bargainers as having "a formica plaque . . . [on their] desk[s] that says] 'Yea, when I walk through the Valley of the Shadow of Death I shall fear no evil, for I am the meanest son of a bitch in the Valley.'" Surely the formica part was unnecessary.).

<sup>28</sup> Menkel-Meadow, *supra* note 7, at 768.

<sup>29</sup> Menkel-Meadow, *supra* note 7, at 771.

<sup>30</sup> Compare Janet Alexander's description of settlement negotiation in Silicon Valley securities litigation Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

book on bargaining tips for *Playboy* readers.<sup>31</sup> Neither of these was an attempt to describe a conception of ordinary bargaining practice, and each qualified and restricted its recommendations in numerous, situation-specific ways. In fact, if caricatured adversarial maneuvering of the sort Professor Menkel-Meadow describes as typical dominates ordinary bargaining practice one wonders how so many lawyers could have been induced to buy into a system obviously not in their interest, and one that does not play to their strengths.<sup>32</sup> Perhaps all of that was just the exuberance of youth, however. Professor Menkel-Meadow expressed the above views over twenty years ago and many of us were more combative then.<sup>33</sup> While she has re-affirmed the criticisms over the years, she also has softened them somewhat and now seems willing to make room for bargaining maneuvers and techniques she once thought inappropriate.<sup>34</sup>

Not everyone has mellowed, of course, many express the original indictment of adversarial bargaining with all the same gusto as Professor Menkel-Meadow in her early years, sometimes even more so, and the trashing of adversarial bargaining remains one of the core rituals of Alternative Dispute Resolution scholarship.<sup>35</sup> For example, John Murray describes the adversarial approach as a kind of refusal to bargain, a process of presenting “an unbreachable defensive position” which an “opponent cannot dislodge or

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<sup>31</sup> See Menkel-Meadow, *supra* note 7, at 776 n.88 (citing MICHAEL MELTSNER & PHILIP G. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION ch. 13 (1974) (from which the article by Meltzner & Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973), was adapted); HERB COHEN, YOU CAN NEGOTIATE ANYTHING (1980)). The Cohen book was more clever than mean-spirited and the Meltzner and Schrag piece was more a defensive reaction to the use of hardball tactics against legal services clients than a suggestion to legal services lawyers that they engage in pre-emptive adversarial strikes. Professors Meltzner and Schrag are a particularly unlikely pair to make bogeymen for the communitarian case. They are among the select few in clinical legal education who have devoted their entire practice and academic lives to serving the poor and underrepresented. Unlike the new wave of communitarian commentators, however, they take concerns of practical politics into account in constructing their bargaining theory, not just idealized notions of optimal social behavior.

<sup>32</sup> To work, the style requires an intimidating presence, a bullying personality, a willingness to make demands without giving reasons, the capacity to lie face-to-face to another, and the like. Lawyers often are depicted in the popular culture as bullies, blusterers, liars and the like, but anyone who has ever taught in law school realizes that, on the whole, they are remarkably ordinary, with all of the mannerisms, values, foibles, anxieties, and limitations of people generally. Some are bullies, some are liars, some are boorish, and some are intimidating, to be sure, but that is true of the population at large. There are over a million lawyers in the country, however, and in social style most are indistinguishable from merchants, bureaucrats, and blue collar workers generally.

<sup>33</sup> See, e.g., Robert J. Condlin, “*Tastes Great, Less Filling: The Law School Clinic and Political Critique*,” 36 J. LEGAL EDUC. 45 (1986) (an exuberant criticism of the tacit authoritarian culture and ideology of clinical legal education).

<sup>34</sup> See Menkel-Meadow, *supra* note 25, at 555-556 (accepting the role of principled argument, preference trading, and passionate commitment in human problem solving); and at 565 (acknowledging that “conflict [can] be necessary for justice”).

<sup>35</sup> Even Professor Menkel-Meadow sometimes cannot resist the urge. In her recent *Chettel* lecture, where she goes out of her way to make inclusivist overtures to other approaches to bargaining, she caricatures adversary practices one more time, perhaps for old time’s sake. See e.g., *Id.*, at 573 (describing how communitarian “processes are intended to enhance public participation, create more enlightened citizens, and produce higher quality and more variegated, creative, and tailored solutions to modern complex problems than conventional on/off decisions produced by the conventional adversary system of trial, or unprincipled compromise in its shadow.”) (emphasis added)

defeat . . . by any means of persuasion based on the merits.”<sup>36</sup> Adversarial bargainers “coerce[e],” “deceiv[e],” and “manipulate[e]” opponents,<sup>37</sup> choose strategies based on what will yield the biggest gain no matter the cost, ignore concerns of “fairness, wisdom, durability, and efficiency,”<sup>38</sup> and consider the “needs/interests/attitudes of opponent[s] as not legitimate. . . .”<sup>39</sup> “Like a military general,”<sup>40</sup> they get “excited” about the prospect of achieving “victory over the opponent on the field of battle,”<sup>41</sup> and leave the task of “resolving the underlying disagreements between the parties . . . to others . . . [so that they can] savor the . . . challenge of the negotiation chase as if it were only a game, like baseball, chess or poker.”<sup>42</sup> Murray sees these comments as descriptive rather than judgmental, as presenting adversarial bargaining in its best light, and he reserves his “criticisms” for later in his discussion when he compares the adversarial approach to his particular understanding of “problem-solving” bargaining.<sup>43</sup>

In a similar fashion, Professors Mnookin, Peppet, and Tulumello (MP&T) criticize adversarial bargaining for its arrogance. In assuming that they always will be able to get better than average results, say MP&T, adversarial bargainers necessarily must think they are more “skillful, intelligent and sophisticated” than other bargainers; that for them bargaining is just a game of “fishing for suckers.”<sup>44</sup> The mistake in this argument, of course, is that it fails to recognize that bargaining is a learning experience as much as a

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<sup>36</sup> John S. Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOT. J. 179, 183 (1986).

<sup>37</sup> Murray, *Competing Theories*, *supra* note 36, at 183.

<sup>38</sup> Murray, *Competing Theories*, *supra* note 36, at 183.

<sup>39</sup> Murray, *Competing Theories*, *supra* note 36, at 182.

<sup>40</sup> Murray, *Competing Theories*, *supra* note 36, at 183. It’s not clear why Murray excludes Naval Officers from his metaphor.

<sup>41</sup> Murray, *Competing Theories*, *supra* note 36, at 183.

<sup>42</sup> Murray, *Competing Theories*, *supra* note 36, at 183. Murray has chosen an odd assortment of games to illustrate his “thrill of victory” point. Lulling one to sleep, rather than beating him into submission, comes more immediately to mind when one thinks of baseball and chess, and none of the games listed is associated with the kind of trash-talking animosities commonplace in football, soccer, boxing and other more physical sports.

<sup>43</sup> Given his emphasis on the strength of the parties’ substantive claims, Murray probably describes the “principled” bargaining method of Professors Fisher and Ury more than the “problem-solving” method of Professor Menkel-Meadow, but the differences between the two approaches often are not noticeable to a person without instruments. For a discussion of the differences, see Condlin, *Bargaining in the Dark*, *supra* note 17, at 39-41.

<sup>44</sup> ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 321-22 (2000) (“a competitive hard bargainer will achieve a better result for a client than a problem solver—if the other side is represented by ineffective counsel so eager to settle a dispute or make a deal that he simply offers concession after concession. . . . [P]roblem solving . . . probably gives up some opportunities to fish for suckers . . . [b]ut . . . how you see this cost . . . will depend upon how likely you believe it is that those you negotiate against will be less skilled, intelligent, or sophisticated than you are.”) Others agree that any attempt to bargain strategically must be based on “the assumption that the other side can be bullied, manipulated or deceived.” Menkel-Meadow, *supra* note 7, at 778; Murray, *Competing Theories*, *supra* note 36, at 184 (“The success of [adversarial bargaining] depends largely on an inequality in the relative level of negotiator competence, which is not a solid base for generating consistently good outcomes.”), though Murray may be of two minds on this issue, see, e.g., *id.* at 185 (suggesting that it is possible for a negotiator to have more “up-to-date knowledge” and “practical negotiating experience[]” than an adversary).

contest.<sup>45</sup> Even highly skilled bargainers change their minds about what cases are worth.<sup>46</sup> Not everyone starts with a complete understanding of the issues in controversy,<sup>47</sup> or access to all of the relevant data; not all unilaterally constructed arguments are dispositive; and not all party interests are clearly defined and rigidly held. It is reasonable for bargainers to assume, therefore, that they will be able to teach one another something during the course of the bargaining conversation.<sup>48</sup> In fact, this is a commonplace assumption in all serious conversation about differences. Take MP&T's "conversation" with their readers about the nature of effective bargaining. In charging adversarial bargainers with hubris, do not MP&T necessarily assume that they can convince adversarial bargainers to see things their (MP&T's) way? If so, why isn't the same explanation available to adversarial bargainers in defending their expectation of better-than-average results? Helping others learn is a social act, moreover, not an arrogant one, based on a trust in the others' ability to understand and grow from new information and experiences.<sup>49</sup> This is as true for adversarial bargainers as it is for MP&T.

### **[summary and transition paragraph still to come]**

#### B. The Normative and Empirical Case for Communitarian Bargaining

An adversarial rhetorical style also characterizes the empirical and normative case for communitarian bargaining. Rather than argue directly for the efficacy of communitarian methods based on evidence from actual bargaining practice, communitarians often turn instead to anecdote, parable, adventure story, and personal taste to support their claims.<sup>50</sup> When they provide empirical evidence it usually takes the form of responses to opinion surveys describing perceptions of bargaining rather than direct data about bargaining itself.<sup>51</sup> There are many variations on this strategy and I will describe the most common ones below.

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<sup>45</sup> See PHILLIP H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 81 (1979) (describing negotiation as a "cyclical process comprising the repetitive exchange of information between the parties, its assessment, and the resulting adjustments of expectations and preferences").

<sup>46</sup> Skillful bargainers concede for other reasons as well. A client may lack of adequate resources to prosecute the case, have a low tolerance for risk, or see better opportunities for gain elsewhere and, as a consequence, instruct the lawyer to settle the case on the adversary's terms.

<sup>47</sup> And as Steve Goodman sang, "a mind confused is sometimes altered." See Mike Smith, *Roving Cowboy (or, the Ballad of Dan Moody)*, in STEVE GOODMAN, *WORDS WE CAN DANCE TO* (Red Pajama Records 1976), lyrics available at <http://www.artistsofnote.com/michael/lyrics/danmoody.shtml>.

<sup>48</sup> Accord, Menkel-Meadow, *supra* note 25, at 574 n.87 (describing research experiments showing that "people actually do change their minds and educate each other" in deliberative discussions).

<sup>49</sup> "Your friends will tell you that they are sincere; your enemies are really so. Let your enemies' censure be like bitter medicine, to be used as a means of self-knowledge." ARTHUR SCHOPENHAUER, *Counsels and Maxims*, in *ESSAYS OF SCHOPENHAUER* 86 (T. Baily Saunders trans., N.D.) (1851).

<sup>50</sup> See e.g., Menkel-Meadow, *supra* note 25, at 559 (describing how the experience of non-adjudicatory decision-making during a Legal Process course in law school was "mesmerizing" in a way that "first-year, standard, Professor Kingsfield – One L experience" was not).

<sup>51</sup> Sometimes they simply report on personal experiences and ask the reader (implicitly) to take their word both for what happened and how it should be interpreted. See e.g., Menkel-Meadow, *supra* note 25, at 560 ("In the back of my legal services office was one woman lawyer, who, instead of bringing dramatic class action lawsuits, quietly cultivated relationships and negotiated good outcomes for clients.")

### 1) Jack Sprat hypotheticals

The first attempts to justify communitarian bargaining were based on the assumption that it is possible to satisfy the interests of all parties to a bargaining relationship equally, that bargaining is a positive and not zero sum game in which party interests inevitably are complementary and compatible. Bargainers simply have to be imaginative and clever, brainstorming together candidly, for mutually satisfactory solutions to emerge. To support this claim communitarians offer a series of what might be described as “paired in the voting” scenarios based on nursery rhyme like stories in which party objectives dovetail rather than conflict. Dividing an orange between two people, for example, is accomplished by giving one person pulp and the other peel;<sup>52</sup> a piece of cake is shared by giving one person icing and the other cake;<sup>53</sup> and a couple who individually prefer mountains and ocean are encouraged to vacation at a mountain resort next to the seashore.<sup>54</sup> These examples seem quaint in retrospect, notwithstanding that an occasional commentator still uses them, but at the time of the communitarian ascendance they were offered in all seriousness as proof of the advantages of communitarian bargaining.<sup>55</sup> Even then it seemed a little ironic that communitarians would define “empirical evidence” to include parables and fables, particularly given the communitarian critique of adversarial bargaining that it lacked a firm empirical grounding,<sup>56</sup> but communitarian argument is nothing if not inconsistent and it has always had difficulty separating personal taste from empirical fact.

Apart from the fact that they are self-serving, the biggest difficulty with nursery rhymes as data is that they do a poor job of representing the world of actual bargaining

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<sup>52</sup> This might have worked had Samuel Johnson been involved in the negotiation. Apparently Dr. Johnson preferred peel to pulp but for reasons that remain mysterious. See Frank Kermode, *Lives of Dr. Johnson*, N.Y. REV. OF BOOKS, June 22, 2006, at 28, 30 (describing how Johnson “collected bits of orange peel from the oranges he had presumably squeezed . . . [and] scraped and preserved the dried fragments [but] . . . refused to tell the inquisitive Boswell why he did so, thus frustrating the biographer’s legitimate passion for little ‘specimens’ . . . of Johnson’s character . . .”).

<sup>53</sup> Menkel-Meadow, *supra* note 7, at 771.

For more cake, see discussion at text accompanying notes 111-116, *infra*.

<sup>54</sup> Menkel-Meadow, *supra* note 7, at 799-800. Dean Pruitt suggests that if the couple is fortunate enough to have two weeks vacation they could divide it evenly, spending a week in the mountains and another at the seashore. See Dean G. Pruitt, *Achieving Integrative Agreements*, in *NEGOTIATING IN ORGANIZATIONS* 35, 36-44 (Max H. Bazerman & Roy J. Lewicki eds., 1983). Menkel-Meadow finds this resolution unsatisfying because of the transaction costs involved in moving from place to place and the fact that it will leave each party unhappy half of the time. Menkel-Meadow, *supra* note 7, at 799. “Everybody happy all of the time” seems to be a credo of communitarian bargaining. It reminds one of Lewis Carroll’s dodo. LEWIS CARROLL, *THE ANNOTATED ALICE* 49 (1960) (“*Everybody* has won, and *all* must have prizes.”).

<sup>55</sup> Legal scholars use the orange and cake illustrations with great facility but it takes a skilled social scientist to get both into the same data set. See e.g., Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 *AM. BEH. SCI.* 211, 220 (1985) (describing “two sisters [who] agreed to split [an] orange in half, allowing one sister to use her portion for juice and the other sister to use the peel of her half for cake,” as overlooking “the integrative agreement of giving one sister all the juice and the other sister all the peel.”). So far as I can tell, no one has yet combined orange, cake and a vacation to a mountain resort next to the seashore.

<sup>56</sup> Menkel-Meadow, *supra* note 7, at 766-67.

practice. Every now and then, I suppose, one is called upon to help members of the Sprat<sup>57</sup> family settle a dispute. Here, preferences are distributed idiosyncratically and the idiosyncrasies complement rather than compete with one another. But for the most part people raised in a common culture share tastes rather than divide them, and have similar hopes and expectations for bargaining outcomes rather than opposite ones.<sup>58</sup> Disputes of any complexity usually are not resolved by looking for something distinctive for each participant, therefore, since much of the time each participant will want more or less the same something. Even when interests are complementary, however, parties will want to bargain over items in dispute, not give them away. To do this they will need to compare the value of pulp to the value of peel, for example, to know how much of one to exchange

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<sup>57</sup> Jack Sprat could eat no fat,  
His wife could eat no lean,  
And so between them both, you see,  
They licked the platter clean.

MOTHER GOOSE TREASURY 14 (Raymond Briggs ed., 1966).

<sup>58</sup> See Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. (forthcoming 2007) (manuscript at 1), available at <http://ssrn.com/abstract=909518> [hereinafter Relis, *Consequences*] (empirical study based on medical malpractice case data challenging the premise that litigants and their attorneys understand litigation-track mediation in the same way and want the same things from it). See also Tamara Relis, “It’s Not About the Money!” *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. (forthcoming 2007) (manuscript at 1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909522) [hereinafter Relis, *Misconceptions*] (examining “why plaintiffs sue and what they seek from litigation”). Professor Relis revives the long-standing argument against the so-called dispute transformation phenomenon, the process through which lawyers reframe litigant objectives into “legally cognizable compartments suitable for processing in the legal system.” Relis, *Misconceptions*, *supra*, manuscript at 4. See also Menkel-Meadow, *supra* note 7, at 783 (describing how clients are intimidated by adversarial proceedings into depending on lawyers “to structure solutions that are ‘legal’ rather than what the client might desire if the client had free rein to determine objectives.”); Carrie Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, J. DISP. RES. 25, 31-33 (1985) (“Lawyers are said to exacerbate disputes by ... translating into limited legal categories what might have been broader and more general.”). Relis grounds her version of this familiar argument in interview data from lawyers and clients involved in malpractice litigation. Unfortunately, her discussion raises as many concerns as it addresses. She does not deal adequately with the so-called “cultural” objection to the dispute transformation critique, for example, that litigants often describe their goals in principled terms because principle has a higher cultural status than money (or, in terms of the familiar joke Professor Relis trades on in her title, “When someone says it’s not about the money, it’s about the money.”) She also does not consider the possibility that litigants may want non-monetary compensation (i.e., apologies, admissions of error, prevention of recurrences, and acknowledgment of harm) in addition to money rather than as a substitute for it. What happens, for example, after an apology has been made and the client still has to live with the costs of the harm? See Menkel-Meadow, *supra* note 7, at 772 (“the ‘concession’ of an apology from the other side may or may not reduce the amount of money to be negotiated as compensation for the other things.”). Relis does not discuss the principal reason defendants do not unilaterally apologize, that in doing so they make themselves more vulnerable to lawsuits for money damages. Some of her data involves wealthy parties for whom money was not a concern and she does not consider the possibility that such litigants are not representative of the litigant pool generally. She fails to consider the extent to which some litigant demands can never be satisfied by anyone or any system (e.g., that a loved one be brought back to life, a vital organ be restored, and the like) and any such effort is forever destined to be inadequate. And her argument for why the legal system should be required to provide all-encompassing relief (i.e., psychic and emotional as well as monetary) —that if it doesn’t, “many fundamental issues within disputes will not be addressed or resolved,” Relis, *Misconceptions*, *supra*, manuscript at 47-48,—begs the question of how different types of harm should be compensated by a social system. On balance, she does not seem to have advanced the case against the dispute transformation critique by all that much.

in return for how much of the other. There is no *a priori* reason to suppose that these items are equally valuable or that they should be traded on a one-for-one basis. Finding a common denominator for comparing items in dispute presents a new bargaining problem, however, and one for which there is no “pulp-peel” formula (short of hard bargaining) to resolve it. A belief in mutually exclusive bargaining outcomes, equally protective of each party’s interests, is usually an expression of hope that bargaining will not be necessary more than a program for bargaining successfully.

It is true that communitarians use these fanciful examples to illustrate the common-sense point that not all value systems are identical and that sometimes bargained-for items may be divided naturally to all the parties’ satisfaction.<sup>59</sup> Communitarians realize that most real negotiations do not involve oranges, of course, and that pulp-peel resolutions are not literally an option most of the time. And yet, having attracted the reader’s attention with these homespun examples, they rarely provide more realistic illustrations from actual bargaining practice to demonstrate the practical force of this common-sense insight. On the rare occasions when they do provide such illustrations, the illustrations are poorly analyzed and unconvincing. Professor Menkel-Meadow’s discussion of the *James* case, for example, probably the most popular of the early Legal Services Corporation case files used to teach negotiation in American law schools,<sup>60</sup> illustrates this point nicely. Finding complementary interests on which to resolve the case would have required Mrs. James, the defendant in a lawsuit on a consumer loan agreement, to remain in a relationship with an automobile dealer who, over a period of several months, had been unwilling or unable (either explanation was plausible) to provide her with a working car, causing her to lose her job, her peace of mind, and all of her discretionary (and non-discretionary) income. Expecting Mrs. James to trust the dealer finally to get things right was wildly unrealistic given this history, and letting her reduce her interests to money, take a cash settlement, and use the cash to purchase a working car from another dealer, was clearly the better course.<sup>61</sup> Yet, Professor Menkel-Meadow relegated this possibility to a single sentence, in a footnote, at the end of a three page discussion about the importance of the parties making a go of

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<sup>59</sup> Condlin, *Bargaining in the Dark*, *supra* note 17, at 44 n.122; Menkel-Meadow, *supra* note 7, at 787 n.123, 800 n.171 (describing the “Homans” principle: “[B]ecause people have different preferences or values it is possible to increase the number of outcomes in situations where several differentially valued items are at stake.”) (citing G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961)). The Homans’ principle can be overextended. Different parties to a negotiation may not attach the same value to each of the items in dispute, but it will be the rare case where an item valued by one person socialized in a particular culture will have no value whatsoever to another person socialized in the same culture. Even nerds like sports, just not to the same extent as jocks. If parties to a dispute value each of the items at stake to some extent, however, just not the same extent, then each item will have to be bargained over separately. None can be automatically traded for another.

<sup>60</sup> Menkel-Meadow, *supra* note 7, at 772-75 (citing *LEGAL SERVICES CORP., OFFICE OF PROGRAMS SUPPORT, VALLEY MARINE BANK V. TERRY JAMES* (1975)).

<sup>61</sup> HERBERT KRITZER, *LET’S MAKE A DEAL* 43 (1991) (In some cases where nonmonetary remedies are available lawyers and clients do not want them “because they do not want to have an ongoing relationship with someone who has forced them into court.”).

their relationship.<sup>62</sup> Communitarians sometimes can be pretty unilateral about the need to be bilateral.<sup>63</sup>

## 2) *Shell Games, Parables, and Fables*

In this category of communitarian scholarship, intellectual sleight of hand substitutes for analysis and evidence to make the communitarian case. Typically, a catchy story with a clever and non-obvious punch line is used to show how a seemingly intractable bargaining problem was made to give way in the face of imaginative, communal thinking, suggesting that all barriers to agreement can be overcome when bargainers stop thinking like adversaries and start thinking like colleagues. Collectively, these stories make up a set of bargaining parables, much like children's fairy tales, offering up folksy accounts of practical bargaining wisdom extracted from bargaining adventures. Like fairy tales generally, the stories are intended to produce epiphanies ("Of course, why didn't I think of that?") rather than skeptical analysis ("Why is that so?"), and also like fairy tales, they suffer when examined closely.<sup>64</sup> I will discuss the most popular example.

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<sup>62</sup> Menkel-Meadow, *supra* note 7, at 775 n.82 (acknowledging that "it is possible, of course, that the parties would prefer not to deal with each other . . .")

<sup>63</sup> This inclination to decide, unilaterally, what is in another's best interest, whether the other recognizes it or not, can extend into areas of authority arguably delegated to clients by the Lawyer Rules of Professional Conduct. *See, e.g.*, MNOOKIN, PEPPET & TULUMELLO, *supra* note 3, at 293 ("attorneys retain significant flexibility in defining the bounds of zealous representation [when] [t]he client's interest, conceived broadly, may be better served by a more constrained and reasoned approach to negotiation than by initiating a contest of wills or a war of attrition . . . even if the client insists upon it."). *Contra* Condlin, *Bargaining in the Dark*, *supra* note 16, at 70-78 (describing division of authority between lawyers and clients in making decisions about bargaining objectives and methods)

<sup>64</sup> Erin Ryan, *Building the Emotionally Learned Negotiator*, 22 NEGOTIATION J. 209, 216 (2006) (book review) ("The parable model, a time-honored method of negotiation pedagogy, is strained almost to the point of overuse, leaving the sophisticated reader craving a more straightforward presentation of argument and data.").

In his widely-read book *Getting Past No*,<sup>65</sup> William Ury re-tells the ancient<sup>66</sup> story of the Eighteen Camels.<sup>67</sup> A father died and left seventeen camels to his three sons. In a will, he bequeathed the camels as follows: he left half to his eldest son, a third to his middle son, and a ninth to his youngest son. When the sons tried to distribute their inheritance,<sup>68</sup> however, they could not do so because seventeen is not divisible into whole numbers by two, three and nine and the bequest was one of camels, not camel meat. Stymied, the sons had the good sense to consult the proverbial “wise old woman,” who,

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<sup>65</sup> For the most part I will refer to the revised, paperback edition of the book, WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (rev. ed. 1993) [hereinafter URY, (rev. ed.)]. Professor Ury published an earlier, hardcover edition under a slightly different title, WILLIAM R. URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991) [hereinafter URY, *DIFFICULT PEOPLE*], and while the content of his argument does not change much between the two editions, his organization of the discussion does.

<sup>66</sup> URY (rev. ed.), *supra* note 65, at 159. A Google search turns up dozens, if not hundreds, of versions of this story and its popularity seems to be growing. Recently, for example, the Chaplain of the Alaska Legislature used it to close a session of the State Senate. *See* Senate Journal, 24th Leg., 2d Sess. 2639 (Alaska, Mar. 31, 2006), *available at* [http://www.legis.state.ak.us/basis/get\\_single\\_journal.asp?session=24&date=20060331&beg\\_page=2639&end\\_page=2657&chamber=S&jrn=2647](http://www.legis.state.ak.us/basis/get_single_journal.asp?session=24&date=20060331&beg_page=2639&end_page=2657&chamber=S&jrn=2647). The origins of the story are somewhat unclear. At least one person suggests that it first appeared, in substance if not exact form, in the *Ahmes Papyrus* and was used to illustrate the nature of algebraic reasoning. *See, e.g.*, The Camel Problem, <http://members.fortunecity.com/jonhays/camel.htm> (last visited Nov. 6, 2006). The Ahmes, or A’h-mosé, or Rhind Papyrus (alternately named after the scribe who copied it from a now lost Egyptian Twelfth Dynasty text, or the Scottish Antiquarian who purchased it in 1858 and donated it to the British Museum, where most of it now resides), is an ancient Egyptian mathematical text written “in hieratic (cursive) script as opposed to the earlier form of hieroglyphic or pictorial script,” and probably dates from the end of the Middle Kingdom (2125-1648 BC). ELI MAOR, *TRIGONOMETRIC DELIGHTS 3-5* (2002). It claims to be a “Complete and thorough study of all things, insight into all that exists, knowledge of all secrets . . . ,” *id.* at 5 (quoting BAERTELL L. VAN DER WAERDEN, *SCIENCE AWAKENING 16* (Arnold Dresden trans., 1961)), but it probably is more accurately described “as a collection of exercises, substantially rhetorical in form,” used to train scribes and perhaps instruct students in mathematics. Don Allen, *The Ahmes Papyrus*, <http://www.math.tamu.edu/~don.allen/history/egypt/node3.html> (last visited Nov. 20, 2006); *see also* MAOR, *supra*, at 5. In the “algebra lesson” version of the story, a stranger riding a camel happens upon three young men who cannot figure out how to divide seventeen camels by the above percentages. The stranger realizes that the young men have the answer to their problem (17) but do not know to set up the unknown “x” so that the arithmetic will work out. To help them, he converts their three shares into unit fractions with the least common multiple and adds the fractions together. Because the least common multiple of 2, 6 and 9 is 18 ( $2 \times 9 = 18$ ), the stranger adds  $9/18 + 6/18 + 2/18$ , to come up with the sum of  $17/18$ . The problem, stated algebraically, then reads:  $(17/18)x = 17$ , or (dividing both sides by 17),  $x/18 = 1$ , or (multiplying both sides by 18),  $x = 18$ . The stranger then realizes that “x” must be made eighteen to solve the problem, so he adds his camel to the young men’s seventeen and the camels are easily apportioned. *See* The Camel Problem, *supra*. So understood, the solution is a variation of so-called conjugation or bypass strategies found in linear programming algebra, a method of solving an intractable problem by transforming it into a solvable one and then transforming the answer into the terms of the original problem. Bypass strategies reputedly were used to help thwart the Soviet blockade of Berlin during the Second World War and to influence President Truman to fire General Douglas MacArthur in the Korean War. *See* Two Algebras Involved in Momentous Events, <http://members.fortunecity.com/jonhays/linear.htm> (last visited Oct. 20, 2006).

<sup>67</sup> URY (rev. ed.), *supra* note 65, at 159.

<sup>68</sup> The process was complicated by the fact that camels are not fungible: some are young and some old, some healthy and some sick, some strong and some weak, some large and some small, and so on and so forth. For purposes of this discussion, however, I will assume that all camels are created (and remain) equal.

after “pondering” the problem for a short time, said “See what happens if you take *my* camel.”<sup>69</sup> With eighteen camels the distribution problem ostensibly was solved. The eldest son took his half share, which was nine, the middle son took his third share, which was six, and the youngest son took his ninth share, which was two, and because nine, six and two add up to seventeen, the sons had one camel left and were able to give it back to the wise old woman.<sup>70</sup> All then presumably live happily ever after, basking in the warm, roseate glow of a communitarian resolution.

Professor Ury does not suggest that the lesson of this story applies literally to legal bargaining, of course, since camels are not a common object of negotiation in the modern world, at least not in this country, and wise old women also may be in short supply. But he does suggest that the eighteenth camel story illustrates how communitarian thinking permits bargainers to reach agreements that at first seem impossible by encouraging them to think unconventionally, outside the camel box if you will, “step[ping] back from [a] negotiation [and] look[ing] at the problem from a fresh angle . . . .”<sup>71</sup> A truly close look at the wise old woman’s suggestion, however, shows that more than unconventional thinking is going on.

First, make the counterfactual assumption that live camels can be distributed in percentage as well as whole units. This assumption will be true most of the time in bargaining since most bargained-for items (e.g., property, goods, money, services), are divisible into sub-units, even if camels are not.<sup>72</sup> If we divide the camels according to the fractions expressed in the father’s will, therefore, the eldest son would receive 8.5 camels, the middle son 5.67 camels, and the youngest son 1.89 camels. When these numbers are compared with the distributions of nine, six and two produced by the wise old woman’s suggestion we find that each son receives a slightly reduced share (less in the way of camel essence, if you will) under the percentage system than under the woman’s system, but the reductions are not equal. The eldest son receives half (.50) a camel less under the percentage system than under the woman’s system, the middle son thirty-three hundredths (.33) of a camel less, and the youngest son eleven hundredths (.11) of a camel less. The eldest son does better under the woman’s system, therefore, than both the middle and youngest sons, and the middle son does better than the youngest. The wise old woman’s suggestion turns out to have distributional and not just problem-solving effects, and perhaps even a political component as well (“the rich get richer”). It does not so much effectuate the father’s bequest as change it, and most “neutral” communitarian bargaining techniques have similar effects.

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<sup>69</sup> URY (rev. ed.), *supra* note 65, at 159.

<sup>70</sup> URY (rev. ed.), *supra* note 65, at 159. It is not clear whether they gave back the same camel or an inferior one. It is doubtful that they gave the woman a better camel, sensitive as they were to protecting their property rights.

<sup>71</sup> URY (rev. ed.), *supra* note 65, at 159.

<sup>72</sup> Live camels might be divisible into sub-units if one thinks of them in terms of their use rather than their person (so to speak). The sons could own the camels in common, for example, and develop a time share system for using and caring for them, so that each son would have the right to take the camels for specified periods of time (calculated on the basis of his percentage ownership interest) and the corollary obligation to pay for a percentage of the cost of the camels’ room and board. This would have been a true problem-solving resolution to the sons’ problem.

The problem does not end there, of course. The reader will have noticed that the 8.5, 5.67, and 1.88 camels bequeathed under the father's will add up to sixteen camels, not seventeen, and that there is one camel left over. What is to be done with it? A first response might be to divide the remaining camel by the same percentages used to divide the first sixteen and add the results to those of the earlier division. But that also would leave a camel residue, so to speak, as would any subsequent such division *ad infinitum*. This residue will become very small in absolute terms, but it will never go away completely. The real problem, of course, is that the father did not bequeath his entire estate. One-half, one-third and one-ninth do not add up to one. The principal problem raised by the camel devise, it turns out, is not how to distribute the father's bequest but what to do with unbequeathed property—should it go to the state, to charitable causes, to the father's relatives in equal shares, used to pay the expenses of the estate's administration, left to wander aimlessly in the desert, or what? And who should make this decision—a court, the father's personal representative, the sons, the camels, or whom? The eighteenth camel story is based on a trick, in other words, rigged from the outset to make the obvious solution unworkable and an unconventional one seem necessary. In reality, the story is not about bargaining at all,<sup>73</sup> it is about a question of substantive property law, and Professor Ury not only ignores this question, he purports to answer it with a bargaining maneuver.

So the wise old woman missed the point; so what? Her trick was clever, presumably the sons walked away happy with the outcome, and the settlement was likely to be stable. Isn't that enough to justify using the story as proof of the case for communitarian bargaining? How, as a rhetorical move, in other words, does the story represent a communitarian turn to the adversarial side? The answer lies in the way the story attempts to deceive a reader about what's going on in the problem and to exploit the unselfconscious tendency to pay tribute to cleverness. Professor Ury has a point to make, that bargainers should not fixate stubbornly on conventional bargaining maneuvers when out-of-the-ordinary ones (in this case, temporarily expanding the bargaining pie) might have a better chance of producing an agreement, but he seems unwilling to subject that point to critical examination. At one level of abstraction (i.e., it is good for bargainers to be inventive), the point is not controversial, even adversarial bargainers would agree with it. But whether communitarian methods are more conducive to inventiveness than adversarial ones is a debatable question and needs to be examined.<sup>74</sup> Rather than support

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<sup>73</sup> It is an example of effective adversarial bargaining if the eldest son consciously exploited the old woman's suggestion to gain a disproportionately larger share than his brothers of the father's bequest. Communitarians really ought to stop using this story.

<sup>74</sup> Like bile in Sigizmund Krzhizhanovsky's anti-utopian short story "Yellow Coal," base sentiments sometimes are capable of producing noble results. See Sigizmund Krzhizhanovsky, *Yellow Coal*, in SIGIZMUND KRZHIZHANOVSKY, 7 STORIES 184, 188 (2006) ("My project is simple: I propose to use the energy of spite inhabiting countless individuals . . . [to] set our factories' flywheels spinning again"). Bargainers might be more inventive defending themselves in the give-and-take of an adversarial argument, for example, than in chatting amiably in a communal conversation. No doubt, defending oneself is less comfortable than chatting amiably (though it may be more exhilarating), but comfort and inventiveness are not the same thing, and what produces inventiveness is the question to be answered. Unfortunately, the eighteenth camel story assumes the question away. Professor Menkel Meadow also believes that communitarian bargainers are naturally more creative than adversarial ones and finds proof in the familiar

his point with evidence from actual bargaining practice, however, and leave it to the reader to evaluate the strength of the connection between communitarian methods and inventiveness, Professor Ury pulls a camel out of a hat,<sup>75</sup> so to speak, to deflect attention from that issue and cause a reader to think it has been resolved when it hasn't. The eighteenth camel trick ignores the father's true interests, collapses a substantive law issue into one of bargaining practice, and solves a different problem than the one presented by the story, all the while pretending to show the advantages of communitarian bargaining, and that is an adversarial way to argue.

It is possible, of course, that Professor Ury just missed the unbequeathed property issue, but if he did not,<sup>76</sup> it is hard to understand why he would offer the camel story as an illustration of the effectiveness of communitarian bargaining. Perhaps he wanted to remind everyone of the heuristic value of thinking unconventionally, in this case by expanding the bargaining pie. He emphasizes the importance of being unconventional throughout his book and sees creativity as a defining feature of his "Breakthrough" method of negotiation. Moreover, expanding the pie is a favorite communitarian maneuver, praised frequently in the literature over the years for its capacity to break impasse,<sup>77</sup> and Professor Ury simply may have called it to duty once more, this time to establish that "communitarians are the most creative bargainers." If the goal is to convince readers that disagreement is never truly intractable and that there is never a reason to resort to external normative standards to resolve a bargaining problem, then the eighteenth camel trick seems proof positive of that point. But being clever is not the same thing as being correct and the eighteenth camel maneuver is just clever. Professor Ury is not the first to conflate questions of substantive law with questions of bargaining technique. Communitarians as a group have always been somewhat hostile (or at least

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communitarian data-point of cake. See Menkel-Meadow, *supra* note 7, at 780-82 ("The principle that one should hide information about one's real preferences is based on unexplored assumptions of human behavior that negotiators are manipulative, competitive and adversarial. The danger of acting on such assumptions is that opportunities for better solutions may be lost (remember the chocolate cake!) . . ."). Cake does heavy argumentative duty for communitarians.

<sup>75</sup> See Alex Stein, *A Liberal Challenge to Behavioral Economics: The Case of Probability*, Cardozo Legal Studies Research Paper No. 180, *forthcoming* in NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 6 (Symposium on Behavioral Law & Economics' Challenge to the Classical Liberal Program), 2007 available at <http://ssrn.com/abstract=960306> (describing Behavioral Economics experiments as "conjurer's tricks").

<sup>76</sup> There is no indication in his discussion of the story of whether Professor Ury saw the unbequeathed property issue. He uses the story, along with two others, to summarize the benefits of "Breakthrough" negotiation and seems to assume that the eighteenth camel maneuver solved the sons' problem. This would indicate that he did not see the issue. On the other hand, Professor Ury is a smart man, the issue is not obscure, so it is hard to believe he did not see it.

<sup>77</sup> Menkel-Meadow, *supra* note 7, at 809-10 ("By expanding resources or the materiel available for division, more of the parties' total set of needs may be satisfied. Indeed, . . . parties come together . . . precisely because their joint action is likely to increase the wealth available to both. . . [and] . . . have the opportunity to help each other by looking for ways to expand what is available to them."). The maneuver also is discussed as a manifestation of the "fixed-pie bias." See Max H. Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in NEGOTIATING IN ORGANIZATIONS, *supra* note 54, at 51, 62-63; Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 98, 112 (1990) (referring to the problem as the "fixed-sum error").

indifferent), to the role of law in bargaining, turning to it only when all else fails, and they don't seem to feel any particular obligation to respect legal interests simply because they are legal interests,<sup>78</sup> perhaps because of their distrust of rights discourse generally. Offering evidence one knows to be false is the sort of move communitarians would be quick to condemn if used by others, however, and they cannot have it both ways.

### 3) *Triage (or War) Stories*

Proponents of communitarian bargaining also offer what might be described as triage stories to support the claim for communitarian methods but, as with the story of the eighteenth camel, the lessons from these stories often are of questionable relevance to ordinary bargaining practice and the manner in which the stories are told frequently is anything but communitarian. Triage stories are about bargaining in its most extreme and idiosyncratic form, conducted under “battlefield” conditions, with life and death hanging in the balance, an overlay of nearly unmanageable tension distorting the decision-making processes, and the parties’ backs against the wall. William Ury’s story of the “Hostage Negotiation,” also taken from *Getting Past No*,<sup>79</sup> is a good example of the genre. Not only does this story purport to extrapolate to bargaining generally from an exceptionally unusual bargaining event, but it does so using many of the adversarial techniques communitarians decry.

A convicted armed robber (Van Dyke), while having a cast removed at a hospital, seized a corrections officer’s gun, shot the officer, and took several hostages while trying to escape. During the ensuing stand-off Van Dyke threatened to kill individual hostages *seriatim* until he was allowed to go free. Over a period of nearly two days, a police negotiator (Louden), the protagonist in the story, with the help of a trusted (by Van Dyke) newspaper reporter, a local television station, and a state corrections commissioner, convinced Van Dyke to give up his escape attempt and release the hostages. During the ordeal, Van Dyke and Louden had several emotionally charged conversations about Van Dyke’s reasons for trying to escape<sup>80</sup> and his conditions for agreeing to surrender. Ultimately, Van Dyke released the hostages in exchange for press coverage of his grievances and a transfer to another (hopefully federal) prison. The fact that the police (in the person of Louden) “shot straight with [him]” also may have contributed to his decision.<sup>81</sup>

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<sup>78</sup> Menkel-Meadow, *supra* note 7, at 826 (when “the parties have widely divergent views . . . one of the primary advantages” of problem solving “is that no judgment need be made about whose argument is right or wrong); *id.* at 817 (“There is nothing in the problem-solving model which necessarily compels parties to consider the justness of their solutions . . .”). Professor Menkel-Meadow’s views on the role of legal rights may have evolved over the years, *see e.g.*, Menkel-Meadow, *supra* note 34.

<sup>79</sup> URY (rev. ed.), *supra* note 65, at 163-68.

<sup>80</sup> Van Dyke listed corruption and abuse in the state prison system, an exceptionally long sentence for armed robbery, a newspaper report that he informed on fellow inmates and guards—he admitted to informing on guards, but not inmates—and his fear that he would be killed if he was returned to state custody, as his reasons for trying to escape. URY (rev. ed.), *supra* note 65, at 165-67.

<sup>81</sup> Van Dyke was taken to a federal detention center upon surrendering, but it is not clear whether he was transferred permanently to a federal prison. *See* URY (rev. ed.), *supra* note 65, at 167 (correction officials would “try to arrange a transfer”), *id.* at 168 (Van Dyke won only “a public promise” to be transferred).

This particular variation of “Breakthrough Negotiation,” as Professor Ury calls his method,<sup>82</sup> was successful, according to Ury, because Loudon convinced Van Dyke that he (Louden) could be trusted. Five qualities of his behavior made this possible. First, he controlled his emotions and remained focused on his own objectives rather than Van Dyke’s erratic behavior. Ury describes this as “Going to the Balcony.” Second, he acknowledged the legitimacy of Van Dyke’s points and agreed with them whenever possible. Ury calls this “Stepping to His Side.” Third, he reframed Van Dyke’s demands rather than rejected them and turned them into problem-solving questions about the parties’ mutual interest. Ury calls this “Changing the Game by Changing the Frame.” Fourth, he “help[ed Van Dyke] save face and make the outcome appear to be a victory” by involving him in the process of fashioning a resolution. Ury calls this “Building a Golden Bridge.” And finally, he used “power . . . to [bring Van Dyke] to his senses, not his knees,”<sup>83</sup> making it “hard for him to say no” by “educat[ing him] about the costs of not agreeing,” “warning” him rather than “threatening” him, and assuring him that his (Louden’s) goal was “mutual satisfaction, not victory.”<sup>84</sup> These might have been the reasons Van Dyke surrendered, but simpler explanations that do not rely on platitudinous neologisms or self-serving factual conclusions seem to make more sense.

To start with, Loudon may have “prevented” something that was never going to happen. Van Dyke was convicted of armed robbery, not murder, and he may not have planned (or been able) to kill any of the hostages under any circumstances. During the time he held the hostages he did not do anything to corroborate the threat to kill them (e.g., shoot someone non-fatally), and the threat itself was an almost automatic move for a person in his situation. It was his only source of leverage. Without some indication that he was capable of cold blooded murder, however, one would have expected the threat to be empty and it was. Van Dyke may have surrendered because he was exhausted by the ordeal and did not have the stamina to continue or the will to carry out his threat. Unlike Loudon, he was on his own. He had no confederates and could not take a break from the negotiation for even a short time. Someone had to watch the hostages. Adrenalin and drugs do not work forever, and it was only a matter of time before he would become non-functional. Loudon no doubt knew this and simply waited until Van Dyke gave out, talking him through darker moments of the process as needed. “Protractor Negotiation”<sup>85</sup> might be a better description of Loudon’s style than “Breakthrough Negotiation.”

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<sup>82</sup> URY (rev. ed.), *supra* note 65, at 11-14, 169-71 (describing the elements of Breakthrough Negotiation).

<sup>83</sup> URY (rev. ed.), *supra* note 65, at 168.

<sup>84</sup> URY (rev. ed.), *supra* note 65, at 169-70.

<sup>85</sup> I take the name from Bruce Bromley’s controversial description of his approach to litigation. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 56 (1994) (quoting a Time magazine story describing Bruce Bromley, a Cravath partner, as boasting to a group of Stanford law students in 1958, “I was born, I think, to be a protractor . . . I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity. . . . [One case] lasted 14 years. . . . We won that case, and, as you know, my firm’s motor was running all the time—every month for 14 years.”) When he first announced it, Bromley probably thought that the “protractor” characterization was funny (and savvy), but changing attitudes toward delay in the legal system may now make that view seem obtuse.

While Van Dyke reputedly explained his decision to surrender as prompted, in part, by Louden's willingness to "sh[o]t straight with him,"<sup>86</sup> it is unlikely that a prison inmate of any sophistication would see a police hostage negotiator as his friend, or would believe that state correction officials would forget about a hostage-taking incident once the crisis was over, and the suggestion that Van Dyke thought this way seems a little panglossian. This was not the first hostage taking in recorded history, particularly in New York where the story was set, and prison inmates have a great deal of direct data from which to predict an official response to such an event. Surely Van Dyke knew he had no leverage once the last hostage was freed and he must have bargained from that perspective. The most sensible explanation for his decision to surrender, therefore, may be the most obvious one. After Louden and the state corrections department agreed to provide press coverage for his grievances and transfer him to a less dangerous prison, Van Dyke had achieved all he could hope for in taking the hostages and had everything to gain by giving up. If Louden and the corrections department kept their promises (they already had provided the press coverage), and didn't punish him additionally for his attempt to escape (unlikely), he had made a pretty good deal and that, coupled with the fact that he did not have the strength to continue, would explain his decision to surrender. The cute "Going to the Balcony" neologisms are not needed. Van Dyke probably settled for the reason most people settle, he got what he wanted and all he could expect. Professor Ury's story is an account of a simple *quid pro quo* exchange, in other words, and calling it "Breakthrough Negotiation" is a little over the top.

Assuming that the Hostage Negotiation is the story of a bilateral deal, what are we to make of Professor's Ury's use of it as evidence for the communitarian way of arguing? The first thing one notices is that Louden's bargaining style is an odd one for a communitarian to recommend or adopt. Louden lied, dissembled, manipulated, threatened, and may even have reneged on his promise to transfer Van Dyke to a federal prison, all in a fashion worthy of the communitarian caricature of adversarial bargaining. Even when he expressed respect for Van Dyke he did so for strategic reasons and not because he believed what Van Dyke said. He did all of these things, no doubt, because failing to use every trick and device at his disposal when lives hung in the balance would have been unduly squeamish. But this is why battlefield stories usually do not have much to teach day-to-day bargaining.<sup>87</sup> Most legal bargaining does not involve issues of life and death, is not conducted in public or under intense political pressure for a quick and favorable outcome, does not operate in a compressed time frame in which decisions must be made on the spur of the moment without the opportunity for extensive investigation or deliberation, and is subject to normative constraints (e.g., do not lie, cheat or steal), that have less force when life and death is at stake. Triage negotiation is not ordinary negotiation in any sense of the term, in other words, and because of this it has little to teach ordinary negotiation. Arguing that it does, again, asks a reader to draw a conclusion based on false evidence.

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<sup>86</sup> URY (rev. ed.), *supra* note 65, at 168.

<sup>87</sup> Brad Wendel describes the deduction of a general principle from a fanciful case as the resort to the "shopworn trope" of the "ticking time bomb hypothetical." See W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 121-122 (2005). Henry Shue has the classic critique. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 142 (1978)

Professor Ury also ducks the most interesting question raised by the hostage negotiation story, that of whether there are any limits on leverage in communitarian bargaining. For example, is threat a legitimate communitarian technique? Was it acceptable for Loudon to threaten Van Dyke to extract concessions and force a favorable settlement? Threat is based on power, not entitlement or joint interest, and using it would seem to be antithetical to the qualities of candor, respectfulness, and honesty characteristic of communitarian bargaining. Loudon's use of threat was acceptable, according to Professor Ury, because it brought Van Dyke "to his senses, not his knees,"<sup>88</sup> but if bringing him to his senses had not worked (i.e., he did not surrender), would bringing him to his knees have been the next communitarian step? In answering such questions communitarians usually turn to suspect distinctions that permit the behavior in question while calling it something else. The distinction between warning and threat, for example, repeated mantra like over the years by communitarian writers,<sup>89</sup> and defended by Professor Ury,<sup>90</sup> is the most popular of these distinctions, but it is a distinction still in search of its first coherent publicist.

Functionally, a warning is identical to a threat. Each works by causing a person to compare the costs of two harms (i.e., the projected threat and the relinquishment of one's demand), and decide which of the two is more tolerable. Neither warning nor threat makes a claim about legal, moral or political rights, or about appropriate social behavior. Each seeks to manipulate and control rather than inform and instruct. The only difference between the two is the language in which each is expressed,<sup>91</sup> and yet for communitarian bargainers, warning is acceptable and threat is not. Perhaps the distinction is empirical, not analytical, based on the judgment that a warning is popularly thought to be less offensive than a threat. If so, someone should write up the survey.<sup>92</sup>

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<sup>88</sup> URY (rev. ed.), *supra* note 65, at 168. The difference between "senses" and "knees" (as metaphors) is not self-evident. I gather Ury is saying that Loudon used just enough force to win the negotiation and did not punish Van Dyke gratuitously. While this may establish that communitarians are not sadists, how much more than that it establishes is not clear.

<sup>89</sup> See e.g., Menkel Meadow, *supra* note 6, at ; and Fisher & Ury, *supra* note 16, at . Julie Macfarlane describes the almost phobic reaction of a communitarian lawyer to a client's questioning of the "warning-threat" distinction. The client told Macfarlane that when she (the client) characterized one of her husband's statements during a divorce negotiation as "a threat, 'both lawyers jumped at me and said, 'Oh, no, no, no, you mustn't see it as a threat.' Oh, yeah, you're not supposed to—I was immediately jumped on by both lawyers for even using that word—but this is the ultimate reality because it was a threat. I mean, it was clear that . . . he was trying to bully me into—agreeing to something that I didn't want to do.'" JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, REPORT TO FAMILY, CHILDREN AND YOUTH SECTION, DEPARTMENT OF JUSTICE CANADA 34 (2005), available at <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>.

<sup>90</sup> URY (rev. ed.), *supra* note 65, at 136-38.

<sup>91</sup> In most dictionaries, each term is defined in terms of the other. See, e.g., MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1228 (10th ed. 1996) ("threaten . . . to give signs or warning of"); AMERICAN HERITAGE DICTIONARY (2d College ed. 1985) ("warning . . . An intimation, threat, or sign of impending danger . . .").

<sup>92</sup> Professor Ury suggests that "a threat is an announcement of [an] intention to inflict pain, injury, or punishment on the other side. . . . [while a] warning . . . is an advance notice of danger. A threat comes across as what *you will do* . . . if they do not agree. A warning comes across as *what will happen* if agreement is not reached. . . . [A] threat is confrontational . . . , a warning is delivered with respect . . . [and

There may be no need, however, since communitarians could simply reverse the terms, approving of threats but not warnings, if it turned out that public sentiment ran the other way. The problem with the distinction is with the distinction, if you will, and not with the rank ordering of the two concepts. It is the proverbial distinction without a difference. Communitarians make it, I assume, because they recognize that there are times in bargaining when something stronger than reasoned argumentation is needed. Some people do the right thing, not because it is right, but because not doing it would cost them more than doing it, and dealing effectively with such people requires something more powerful than a well-formed syllogism. The warning/threat distinction is simply a fig leaf for concealing the fact that communitarians sometimes want to have it both ways, free to use power when nothing else will work (because consequences matter), but also free to deny that they ever resort to pure power (because image also counts).<sup>93</sup> Not surprisingly, hypocrisy is another quality communitarians are quicker to recognize in adversarial bargainers than in themselves.

#### 4) *Misappropriated Mathematics*

In keeping with the legal intellectual fashion of the last century, communitarian bargaining theory also has an ersatz-scientific side.<sup>94</sup> Communitarians borrow from game theory's collection of "fair division" algorithms, for example, to defend not so much a full blown theory of bargaining practice as much as a set of techniques for resolving certain recurring bargaining problems. The most well known example of this borrowing involves the redoubtable "one cuts and the other chooses" (OC<sup>2</sup>) fair-division algorithm, the oldest and most extensively studied of the mathematical procedures for producing so-called "envy-free division."<sup>95</sup> OC<sup>2</sup> may look like a bit of folkloric wisdom more than a

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t]he more dire the warning, the more respect you need to show." URY (rev. ed.), *supra* note 65, at 137. As long as we have crossed into the realm of the linguistically fanciful, why not: "A warning is a soup that eats like a meal."

<sup>93</sup> There are many other such distinctions in the communitarian literature. Equally disingenuous is the one between "position," which is bad because a feature of adversarial bargaining, and "illustrative suggestion that generously takes care of your interests," which is good because a feature of communitarian bargaining. See FISHER & URY, *supra* note 17, at 55.

<sup>94</sup> See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1046 (10th ed. 1996) (defining scientism as "an exaggerated trust in the efficacy of the methods of natural science applied to all areas of investigation."). The legal academy's interest in being scientific is a subset of its interest in being inter-disciplinary and is traceable, in part, to a long-standing insecurity over law's place in the University. Episodes in this history (some of which continue to the present) include "sociological jurisprudence" in the early twentieth century, the law and psychiatry movement in the 1950s, the critical legal studies movement in the 1960s, the law and social sciences movement in the 1970s, the law and economics movement in the 1980s, and perhaps a burgeoning law and neuroscience/law and biological sciences movement at the present. See Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645-46 (1968), for the best discussion of the psychic forces behind law's long time felt need to prove itself to the academy. Not everyone is a supporter of inter-disciplinary education. See, e.g., Anthony D'Amato, *The Interdisciplinary Turn in Legal Education* 5 (Northwestern Law Public Research Paper No. 06-32), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952483) (arguing that "we have no rational basis for expecting any discipline to contribute a problem-solving idea, or any useful idea at all, to another discipline.").

<sup>95</sup> An "envy-free division is one in which every person thinks he or she received the largest or most valuable portion of something—based on his or her own evaluation—and hence does not envy anyone else." STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE

mathematical algorithm<sup>96</sup> but it is both, and the so-called fair division problem<sup>97</sup> it seeks to resolve is a prototypical ancient<sup>98</sup> and modern bargaining problem.<sup>99</sup> Mathematicians, like moral and political philosophers, have long been intrigued by the difficulty of dividing goods (i.e., land, personal property) and rights (e.g., to vote), fairly among multiple claimants, as well as the imbedded difficulty of defining the concept of “fairness” at the basis of such divisions. Others have worked on the problem, of course—the Bible, Koran and Talmud contain several well know fair division procedures<sup>100</sup>—but for the most part these attempts are grounded in ideologies that are not compelling to everyone. Mathematics seeks to transcend personal views of fairness and construct procedures acceptable to all.<sup>101</sup>

The modern effort to develop fair division algorithms dates principally to World War II and the work of the Polish mathematician Hugo Steinhaus and his colleagues Bronislaw Knaster and Stefan Banach.<sup>102</sup> Starting with the requirement of proportionality (the ability of each player to guarantee what he perceives to be half the

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RESOLUTION 2 (1996) [hereinafter BRAMS & TAYLOR, FAIR DIVISION]; *see also* STEVEN J. BRAMS & ALAN D. TAYLOR, WIN-WIN, *supra* note 4, at 13. The concept has been used in mathematics for almost fifty years and in economics for almost forty. BRAMS & TAYLOR, FAIR DIVISION, *supra*, at 2.

<sup>96</sup> One suspects that many of the people using the algorithm to defend communitarian bargaining don’t think of it in mathematical terms either.

<sup>97</sup> *See* Lowry’s retelling of Aesop’s fable about The Ass, the Fox and the Lion as a fair-division problem.

It seems that a lion, a fox, and an ass participated in a joint hunt. On request, the ass divides the kill into three equal shares and invites the others to choose. Enraged, the lion eats the ass, then asks the fox to make the division. The fox piles all the kill into one great heap except for one tiny morsel. Delighted at this division, the lion asks, “Who has taught you, my very excellent fellow, the art of division?” to which the fox replies, ‘I learnt it from the Ass, by witnessing his fate.’

S. TODD LOWRY, THE ARCHAEOLOGY OF ECONOMIC IDEAS: THE CLASSICAL GREEK TRADITION 130 (1987).

<sup>98</sup> The procedure goes back at least five thousand years to the Hebrew Bible and the story of Abraham and Lot in the book of Genesis. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 53. At first glance, King Solomon’s need to determine which of two women was a baby’s biological mother might seem to present a fair division problem, but the King’s threat to cut the baby in half used a “division” technique as a lie detector rather than a fair distribution algorithm. *Id.* at 8. The algorithm also appears in Hesiod’s *Theogony* where Zeus and Prometheus divide a portion of meat by having Prometheus place the meat in two piles and Zeus selecting one of the piles (though Prometheus used the technique to fool Zeus and his intentions were self-interested more than fair). *See* HESIOD, THEOGONY, WORKS AND DAYS, SHIELD 24-25 (Apostolos N. Athanassakis ed. & trans., 2d ed. 2004). One gets the sense that similar procedures were in use on regular basis in caves long before that, although perhaps not in the Paleolithic period. *See* R. DALE GUTHRIE, THE NATURE OF PALEOLITHIC ART 34-36 (2005) (arguing that Paleolithic people lived mostly in open air camps because bears hibernated in caves and made them unsafe for humans).

<sup>99</sup> Neal Stephenson used a somewhat unusual version of a fair division algorithm in his popular science fiction adventure CRYTONOMICON 623-33 (1999), when he had a family divide a grandmother’s possessions by physically placing them in appropriate positions in an empty parking lot representing the two-dimensional space of monetary and emotional values.

<sup>100</sup> *See* H. PEYTON YOUNG, EQUITY IN THEORY AND PRACTICE 64-80 (1995), for a discussion.

<sup>101</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 1.

<sup>102</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 30; Jack M. Robertson & William A. Webb, *Extensions of Cut-and-Choose Fair Division*, 52 ELEMENTE DER MATHEMATIK 23 (1997); Francis E. Su et al., *Envy-free Cake Division*, Mudd Math Fun Facts, <http://www.math.hmc.edu/funfacts/ffiles/30001.4-8.shtml> (last visited Dec. 12, 2006).

value of the divided goods regardless of what other players do),<sup>103</sup> the mathematical conception of fairness has gradually moved closer to philosophical conceptions by incorporating the notions of envy-freeness (each player thinks he is as well off with his announced allocation of goods as he would be with his opponents' announced allocation),<sup>104</sup> equity or equitability (each player thinks the value of what he received is equal to the value of what his opponent received),<sup>105</sup> truthfulness (each player announces his valuation of the bargained-for goods truthfully),<sup>106</sup> and efficiency (each player receives the particular goods he values more than any other player and no other division of goods will make one player better off and other players no worse off), all within increasingly more refined algorithmic formulations.<sup>107</sup> Subsequent work also has accommodated the complexities introduced by multiple parties (e.g., n-party games, division by auction, division by election),<sup>108</sup> player manipulation of announced values, and the difficulties involved in applying the algorithms to real life negotiation (e.g., distributing estate property, dividing land parcels for zoning, configuring legislative districts for voting, and the like),<sup>109</sup> so that the mathematical literature on fair division is now rich and voluminous.<sup>110</sup>

The operation of the OC<sup>2</sup> algorithm usually is illustrated with a story about two children dividing a piece of cake.<sup>111</sup> In the story's simplest form, the children are told that one of them will be permitted to cut the cake and the other will be permitted to choose the first piece. This division of authority is designed to induce the first child to cut the cake into pieces of equal value (which usually but not always means equal size), so that he will be left with a piece that is equivalent to that of the second child and the distribution of the cake will be stable.<sup>112</sup> It is difficult to cut a piece of cake into equal (or equally valuable) halves, however, either because the properties of the cake are not

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<sup>103</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 9.

<sup>104</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 71.

<sup>105</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 71. "Equitability" differs from "envy-freeness" in the sense that the latter involves a comparison of the divided goods based on a player's own internal evaluation and the former involves an external or interpersonal comparison of the value of the divided goods. *Id.* See also BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 14-15 (describing the quality of "equitability"). It also is possible for a division to be "egalitarian equivalent," that is, equitable even though the parties do not receive perfectly equal allocations. *Id.*

<sup>106</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 72-73, 76-77.

<sup>107</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 2 n.2, 44, & 62. It has proved difficult to devise a procedure combining all of these properties. *Id.* at 48. Trade-offs seemingly are inevitable.

<sup>108</sup> BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 62-66.

<sup>109</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 115-126, 178-198, 204-228.

<sup>110</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 30-47 (describing the Steinhaus-Kuhn lone-divider procedure, the Banach-Knaster last-diminisher procedure, the Dubins-Spanier moving-knife procedure, the Fink lone-chooser procedure, the Woodall and Austin extensions of the Fink procedure), 68-75 (describing the Brams-Taylor Adjusted-Winner procedure), 75-78 (describing the Brams-Taylor Proportional-Allocation procedure), and 78-80 (describing the Brams-Taylor combined Adjusted-Winner and Proportional-Allocation procedure).

<sup>111</sup> There are several other versions of the story. For a collection, see BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 1-9.

<sup>112</sup> The algorithm does not consider who would value the cake more, who is in greater need of a piece of cake, who contributed more to making it, or other such "philosophical" concerns in its calculation of fair distribution. Cake may be associated with dessert in other aspects of life, but not in mathematics.

distributed evenly throughout the piece,<sup>113</sup> the halfway point is difficult to identify,<sup>114</sup> or it is hard to make an even cut.<sup>115</sup> Thus, it quickly becomes apparent to anyone using this procedure that it is better to choose than to cut.<sup>116</sup> Choosing provides an opportunity to obtain the more valuable piece in a way that cutting does not. There are ways in which the cutter can make the choice difficult, of course, (e.g., cut the cake so that the piece with the most frosting or filling is smaller), particularly if he has access to the chooser's value preferences (e.g., put the cherry or nuts which the chooser is known to prefer on a smaller piece), but everything else equal, it is better to choose than to cut. The real negotiation in using the procedure, therefore, is over who will cut and who will choose, and there is no algorithm for resolving that negotiation. Like many communitarian bargaining techniques, the cut-choose algorithm relocates the bargaining problem, and sometimes makes it easier, but it does not solve it.

There are more fundamental difficulties with using a mathematical procedure to solve real-life bargaining problems, however, even if the procedure "works" in some technical sense of that term. A fair division algorithm ignores the role of legal rights in shaping the content of a negotiated agreement, for example, and assumes that bargainers are free to choose the standards by which their disputes will be resolved, but this condition rarely exists in real life bargaining. Parties are free to construct their own standards for resolving hypothetical disputes in a state of nature, but disputes arising in a state governed by law and regulated by legal institutions must take legal rules into account.<sup>117</sup> Moreover, while mathematical conceptions of fairness have become considerably more sophisticated over the years, they do not yet take account of all of the social, moral, and political interests involved in even the most rudimentary bargaining interaction. An algorithm works like a bug spray. It solves a problem in a single bold stroke by targeting and neutralizing a mechanism at the root of the problem. It is a total solution and does not tolerate a contingent, qualified or partial answer, or a functional disagreement (i.e., an agreement to disagree) of the sort inevitably necessary in many

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<sup>113</sup> BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 54 (describing the difference between homogeneous and heterogeneous goods).

<sup>114</sup> Think of the piece of cake as in the form of an oddly shaped ellipsis that slopes irregularly from both front to back and side to side. It would not be easy to find the middle of such a shape. The complexity of the stakes and the difficulty of dividing whole collections of items make the OC<sup>2</sup> procedure ill-suited to much modern negotiation. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 66-67.

<sup>115</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 41-42; J. KEITH MURNIGHAN, THE DYNAMICS OF BARGAINING GAMES 103 (1991). The differences produced by these problems will be small when the bargained-for good is a piece of cake but they can be more substantial when real life goods are substituted. Even with cake, the psychic value of being able to choose a marginally larger piece can be the difference between an excellent outcome and an ordinary one.

<sup>116</sup> Brams and Taylor describe some of the ways pieces of cake can differ, including those that depend upon differences in the cake's type. BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 8. In a tacit acknowledgment that use of the algorithm does not inevitably equalize the parties' positions, there is a subcategory of research devoted to "maximizing individual returns" in using the procedure. BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 22-29; BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 55-58 (describing examples of strategies for using the cut-choose procedure). Dissatisfaction with the consequences of its strategic use is one of the reasons the OC<sup>2</sup> procedure has lost favor with modern game theorists. BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 66-67.

<sup>117</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 7-8; BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at ix (mathematical procedures not helpful in arguing the merits of an out-of-court settlement of a lawsuit).

real-life disputes. A mathematical approach is stymied by the fact that the social universe is different from the noumenal universe. Social data reacts to attempts to manipulate it by changing form and content, it is not static or driven by mechanisms that can be turned on or off with a single switch; resolving a social dispute requires constant monitoring more than a single bold stroke. Moreover, a socially constructed concept such as fairness cannot be reduced to a single, timeless procedure acceptable to all. Issues of fairness are not finally and fully resolved, debate about them simply reaches temporary resting points.

For mathematicians, the interest in fair division algorithms comes, in major part, from the desire to eliminate envy<sup>118</sup> and haggling<sup>119</sup> from the bargaining process. Envy, it is assumed, makes bargaining outcomes unstable and haggling makes bargaining conversations unpleasant. While admirable goals, this effort is likely to founder in the socially messy world of actual dispute bargaining. Envy is the perception of unfairness rather than unfairness itself, and bargainers alone control the question of how well they think they did in comparison with their adversaries. All the “objective” evidence in the world will not convince someone he has had the better of an exchange if he thinks, rightly or wrongly, that he was entitled to more, and someone who has been fooled into thinking he won big when he did not, will not envy his adversary even if he should.

The attempt to eliminate haggling faces similar difficulties. Haggling is the process through which bargainers learn about, adjust to, and accommodate the interests of other bargainers. It is used to change minds, weaken convictions and make trades. It permits bargainers to call attention to facts not fully considered or treated with sufficient respect, to revive arguments dismissed prematurely, and to express the nature of their interests and the intensity of their resolve.<sup>120</sup> For the most part, mathematical procedures assume that these factors are static, that bargainer positions, once announced, do not change, but bargaining is a live conversation in which all of the cultural, social, political, moral, and aesthetic forces that define the parties’ interests and their values, along with the institutional and social contexts in which the disputes arise, combine and re-combine to shape the way beliefs and attitudes grow, change, weaken, and adapt, sometimes on a moment-to-moment basis throughout the bargaining conversation. Only communitarians think that bargaining positions once taken are never modified, and they attribute this view to adversarial bargainers.<sup>121</sup> Haggling makes mutually accommodative maneuvering possible. The forces released by haggling help defuse the anger and tension inherent in bargaining and permit the sublimation of conflict necessary to the lasting resolution of any dispute. It is no more possible to eliminate haggling from bargaining than to remove reasoning from judgment. Communitarians would be better off joining the effort to improve haggling, by making it more substantive and rational, rather than trying quixotically to eliminate it.

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<sup>118</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 4 (“A *leitmotif* of this book is the search for procedures that quench the flames of envy . . .”).

<sup>119</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 67 (describing the benefit of their Adjusted Winner procedure as “obviate[ing] the need for . . . haggling”).

<sup>120</sup> BRAMS & TAYLOR, FAIR DIVISION, *supra* note 95, at 84, have a good example of this process in operation.

<sup>121</sup> See Schneider, *supra* note 6, at 178 (describing positional bargaining as making “take it or leave it” demands).

Dispute bargaining is not a crossword puzzle or an Easter egg hunt in which there is a single, predetermined solution waiting to be discovered. It is a protean political and social event whose eventual form and outcome is determined by the yet-to-be-chosen actions of the parties and the normative standards—legal moral and social—that influence how those choices will be made, and any attempt to understand and shape its operation must consider it in this light. Bargainers must believe that their interests and rights have been understood and protected, that they have been respected as persons, and that the terms of their agreements are fair, before they will give up their demands and agree to settle. Fair division algorithms do not help much in determining when most of these concerns have been satisfied. The turn to fair division algorithms illustrates once again the communitarian effort to hoist adversarial bargaining on its own supposed petard. Communitarians use algorithms without any explicit acknowledgment of their history or seeming understanding of the kinds of problems they were designed to solve, and fail to include the qualifications, limitations, and restrictions on their use that mathematicians are careful to add. They appropriate a mathematical procedure, in other words, strip it from its context, ignore its limits, admit that it does not apply directly to real life scenarios, but then argue (implicitly) that only an unimaginative dunce<sup>122</sup> could fail to see its (communitarian) implications. This is adversarial argument.<sup>123</sup>

### 5) *Neologism as High Theory*

There is a tendency on the part of some communitarian commentators to replace the received concepts and terminology of traditional bargaining theory with concepts and terms of their own and then offer up the result as new theory. This particular form of “nominalism about realism,” to reverse Arthur Leff’s classic phrase,<sup>124</sup> appears most prominently in the communitarian appropriation of the Prospect Theory of Daniel Kahneman and Amos Tversky.<sup>125</sup> Long before they learned of Prospect Theory, in fact, communitarians were natural disciples. It is an article of faith with communitarian theory, for example, that bargaining success is a function of form more than substance, that how one puts a point counts for more than what one says, and that influencing others is more a matter of exploiting unselfconscious assumptions, biases, and compromised

<sup>122</sup> Dunce comes from “Duns,” the thirteenth-century Scottish logician, philosopher and theologian “Duns Scotus, whose once accepted writings were ridiculed in the [sixteenth] century.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 359 (10th ed. 1996).

<sup>123</sup> If one treats the argument for OC<sup>2</sup> (and other such algorithms) as simply the recommendation of a piece of homespun wisdom for dividing power evenly in bargaining relationships, it has a different kind of problem. It is based on a misunderstanding of the types of problems parties bring to lawyers. Cut-choose opportunities occur infrequently in legal bargaining, and when they do, dividing authority in this fashion does not so much solve the bargaining problem as relocate it (to the question of who cuts and who chooses). The argument for such a procedure is used to pre-empt discussion about bargaining effectiveness rather than advance it, and pre-empting discussion is a characteristic of adversarial bargaining.

<sup>124</sup> Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

<sup>125</sup> Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representations of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992). See also DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982); DANIEL KAHNEMAN & AMOS TVERSKY, *CHOICES, VALUES AND FRAMES* (2000).

intellectual decision-tools than it is of giving substantively convincing reasons for changing one's mind. Prospect Theory provides a complicated conceptual apparatus for organizing, articulating and defending these views.<sup>126</sup>

Prospect Theory can be interesting, sophisticated, and sometimes counterintuitive, but the communitarian adaptive re-use of it is often little more than the linguistic repackaging of common sense nostrums in the guise of high theory. It reminds one of the abuses visited on the concept of "paradigm" by the disciples and imitators of Thomas Kuhn.<sup>127</sup> In an earlier era, work of this sort would have been dismissed on the ground that "it might be social science but it's not news,"<sup>128</sup> but, sadly, that reaction has lost much of its appeal in a world where even junk science is often seen as better than no science at all. Interesting social science work on bargaining exists, of course, (indeed, there are several classic studies),<sup>129</sup> and no doubt it will continue to be produced, but until

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<sup>126</sup> Two bargainers equally understanding of and skilled at the techniques of Prospect Theory would be a sight to behold, a sort of a reverse Alphonse and Gaston. Unlike adversarial bargainers trying to avoid making the first offer, they would thrust and parry with great enthusiasm and finesse, repeatedly neutralizing one another's efforts in a maelstrom of self-replicating maneuvers and techniques devoid of any progress. As Alex Stein shows in his analysis of the well-known Blue Cab experiment from the literature of Behavioral Economics, people (and presumably this includes lawyer-bargainers) can avoid decision errors when properly alerted to them. Social science experiments catching subjects in such errors, in Stein's view, are traps that "function as the conjurer's sleight of hand; each trick can be played only once...the play uncovers and destroys the trick." See Stein, *supra* note 75, at 6. Orr and Guthrie's enthusiastic description of how "anchoring exerts . . . influence in . . . the courtroom and at the bargaining table" does a good job of describing the influence of Kahneman and Tversky's new conceptualizations in the legal academy. Orr & Guthrie, *supra* note 2, at 605.

<sup>127</sup> See Jeff Sharlet, *A Philosopher's Call to End All Paradigms*, CHRON. HIGHER EDUC., Sept. 15, 2000, at A18 (discussing THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970), and the many ways in which "paradigm" was misunderstood and misused). Lawyers associated with the Collaborative Family Law (CFL) movement are among the known offenders. See, e.g., Macfarlane, *supra* note 89, at 33 (CFL lawyers describe the fact that they use collaborative law practices in interactions with family members as a "paradigm shift"). Professor Menkel-Meadow also bemoans the fact that references to "paradigm shift" have become "trite," but then uses the term in similar fashion herself. See Menkel-Meadow, *supra* note 7, at 487, 488.

<sup>128</sup> I first heard this expression from a legal sociologist who used it to conclude his remarks at a law and sociology conference. He had a sense of humor that many in his field do not. For examples of "social science but not news" types of insights within the legal bargaining literature, see Orr & Guthrie, *supra* note 2, at 611 (concluding that subjects in a group receiving a smaller opening demand were more likely to settle than those receiving a larger opening demand), at 611 ("Opening offers, policy limits, damage caps, and other starting figures appear to influence outcomes at the bargaining table."), at 624 ("negotiators can harness the power of anchoring by setting high goals for themselves prior to negotiation), at 626-27. Orr & Guthrie also advise that "When negotiating a car purchase . . . negotiators should rely on statistical data available in such publications as *Consumer Report* (sic) or *Kelley's* (sic) *Blue Book* to help them determine an appropriate deal point." *Id.*, at 627. This suggestion appears directly under a page header which reads "New Insights from Meta-Analysis." (emphasis added) *Id.* There is no indication as to whom this is new(s), though there is evidence that some car buyers could benefit from knowing it. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiation*, 104 HARV. L. REV. 817, 856 (1991) (describing the remarkable ignorance with which most purchasers approach the task of buying a new car—almost half of all purchasers pay retail).

<sup>129</sup> See, e.g., Catherine H. Tinsley, Kathleen M. O'Connor, & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISIONAL PROCESSES 621 (2002). See also Thompson & Hastie, *supra* note 77; **and others**. The Tinsley article illustrates both the potential benefits and limitations of this new social science work. In a carefully

it is based on data taken directly from actual (i.e., non-gaming) bargaining practice it will be of limited relevance to real life bargaining. I discuss this topic at greater length in the next section. Here, I describe a few communitarian contributions to the language (ours, most of the time) of bargaining theory.

An unexpected example of “nominalism about realism” is Dan Orr and Chris Guthrie’s article extolling the analytical power of the Prospect Theory concept of “anchoring.”<sup>130</sup> Professor Guthrie has written extensively about bargaining and his work is original, intelligent, and sophisticated. Anchoring is an interesting phenomenon and, everything else equal, bargainers generally are better off knowing about it than not. The Orr and Guthrie article has a worthy objective, therefore, it responds to a genuine need, and the authors are accomplished commentators on the subject, and yet, someplace in the execution stage things go linguistically off track. Throughout the article, Orr and Guthrie use a convoluted and confusing sort of social-sciencespeak essentially to describe the influence of suggestion on bargainer expectation, aspiration, and behavior. They define anchoring, sensibly, as the process of giving undue weight to the first number one encounters in estimating the value of a bargained-for item by permitting that number to

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designed study, Tinsley and her colleagues show, among other things, that a reputation for “distributive [bargaining] hurts a party because the negotiator facing that party forms negative prejudices of that party’s intentions which then affect the subsequent interaction.” Tinsley et al., *supra*, at 637. The authors account for most of the relevant contingencies and spell out many of the necessary qualifications but their study has at least two major problems. That an adversary’s reputation would affect how one approaches negotiation is not something an experienced bargainer would need a carefully crafted study to understand. What more natural influence on expectations could there be than what one anticipates the adversary will do, and what better source of information about what the adversary will do could there be than the adversary’s reputation? The second problem is with the mechanism used in the study to introduce the independent variable of reputation. It misrepresents its counterpart in real-life bargaining. Unlike law practice, where a bargainer must deduce an adversary’s reputation from a confusing and often contradictory welter of gossip, public records, prior direct experiences, and the like, Tinsley’s subjects were told definitively that their adversaries were “particularly adept at distributive bargaining” (or they were not given any information about their adversary’s bargaining reputation at all). Tinsley et al., *supra*, at 639. The negotiation was conducted by email, which limited the opportunity to test this reputational information and ruled out the use of so-called paralinguistic data (e.g., demeanor, non-verbal behavior, attitude, and the like). While the study is instructive on the non-controversial question of whether reputation influences expectations, therefore, it has little or nothing to say on the related and more important (at least for practical purposes) questions of how reputation is created, whether it can be manipulated, and whether pre-conceived views about it are defeasible. If bargainers control the development of their reputations to even a small extent, or if their reputations are never as clear as Tinsley’s study represented to its subjects, the significance of the study is greatly qualified. It may be that the lessons from social science research are more relevant to simple, categorical, and academic bargaining games than they are to the complicated and extended social relationships of actual bargaining. For classic social science studies on bargaining, see THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1960); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); **[more to come]**

<sup>130</sup> Orr & Guthrie, *supra* note 2. Prospect Theory might be abandoning, or at least downgrading, the concept of anchoring. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 56 (Thomas Gilovich et al. eds., 2002) (“It has become evident that an *affect heuristic* should replace anchoring in the list of major general-purpose heuristics.”) (citation omitted). *But see* Daniel T. Gilbert, *Inferential Correction*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra*, 167, 167 (arguing that “anchoring and adjustment—describe[] the process by which the human mind does virtually all of its inferential work”).

“exert[] a stronger impact than . . . subsequent pieces of numeric information.”<sup>131</sup> They assert that this not always rational phenomenon<sup>132</sup> is caused by a “fail[ure] to adjust . . . away from the anchor,”<sup>133</sup> even though that is a little like saying one anchors because one does not “not anchor.” They acknowledge that this explanation begs the question and quickly add that “fail[ing] to adjust” is caused by “a lack of cognitive effort” in the face of “uncertainty.”<sup>134</sup> Again, this does not come as a surprise. “I just didn’t think,” is a common reaction when things do not go as well as one had expected. Orr and Guthrie continue in this vein for several pages, taking common-sense concepts and behaviors for which ordinary language terms exist and relabeling them to provide readers with several new ways to express the ideas of “think,” “analyze,” “judge,” “aspire,” “demand,” and the like. Ordinary terminology would have worked as well.

Russell Korobkin, in an article describing some of the reasons parties fail to settle,<sup>135</sup> also re-labels well known bargaining concepts unnecessarily,<sup>136</sup> producing a confusing welter of new terms and concepts that add few if any substantive insights to the ideas already in place. Like Professor Orr, Professor Korobkin has written extensively about bargaining and his work is among the best in the field, but he has the habit of replacing familiar terms that are understandable with personal substitutes that often are not. His preferences for “bargaining zone” over “bargaining range,” and “walkaway point” over “reservation point”<sup>137</sup> are not controversial, but following the lead of Behavioral Economics, he describes mediation as “a process by which [parties] de-bias

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<sup>131</sup> Orr & Guthrie, *supra* note 2, at 60 (quoting Fritz Stack & Thomas Mussweiler, *Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring*, in FOUNDATIONS OF SOCIAL COGNITION 79, 80 (Galen V. Bodenhausen & Alan J. Lambert eds., 2003)).

<sup>132</sup> Suppose, for example, the first number one encounters in trying to place a value on an item is laughable. The fact that it comes first should not give it any particular influence in the process of assessing value.

<sup>133</sup> Orr & Guthrie, *supra* note 2, at 602. They offer several explanations for this behavior and call each one a “theory” in its own right (e.g., “Social Implications Theory,” “Insufficient Adjustment Theory,” “Numeric Priming Theory,” and “Information Accessibility Theory”), though I assume they use theory here in some non-technical sense of the term. If failing to adjust to an anchor number is a “theory” of why the number has a disproportionate influence on outcome, Orr and Guthrie will need to explain the difference between theory on the one hand and cause on the other. Each of the “theories” they list seems more accurately described as an ordinary intellectual or psychological phenomenon (i.e., in order of above parenthetical: believing the other person when he says the number is relevant; not thinking carefully about whether the number is relevant; according too much relevance to the number that comes first; letting the fact that one treats the number as provisionally true for purposes of evaluating it count as evidence of its relevance).

<sup>134</sup> Orr & Guthrie, *supra* note 2, at 603.

<sup>135</sup> Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000). See also Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006).

<sup>136</sup> Professor Korobkin describes his purpose as providing a new way to think about negotiation. Korobkin, *A Positive Theory*, *supra* note 131 at 1789 (“This article presents a new dichotomy that creates a clear theoretical structure for viewing . . . legal negotiation. . . [it] presents not a new way to *negotiate* but a new way to *think about negotiation*.”). But since his principal concepts of “zone allocation” and “surplus allocation” describe (and run together) already well-know and extensively discussed negotiation processes (e.g., information bargaining, conversational advocacy, trading and the like), it seems more accurate to say that he provides a new way to talk about negotiation.

<sup>137</sup> Korobkin, *A Positive Theory*, *supra* note 131, at 1791 (“First, negotiators attempt to define the bargaining zone—the distance between the reservation points (or ‘walkaway’ points) of the two parties. . . .”).

each other”<sup>138</sup> (it sounds painful but it turns out, simply, to mean argue to one another); characterizes the relationship between bargainer anger and bargaining impasse in terms of a “malevolent utility function” (i.e., the extent to which the parties like or dislike one another);<sup>139</sup> warns about “the second order problem caused by divergent construals” (i.e., parties are more likely to accept a settlement if they think the other side was respectful, dignified and honest);<sup>140</sup> and adopts the concepts of “correspondence bias” (i.e., blame the person not the situation when the other bargainer does bad things); “actor-observer bias” (i.e., blame the situation not the person when you do bad things); and “naïve realism” (i.e., trust your own beliefs more than others), all on a single page.<sup>141</sup> Within a particular “community of interpretation,”<sup>142</sup> so to speak, this might be an understandable way to converse, but it is not the best way to talk to lawyers.<sup>143</sup>

Perhaps the most confusing aspect of this tendency on the part of many communitarian commentators to construct their own linguistically original world is that most of the time new language is not needed. Well-understood terminology is available to describe everything going on in bargaining and everything communitarians want to discuss. Making up non-intuitive substitutes (e.g., what could be the intuition behind “Go to the Balcony?”), makes discussion more confusing and less likely to be productive. One must keep flipping back to check on definitions to understand the point.<sup>144</sup> At its core, demanding that discussion proceed exclusively in one’s own idiosyncratic and non-intuitive language is an asocial act. It closes off the universe of discourse to all but select insiders and gives those insiders a trump card with which to shut down conversation whenever it becomes unpleasant (i.e., critical). This effectively insulates communitarian

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<sup>138</sup> Korobkin, *Impediments*, *supra* note 135, at 297.

<sup>139</sup> Korobkin, *Impediments*, *supra* note 135, at 300. Korobkin explains why settlements fail in this way: “dispositional attributions lead to anger; anger helps to create malevolent utility functions; malevolent utility functions reduce the likelihood of parties reaching agreement . . . because the parties want not only to vindicate their legal entitlements but also to cause pain to their adversaries. Thus, dispositional attributions reduce the likelihood of . . . settlement.” *Id.* at 301. One might paraphrase the explanation in this way: “Parties don’t settle because they get mad at what they think (sometimes mistakenly) are the other party’s motives.” In the spirit of the note, think of this paraphrase as a “linguistically benevolent alternative,” or LBA.

<sup>140</sup> Korobkin, *Impediments*, *supra* note 135, at 322.

<sup>141</sup> Korobkin, *Impediments*, *supra* note 135, at 302. William Ury makes the most colorful contributions to the communitarian bargaining lexicon in his “Hostage Negotiation” story discussed earlier. See notes 68-78, and accompanying text. His expressions are some of the strangest to be found anywhere in the literature.

<sup>142</sup> STANLEY FISH, *Interpreting the Variorum*, in *IS THERE A TEXT IN THIS CLASS?* 147, 171-72 (1980) (describing the concept of “community of interpretation”).

<sup>143</sup> I do not mean to deprecate the usefulness, and sometimes necessity, of manufacturing new technical language to describe social science data. Some social phenomena are complicated and not easily described in words found routinely in Websters. But most bargaining behavior is ordinary social behavior and may be analyzed fully in the vocabulary of ordinary discourse. Lawyers use ordinary language, lawyers are the bargainers of the legal world, and one of the principal purposes of bargaining theory is to inform bargaining practice. It would seem sensible, therefore, for bargaining scholarship to use lawyer language whenever possible, to maximize its chances of being understood and insure that it is taken into account.

<sup>144</sup> This evokes memories of a familiar objection to endnotes (and footnotes for some) in law review articles.

theory from any outside intellectual check and makes it a “self-sealing” world view.<sup>145</sup> The willingness to talk with only one’s self is reminiscent of the communitarian criticism of adversarial bargaining, that it is a “take it or leave it” system of discourse in which others may agree but not dispute.<sup>146</sup> Once again, communitarian scholarship finds itself modeling the qualities it criticizes.

### 6) Survey Research – Perception Over Reality

Much of the scholarly support for communitarian bargaining comes from the type of “thought experiments” discussed above. This scholarship is not very empirical and that is a little surprising.<sup>147</sup> If it did anything, communitarian theory instigated a debate over the relative merits of two distinctly different approaches to legal bargaining and one would think the best way to resolve such a debate would be to compare the two approaches in operation.<sup>148</sup> For one reason or another, however, this has not happened. There are a few quasi-empirical, comparative studies of the two bargaining approaches and I will discuss the best known ones here, but they are the exception rather than the rule.<sup>149</sup> To their credit, these studies are more analytically interesting and more informative than their “literary” counterparts, but they also often start from the same faith-based commitment to communitarian theory that characterizes the latter work,<sup>150</sup>

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<sup>145</sup> CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 26 (1974) (describing the property of being “self-sealing”).

<sup>146</sup> See Schneider, *supra* note 6, at 178.

<sup>147</sup> Schneider, *supra* note 6, at 148-49 (“there have been few empirical studies of the negotiation behavior of lawyers,” describing Gerald Williams’s 1976 study as “the most frequently cited and well-known”) (citing Gerald R. Williams, *Legal Negotiation and Settlement* 15-46 (1983)).

<sup>148</sup> It also is interesting that lawyers have not discovered the benefits of communitarian bargaining on their own over the years. If legal academics are correct that communitarian methods are best for everyone involved, one would think that lawyers collectively would have happened upon that insight, even accidentally, at some point or another during the course of the legal profession’s history. Lawyers want what’s best for themselves and their clients, and law practice provides a kind of laboratory in which to collect and test data on what produces the best results. While “practice experiments” may proceed more unselfconsciously, less systematically, and more serendipitously than those in the laboratory, they also are likely to be more long-lived and be based on a larger body of data, making up in sheer volume what they lack in method, “number-crunching” their way to a solution. If communitarian bargaining produces the best results for everyone involved, in other words, lawyers should have discovered that fact on their own long before now. And yet they cling stubbornly to their old-fashioned, adversarial methods. What explains that? Professor Menkel-Meadow wonders about the same thing. See Menkel-Meadow, *supra* note 12, at 485-87. Could it be that the methods work?

<sup>149</sup> Schneider, *supra* note 6, at 148. This pattern may be changing. See, e.g., Relis, *Consequences*, *supra* note 58.

<sup>150</sup> Schneider, *supra* note 6, at 148 (describing how “adversarial attorneys have become more extreme and less effective in the last twenty-five years,” evidence to the contrary, even in her own work, notwithstanding). See Andrea Schneider, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612 (2006) (finding family lawyers more adversarial and less problem solving than other types of lawyers); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement in New Jersey: “You Can’t Always Get What You Want,”* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997) (finding that positional bargaining is used seventy-one percent of the time and problem solving bargaining sixteen percent of the time in civil litigation practice in New Jersey); Menkel-meadow, *supra* note 7, at 487 (“I fear that ideas of adversarialism, competition for seemingly scarce resources, individual or national maximization strategies, so-called ‘clashes’ of competing interests and cultures, and vested interests in

and occasionally lapse into the adversarial rhetorical maneuvering reminiscent of it as well.

#### a) The Williams Study

Gerald Williams was the first modern legal academic to study bargaining empirically.<sup>151</sup> In a research program involving questionnaires, interviews, and videotaped observations,<sup>152</sup> he asked one thousand lawyers to rate the effectiveness of the last lawyer with whom they had bargained (on a scale of effective, average, ineffective), and to describe that lawyer's bargaining approach (cooperative or competitive). Nearly half of his respondents described their last opponent as effective and four out of five of those opponents also were described as communitarian (cooperative in Williams' terminology).<sup>153</sup> Not all communitarian bargainers were seen as effective, of course, some were only average and some were ineffective, and competitive bargainers sometimes were described as effective, but for the most part Williams' respondents reported a strong correlation between communitarian methods and effectiveness.<sup>154</sup> Williams concluded from this that lawyers are best off adopting a communitarian approach because other lawyers prefer it and work more easily with it.<sup>155</sup> When most of the world is communitarian, or thought to be so, one should go along to get along.<sup>156</sup>

While pathbreaking in many respects, Professor Williams' study has several weaknesses that undercut its usefulness as a test of the comparative merits of communitarian and adversarial bargaining. To begin with, it is difficult to determine just what the survey respondents meant when they categorized their last bargaining opponents as effective or ineffective. Williams did not provide a definition of effective bargaining

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competitive habits – rather than cooperation or collaboration – continue to thrive and to blunt the great vision of human potential at the heart of" communitarian theory).

<sup>151</sup> GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983). Williams and his colleagues updated this work in 1986 and published the results of a follow up study in 1991. See Lloyd Burton et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. DISP. RESOL. 199. See also Schneider, *supra* note 6, at 148 (describing the Williams study as the "most frequently cited" and "well-known" of the empirical studies of lawyer bargaining). Cornelius Peck published an earlier casebook on negotiation. See CORNELIUS J. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1972).

<sup>152</sup> WILLIAMS, *supra* note 152, at 15-18.

<sup>153</sup> WILLIAMS, *supra* note 152, at 18-19.

<sup>154</sup> WILLIAMS, *supra* note 152, at 18-19.

<sup>155</sup> WILLIAMS, *supra* note 152, at 19 ("The higher proportion of cooperative attorneys who were rated effective does suggest it is more difficult to be an effective competitive negotiator than an effective cooperative [negotiator]"). Williams makes several additional claims for the effectiveness of a communitarian approach. For example, he argues that impasse and deadlock are more common when bargainers are not nice to one another, and that being unpleasant will have long term reputational effects that will influence the settlement of future disputes, *id.* at 50-52, but he does not develop these points or support them with evidence from his study.

<sup>156</sup> Williams also concluded that "it is not regard or disregard of the social graces which determines an attorney's negotiation effectiveness," *id.* at 39, but legal astuteness, that is, the ability to be "perceptive, analytical, realistic, convincing, rational, experienced, and self-controlled," *id.* at 40, in the preparation and presentation of a bargaining case, but he did not discuss the relationship of this conclusion to his more general point about being cooperative.

or a list of specific qualities to take into account in making this determination. He talked about the topic of effectiveness at length and listed a number of factors one might consider in formulating a definition,<sup>157</sup> but he also acknowledged that views on this matter differ widely and he did not say what he thought was the best view.<sup>158</sup> Lawyers responding to his survey thus were free to use any definition of effectiveness they liked and there is reason to believe they used several.<sup>159</sup> One can sympathize with Professor Williams' plight. Bargaining effectiveness, like bargaining power, is nearly impossible to define in a non-circular fashion.<sup>160</sup> Almost any attribute, resource, maneuver, or approach can be effective in the right circumstances or with the right adversaries, and thus, the assumption that everyone must have the same qualities in mind in describing an opponent as effective or ineffective is rarely warranted. The lack of a single, consistent definition of one of its central concepts is a serious problem for an opinion survey, however, and in Williams' case it was fatal. If one cannot know for certain what his lawyer-respondents thought they were asked, or what they said in response,<sup>161</sup> it also is not possible to know what to make of Williams' analysis of their answers.

There is a second difficulty with the Williams study, this one involving the categories of cooperation and competition, that complicates further the task of assessing its results. Williams did not distinguish between substance and style in asking his respondents to categorize their opponents' behavior as cooperative or competitive, and

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<sup>157</sup> WILLIAMS, *supra* note 152, at 7-10.

<sup>158</sup> Williams acknowledged as much when he conceded that "people have a wide variety of beliefs about what constitutes effectiveness in negotiation." WILLIAMS, *supra* note 152, at 8. He presents a "set of hypotheses about effectiveness," but admits that not all would agree with them and does not indicate whether he communicated them to his subjects. WILLIAMS, *supra* note 152, at 42.

<sup>159</sup> See Condlin, *Bargaining in the Dark*, *supra* note 17, at 20-21.

<sup>160</sup> The difficulty is in making predictions about bargaining outcome. Often, it is not hard after a negotiation is over to identify the factors that were influential in shaping its result, but it is much more difficult to say in advance what those factors will be. No attribute or resource is inevitably powerful. Ignorance, lack of resources, even a failure to understand the issues at stake, could be a source of leverage in the right circumstances. Still, academics cannot seem to resist having a go at defining bargaining power. For another in the long line of tautological attempts, see Russell Korobkin, *On Bargaining Power*, in THE NEGOTIATOR'S FIELDBOOK, *supra* note 11, at 251 (power is "the ability to convince the other negotiator to give us what we want . . ."). Professor Korobkin's confusion over the subject of power extends to other parts of his discussion. For example, within a section entitled "The Risks of Power," he says both that "[i]n any situation in which a mutually beneficial agreement [is] possible, the party with relatively less power would yield to the party with relatively more," and almost immediately after that, "the less powerful party might resent the sense of coercion or inequity inherent in the more powerful negotiator's demands and refuse to yield, even knowing that this course of action will result in a worse outcome for himself . . ." *Id.* at 255. If I follow this correctly, a less powerful negotiator (however defined) will both yield and not yield as circumstances permit. If this is dialectical reasoning it would help to have the synthesis. Korobkin is not the only one to provoke readers in this fashion. See, e.g., Orr & Guthrie, *supra* note 2, at 624-25 (recommending that bargainers both exploit the unselfconscious biases of other bargainers and adopt "de-biasing" strategies to prevent such exploitation). The *Negotiator's Fieldbook*, the newest offering of the ABA Section on Dispute Resolution, in which these abbreviated pieces appear, suffers throughout from what appears to have been an editorial directive to make discussions as "accessible" (i.e., simple), as possible.

<sup>161</sup> There is reason to believe that the lawyers gave the highest marks for effectiveness to opponents who were good at routinely processing cases and the lowest marks to opponents who fought for better than average settlements. See Condlin, *Bargaining in the Dark*, *supra* note 17, at 20-21. If this is correct, it would undercut the appeal of Williams' conclusions.

substance and style are two distinctively different realms. Take competitiveness. One can threaten, make *ad hominem* attacks, use a didactic or condescending tone, or score debater's points all independent of the topic being discussed. This is stylistic competitiveness, even when done on behalf of a substantively correct position, and its goal is to win the conversational exchange at the level of personal, rhetorical skill, to be verbally quicker or more forceful than the other bargainer. Conversely, one can make strong but justified demands, refuse to change views without good reasons, and defend views with complicated and extensively developed arguments, albeit in a respectful, likeable and flexible manner. This is substantive competitiveness and its goal is to insure that any agreed-upon settlement protects one's legal and practical rights.

It is impossible to tell from the responses to Professor Williams' questions whether the competitiveness his respondents described was socially rude and obnoxious behavior or strong substantive argument, and the difference is crucial. Stylistic competitiveness is almost always inappropriate in bargaining and usually ineffective as well, but substantive competitiveness is unavoidable.<sup>162</sup> If bargainers do not make justified demands and take principled stands, even when they go beyond what other bargainers expect, they will have waived their clients' interests unilaterally and conceded rather than settled their disputes. No doubt, communitarians object only to stylistic competitiveness. Their critique of adversarial bargaining, for example, is based mostly on examples of belligerent, insensitive, and socially inappropriate behavior rather than examples of forceful argument and justified demands. And almost certainly they do not mean to recommend conceding claims just to be nice or to insure that everyone comes away from a negotiation with roughly the same payoff. That is a program for resource redistribution rather than bargaining. Communitarians could express their objections to adversarial bargaining more clearly, therefore, but whether they do or not, socially inappropriate behavior must be what they have in mind when they complain about bargainers as being "adversarial" or "positional."<sup>163</sup> Professor Williams' failure to ask whether past opponents were "tough," "forceful," and "aggressive," because of what they said or how they said it, therefore, makes it difficult to determine what, if anything, his study shows about the relationship between communitarian methods and bargaining effectiveness.

There is a final problem with the Williams study that plagues all empirical research that commingles the task of collecting data with the task of evaluating it. Williams asked his lawyer-respondents to categorize their opponents' bargaining behavior as cooperative or competitive after they had evaluated it as effective or ineffective. One would expect the lawyers to tell consistent stories in this situation, to make sure their descriptions of what happened matched their evaluations of whether the behavior was effective, and thus it should come as no surprise that most of the lawyers characterized their last opponents as cooperative. The lawyers had settled with these opponents after all, and since they (the lawyers) presumably did not believe they could be

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<sup>162</sup> Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 72-79 (1985).

<sup>163</sup> It may be that communitarians object only to unskillful adversarial bargaining, not adversarial bargaining generally. I discuss that possibility in more detail shortly.

bullied, deceived or intimidated they also must have believed that their opponents approached them in a cooperative manner (or they would not have settled).<sup>164</sup> The lawyers' stories may have been true,<sup>165</sup> but it would take direct data about their actual bargaining behavior to confirm that fact and that's precisely the kind of data the Williams study does not have. The study may be perfectly circular; without more trustworthy data it is impossible to tell.

#### b) The Schneider Study

Professor Williams is not alone in these problems. Communitarian empirical work on bargaining tends to confuse perception with reality by equating what lawyers say about bargaining with bargaining itself. Andrea Kupfer Schneider's update of the Williams study based on a more elaborate version of Professor Williams' research instrument<sup>166</sup> is a case in point. Professor Schneider entitles her study "Empirical Evidence on the Effectiveness of Negotiation Style," but it is clear from the outset of her article that she is describing lawyer perceptions of negotiating style,<sup>167</sup> not negotiating style itself, and by the end of the article she has turned the rule of "perception over reality" into an epistemological principle.<sup>168</sup> There seems to be some hard to alter feature of the communitarian mindset that prefers appearance over essence.<sup>169</sup>

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<sup>164</sup> Sometimes lawyers settle on terms they know are bad, in response to bargaining maneuvers they think are ineffective, because external circumstances make settling necessary (or at least rational). An adverse bargainer need not always be communitarian for a lawyer to settle. I assume this is not the prototypical experience for most bargainers, however, and not the one they would be most likely to remember and report in a survey about their bargaining practice.

<sup>165</sup> For an example of how lawyer beliefs and expectations about their own bargaining behavior do not always reflect reality, see Condlin, *Bargaining with a Hugger*, *supra* note 6, at 60-71.

<sup>166</sup> Schneider, *supra* note 6, at 152-58 (describing "updates" to Williams study instrument). Within the legal bargaining academy Schneider's study is thought to be an excellent example of empirical research and to make a strong case for the superiority of the communitarian model. The study is reproduced at disproportionately greater length in the Wiggins and Lowry reader, for example, and appears in almost all of the negotiation casebooks. While it is true that her update of the Williams' survey instrument adds many new categories of information and choices it has little in the way of new descriptive material about bargaining style or bargaining effectiveness to help lawyers make these choices. She not only fails to provide a definition of effectiveness, for example, she explicitly refuses to provide one. Schneider, *supra* note 6, at 195 ("[T]he meaning of effectiveness is left to each responding attorney to determine."). As a consequence, her work reproduces most of Williams' mistakes, magnifying some and minimizing others, without offering any new antidotes. Schneider, *supra* note 6, at 155 (describing why the effectiveness rating scale of Williams' survey was left in its original form). This has the unfortunate effect of piling up the confusions left by Williams' study rather than resolving them, so that in the end Schneider has produced a kind of Williams on steroids. Schneider has extended her research into other areas of bargaining, but her methodology remains the same. See Schneider, *Family Lawyers*, *supra* note 150. She also continues to describe her analysis as about reality ("What Family Lawyers Are Really Doing"), rather than perception.

<sup>167</sup> Schneider, *supra* note 6, at 147 ("[T]he study shows . . . that a negotiator who is assertive and empathetic is *perceived* as more effective.") (emphasis added).

<sup>168</sup> Schneider, *supra* note 6, at 196 ("[L]awyers' perceptions of other lawyers are the closest we can get to objective conclusions about effective negotiation behavior.")

<sup>169</sup> See *supra* note 125-126 and accompanying text. One could combine the communitarian preoccupation with form and the lessons of the Jack Sprat hypotheticals to produce a kind of primer for bargaining with a communitarian. Always offer items that look good and ask for items that are good in return. For another example of the communitarian preoccupation with perception over substance, see Nancy A. Welsh,

The most confusing part of Professor Schneider's survey are her attempts to differentiate effective from ineffective bargaining and adversarial from communitarian style.<sup>170</sup> She talks around these concepts at great length but does not work with a consistent definition of any. She does a lot of "name-calling," that is, associating communitarian bargaining with positive characteristics and adversarial bargaining with negative ones, but for the most part the characteristics she lists are so general in nature that they depend almost exclusively for their meaning on the preconceptions and beliefs of the persons using them. For example, whether an adversary is seen as "arrogant" or only "confident," "headstrong" or only "persistent," "obsequious" or only "friendly," — in each instance the former is a characteristic of adversarial bargaining and the latter a characteristic of communitarian bargaining<sup>171</sup>—will be different for bargainers with different degrees of self-confidence and different levels of bargaining experience. These judgments also will be situation dependent when they involve questions of degree, such as determining whether an opening bargaining demand is "extreme," or an initial position is "unrealistic."<sup>172</sup> As a consequence, it is almost impossible to know what Professor Schneider's respondents had in mind in answering her questions without knowing a good deal more about the respondents themselves and the bargaining situations they faced.<sup>173</sup>

Professor Schneider's discussion has other interesting definitional conundrums as well. For example, she equates effective bargaining with ethical bargaining and, as a corollary, thinks that adversarial bargaining is unethical,<sup>174</sup> but she never says what she means by ethical. She must have more in mind than simple compliance with the legal profession's disciplinary rules since many of the things she objects to (arrogance is a recurring example),<sup>175</sup> may be distasteful but they are not a basis for bar discipline. The few examples of unethical behavior she gives, taken from the supplementary comments of some of her respondents, do not describe self-evident ethical violations, and probably do not describe ethical violations at all if all of the facts are known.<sup>176</sup> She must use

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*Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 754 (2004) (limiting discussion of bargaining fairness to perceptions of fairness, seemingly on the belief that it is not possible to get the real thing — "People often disagree . . . whether an outcome is fair . . . The definition of distributive fairness is, therefore, inevitably subjective."). See also Tinsley et al., *supra* note 129, at 639 ("[C]ognitions and behaviors may be intertwined such that one party's *perceptions* of the other side can affect the other side's *actual behavior*."); BRAMS & TAYLOR, WIN-WIN, *supra* note 4, at 8 ("When a procedure is *perceived* to be fair . . . it is more likely to lead to outcomes that are viewed as legitimate by all the parties.").

<sup>170</sup> Problem-solving is her most consistent synonym.

<sup>171</sup> Schneider, *supra* note 6, at 163-67.

<sup>172</sup> Schneider, *supra* note 6, at 177.

<sup>173</sup> Schneider recognizes and attempts to deal with this problem, but for reasons I discuss shortly she is not entirely successful.

<sup>174</sup> Schneider, *supra* note 6, at 166 ("For problem-solving negotiators, the highest goal is conducting oneself ethically," while for the adversarial negotiator, "If the negotiation becomes focused on ego or making money for the lawyer, one could legitimately wonder if the client's interest is being well served.").

<sup>175</sup> Schneider seems almost phobic about arrogance, repeating the characterization several times during the course of her discussion.

<sup>176</sup> Schneider, *supra* note 6, at 166-67. The best example of this is a series of maneuvers taken from what appears to be a plea bargaining scenario. Schneider describes 1) "having various attorneys contact the state's Attorney" (presumably to lobby for one's client), 2) "bringing in an attorney who was friendly with the judge," and 3) "filing numerous meritless motions" [I take it this means "file numerous motions," since

“ethical” to mean more than ethical in the conventional sense, therefore, but it is not clear what this “more” consists of.

In similar fashion, Professor Schneider equates communitarian bargaining with putting the client’s interests first,<sup>177</sup> which is not controversial, but then she assumes that making large demands and trying for the biggest possible payoffs are examples of lawyers elevating their own interests over those of clients.<sup>178</sup> This is inexplicable. Most of the time in bargaining client interests and lawyer interests are intertwined and a lawyer does better for the client when he does better for himself. There are genuine principal-agent conflicts in bargaining, of course, but Professor Schneider does not describe any of them, and most of her survey responses are too cryptic, or her respondents too uninformed<sup>179</sup> to provide the kind of detail needed to identify problems of this sort.

The proliferation of adjectives, attributes, goals and characteristics arrayed in the evaluative categories of Professor Schneider’s survey also may have confused her respondents. The survey questionnaire listed eighty-nine adjectives, sixty-three bipolar pairs of characteristics, and fourteen strategic goals against which to evaluate the effectiveness of the last negotiation adversary. Many of these terms were duplicative, redundant, and overlapping, and anyone trying scrupulously to apply all of them consistently, making all of the fine distinctions they call for, would have difficulty differentiating one term from another (e.g., what is the difference between “mean” and “nasty,” “headstrong” and “stubborn,” “arrogant” and “egotistical,” and the like?). When it comes to language, more is not necessarily better, or clearer, as any statutory interpretation text will teach. It is as if Professor Schneider took all the adjectives she found in Professor Williams’s data, added new adjectives received in response to her own pre-tests, gave the combined list to a team of law students to find all known synonyms, and then used the unedited results to construct her final questionnaire. The effect is the piling of confusion on confusion.<sup>180</sup>

Clarity problems aside, Professor Schneider also seems not to understand the difference between effectiveness and competence. If she did, she would not have included all forms of obnoxious bargaining behavior in the single undifferentiated

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there is no indication that the motions were denied or that the attorney was sanctioned for filing them—“meritless” in this context seems to be a synonym for “motions I disagree with”], as examples of “dirty tactics.” There is no reason to believe that any of these moves is per se unethical and it would take a good deal more information than Schneider provides to make any of them unethical in context. No ethics rule prohibits any of them, for example, and all of them seem designed to advance the client’s interest. In other parts of her discussion Schneider equates advancing the client’s interest with problem-solving bargaining.

<sup>177</sup> Schneider, *supra* note 6, at 174.

<sup>178</sup> Schneider, *supra* note 6, at 166-67.

<sup>179</sup> A lawyer ordinarily would not know when the adverse bargainer has demanded an excessively large percentage of the client’s recovery as a fee, for example, since an adversary’s fee agreement would have been made outside the lawyer’s presence. When the lawyer criticizes a large demand as putting the lawyer’s interests above the client’s, therefore, he is probably saying only that he does not want to meet the demand, not that he knows that it is motivated by lawyer self-interest. Interestingly, communitarians describe this kind of reflexive rejection of a demand as an adversarial bargaining tactic.

<sup>180</sup> Experienced bargainers also might have seen the tacit communitarian agenda in this terminology and thought “What’s the point?”

category of “adversarial” (or positional) bargaining. Her picture of the typical adversarial bargainer—as someone who makes take-it-or-leave-it demands, abuses others gratuitously, is arrogant, demeaning, insulting and boastful, and the like—depicts an incompetent bargainer more than an adversarial one. Skillful adversarial bargaining does not offend, antagonize, or insult as much as it manipulates and deceives.<sup>181</sup> The adversarial bargainer Professor Schneider has in mind is using bargaining to work out issues of personal development or exorcise private psychological and emotional demons, not bargain.<sup>182</sup> Such a person needs to be kept in check, of course, but his problems are more substantial than the kind that can be solved by having an adequate theory of bargaining. Professor Schneider’s adversarial archetype is a caricature,<sup>183</sup> in other words, and while this might make it easier to criticize, it does not make it easier for a reader to evaluate such criticism.

Professor Schneider’s discussion reminds one of what used to be called the GIGO problem.<sup>184</sup> No matter how complicated the machine, and no matter how many times one turns the crank, if what goes in is what’s left on the floor after all the good meat has been used, the machine will produce sausage. The Williams study was analytically complicated, and Professor Williams manipulated his data in a sophisticated manner, but one couldn’t tell what the data meant and, in the end, that made the results difficult to understand and use. Professor Schneider’s failure to clear up the confusions in Williams’ descriptions of bargaining styles and to provide the definition of bargaining effectiveness

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<sup>181</sup> The Paine lawyers’ behavior in *Condlin, Bargaining with a Hugger, supra* note 6, at 15-59, provides excellent examples.

<sup>182</sup> He is the kind of person typically named as a defendant in a Bar disciplinary proceeding, usually for something done during a deposition. See e.g., *Mullaney v. Aude*, 730 A.2d 759 (Ct. Spec. App. 1999) (male lawyer addressing female lawyer as “babe” and “bimbo” during a deposition); *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 200 (5<sup>th</sup> Cir. 1997) (lawyer commenting “Where the fuck is this idiot going?”; “Get off my back you slimy son-of-a-bitch.”; and “Fuck you, you son-of-a-bitch.” while being deposed); and Joe Jamail’s now infamous diatribe during a deposition in the *Paramount Communications* case, reproduced in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-54 (Del. 1994) (“Don’t Joe me, asshole. You can ask some questions, but get off of that. I’m tired of you. You could gag a maggot off a meat wagon.”), along with his response to the Delaware Supreme Court when invited to explain his comments: “I’d rather have a nose on my ass than go to Delaware for any reason.” *Tex. Law.*, Feb. 14, 1994, at 11.

<sup>183</sup> Schneider is not alone in this regard. Communitarian scholars from Professor Menkel-Meadow to the present have worked with similarly overdrawn conceptions of adversarial bargaining.

<sup>184</sup> GIGO stands for Garbage In, Garbage Out, a computer science term expressing the informal rule that the integrity of a computer’s output depends upon the integrity of its input. The term has fallen out of use as computer programs have become more sophisticated and checks have been built into them to reject improper input. Reputedly, the term was coined by Wilf Hey, the person who developed Report Program Generator, an IBM programming language similar to COBOL and used for the production of large system reports. See *The Free Online Dictionary of Computing*, GIGO (Oct. 3, 2004), <http://foldoc.org/index.cgi?query=gigo>. GIGO also can be used to mean Garbage In, Gospel Out, to express the idea that humans sometimes accept the output of computer systems on faith. See *Wikipedia*, Garbage In, Garbage Out, [http://en.wikipedia.org/wiki/Garbage\\_in,\\_garbage\\_out](http://en.wikipedia.org/wiki/Garbage_in,_garbage_out) (last visited Oct. 23, 2006). No one will be surprised to learn that there is a GIGO website and blog. Garbage In, Garbage Out, <http://www.gigo.com/> (last visited Dec. 12, 2006). There are a lot of lonely souls out there dealing badly with the quiet desperation problem.

that is missing in his study<sup>185</sup> makes her study an empiricist form of “practicing your mistakes.”<sup>186</sup> Moreover, her adjectival categories are so open-ended and susceptible to idiosyncratic interpretation that she may do no more than record the insecurities, fears, doubts, limitations, and prejudices of her respondents. No doubt, some of the judgments reported to her are correct—it is not likely that everyone was talking about personal history—but without some independent vantage point from which to evaluate the accuracy of the answers, it is impossible to tell which judgments are trustworthy and which are not, and no such vantage point is provided.

Professor Schneider recognizes that some of her respondents’ might have projected their own bargaining styles onto adversaries and evaluated the adversaries in that light, punishing those who were seen as different and rewarding those who were seen as alike.<sup>187</sup> To protect against this, she asked her respondents to characterize their bargaining styles using the same standards they applied to the adversaries, and then she compared the two sets of characterizations. She expected that “[b]y looking at the

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<sup>185</sup> Schneider, *supra* note 6, at 195-96. She not only fails to provide a definition of bargaining effectiveness, she explicitly refuses to provide one.

<sup>186</sup> 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, 345 (1997) (describing the lack of any necessary relationship between doing something more than once and getting it right—it is possible to just “practice one’s mistakes”).

<sup>187</sup> Schneider, *supra* note 6, at 193. Professor Schneider assumes her respondents “would have at least some understanding of the other side’s motivations even if [they] were not particularly empathetic,” and thus would be “more accurate in describing and evaluating effective negotiation behavior (of their adversaries) than non-lawyers,” because they were “experienced” at making such judgments. *Id.* at 195. Experience, in this context, means that the respondents were educated in the same way as their adversaries, had similar cultural backgrounds, and were familiar with all the same legal idioms and customs. The difficulty with this argument is that the kind of judgments Professor Schneider asked her respondents to make were judgments about ordinary social skills more than bargaining methodologies. She asked about friendliness, arrogance, attentiveness, respectfulness, stubbornness, belligerence, courtesy, and the like and one doesn’t develop any particular expertise in identifying these qualities by going to law school. Though, in all fairness, law school provides plenty of opportunities to do fieldwork.

Perhaps Professor Schneider should have been concerned with a different kind of “experience,” that of her respondents’ familiarity with survey research and their attitudes toward it. (She could have asked if anyone had taken a course in survey research, for example, in addition to the course in negotiation she did ask about.) It became clear to me in listening to my son answer a telephone survey about why students choose one law school over another that people of his age and background respond almost automatically to survey questions from both their own perspective and that of their questioner. After thirty minutes on the phone, he told me which of the five law schools asked about had probably commissioned the survey, what it hoped to find, why he had been called in particular, and what were the most interesting answers for him to give, and he did this on the basis of inferences he made from the content of the questions and the manner in which they were arranged, repeated and asked. This was his natural reaction to the survey, to figure out what the questioner wanted to hear and then provide it or not as it suited his fancy, rather than answer the questions directly and forthrightly. He may have been wrong in all or some of his judgments, of course, but that’s not the point. The point is that strategy and playfulness, rather than candor, dictated his answers. Like a lot of people in his generation, he had been “over-surveyed” and was fighting back. If Professor Schneider’s lawyer-respondents reacted in a similar fashion (they had the same educational and cultural background as my son, something Professor Schneider thought important in trusting their ability to judge the effectiveness of their adversaries’ negotiation methods), the answers she received were no more trustworthy than my son’s, particularly if her respondents saw the communitarianism *uber alles* spirit latent in her survey and decided either to reinforce, counteract, or ignore it (along with the survey itself).

average difference between the responding attorney and the studied attorney, [she could] roughly assess the differences between them as negotiators. . . . [and then] by comparing these average differences to effectiveness rating[s], [she could] try to see whether the difference in negotiation approach led to lower effectiveness ratings.”<sup>188</sup> While admirable, this maneuver does not take into account the possibility that her respondents were not very good reporters of their own bargaining styles. Most people are not; beliefs, hopes, expectations and defenses get in the way.<sup>189</sup> If the respondents had positive images of their own styles (and most would), they probably took those images from the received wisdom of the settings in which they were trained and had practiced. (Where else?) Since Professor Schneider’s respondents were young in comparison with the bar as a whole,<sup>190</sup> their particular versions of received bargaining wisdom would have been relatively current<sup>191</sup> and relatively academic, and thus would have reflected the popularity of the communitarian model. That being the case, one would expect them to think of their bargaining in communitarian terms, even if it was not.<sup>192</sup>

The fact that the respondents were younger than members of the Bar on average also may mean that they had not yet internalized conventions of ordinary bargaining practice.<sup>193</sup> These conventions are more adversarial than social conventions generally, but not having learned them, Schneider’s respondents might have thought themselves incapable of such behavior. When given a choice between being likeable and being arrogant, therefore, and Professor Schneider’s survey reduces to that choice if socialization and self-awareness are taken out of the picture, it doesn’t take the psychic powers of a Yuri Geller to predict that most will choose likeable. To know whether this is an accurate characterization, however, one would need to see the respondents actually bargain and Professor Schneider has no direct data on bargaining anywhere in her survey. In effect, her attempt to control for projection bias ends up comparing behavior (the adverse negotiators’) with theory (the respondents’), rather than behavior with behavior, or theory with theory. If her argument was a syllogism it would have an undistributed middle term.<sup>194</sup>

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<sup>188</sup> Schneider, *supra* note 6, at 193. More specifically, she asked each respondent to rate the importance of each of fourteen negotiation goals on a scale of one to five. Previously, she had asked them to rate their last negotiation adversary on the same scale. She assumed that “attorneys with a similar approach to negotiation will have similar goals in the negotiation.” *Id.*

<sup>189</sup> Argyris and Schön show how this is so. See Argyris & Schön, *supra* note 145, at viii (finding it normal, not exceptional, for people to believe one thing and act as if they believed something totally different).

<sup>190</sup> Schneider, *supra* note 6, at 158-59.

<sup>191</sup> This would be true even if most of them had not taken a course in negotiation, as Schneider reports. Schneider, *supra* note 6, at 192. All they needed was a familiarity with current law school fashion.

<sup>192</sup> See Heumann & Hyman, *supra* note 150, at 255 (finding that positional bargaining is used seventy-one percent of the time and problem-solving bargaining sixteen percent of the time in civil litigation practice in New Jersey).

<sup>193</sup> Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981); Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982); and several others describe the phenomenon of bargaining conventions and norms.

<sup>194</sup> Professor Schneider discusses other objections that might be made to her survey, but strangely she does not mention the problem of asking subjects to collect data and evaluate it at the same time. She does not seem to see how a judgment about the effectiveness of another’s behavior could influence the way that behavior was described. Moreover, asking lawyers to reconstruct past events without any opportunity to consult records, interview witnesses, or use any of the tools of historical research is a little like asking

The foregoing difficulties with Professor Schneider's study call its conclusions into question but, by themselves, they do not make it an example of communitarian use of adversarial argument. For that, one must turn to the underlying tone of the study. Professor Schneider depicts herself as a disinterested observer set on determining the most effective way to bargain, yet there is an exultant, triumphalist tone to her discussion of communitarian bargaining that is missing when she speaks about adversarial alternatives. She seems to write as a fan more than a spectator, cheering on the home team and belittling the opponent. When she describes the ascendance of the communitarian model in the years since the Williams study, for example, she praises that phenomenon rather than simply reports on it.<sup>195</sup> Like a Social Darwinist describing an increase in the income gap between rich and poor, she has difficulty talking about the triumph of communitarian bargaining without applauding. A reader unfamiliar with the debates in the bargaining literature over the last two decades probably still would pick up on this sentiment. Taking sides in academic analysis risks finding what one wants in the data, however, and for an academic commentator that is a form of adversarial argument.

### c) The Macfarlane Study

Perhaps the most interesting of the empirical studies of legal bargaining, notable for its balance and even-handedness, is Julie Macfarlane's examination of the Collaborative Family Law (CFL) movement in the United States and Canada.<sup>196</sup> The CFL phenomenon is the latest in a long line of true-believer<sup>197</sup> systems popular with the anti-adversarial faction of the legal academy and bar. Macfarlane, a supporter of collaborative law practice but not a true-believer, describes the phenomenon as "one of the most significant developments in the provision of family legal services in the last 25

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randomly selected citizens to write the gospels. That has been tried and the results were not uniformly satisfactory. See BART EHRMAN, *LOST CHRISTIANITIES: THE BATTLES FOR SCRIPTURE AND THE FAITHS WE NEVER KNEW* (2003).

<sup>195</sup> Schneider, *supra* note 5, at

<sup>196</sup> Macfarlane, *supra* note 89.

<sup>197</sup> Macfarlane's study is replete with CFL practitioner statements, some almost mystical, emphasizing the importance of using CFL methods over all other interests including those of the client. Representative examples include: "I don't really care about whether the outcome is optimal in terms of dollars and sense but that [my client] and I live up to our collaborative principles." Macfarlane, *supra* note 89, at 59 (alteration in original).

I would say it's [the CFL approach to others] something that I find now that I can't turn 'on' or 'off' . . . It's just basically 'on' now. In fact, I even find from a personal standpoint even the way that I interrelate with my spouse and my family has changed because of it."

Macfarlane, *supra* note 89, at 33.

I don't sit there and go through the three inches of information they [i.e., the clients] bring me, and I'm not going to do that. . . . I don't need to go through and kind of come up with a plan or an idea of how we should approach it beforehand. And I kind of like that . . . . *In a way, the less I know, the cleaner I can make my negotiations too.*

Macfarlane, *supra* note 89, at 36-37. "I give as little legal advice as possible, because there is so much contamination and you are trying to get them focused back on life issues." Macfarlane, *supra* note 89, at 37.

years.”<sup>198</sup> CFL bargaining is identified by its “contractual commitment between lawyer and client *not* to resort to litigation to resolve the client’s problem”<sup>199</sup> should bargaining fail, and its corollary practice of having lawyers and clients settle their differences in face-to-face, whole-group meetings (often referred to as “Four-Ways”),<sup>200</sup> rather than in meetings between just lawyers. The presence of clients at settlement, it is believed, eliminates or at least reduces the posturing and antagonism that characterizes the highly competitive dynamics of “lawyer-to-lawyer” interaction.<sup>201</sup> “Without the potential of litigation in the background,” CFL practitioners believe that “lawyers will take different steps and adopt different strategies for negotiation.” They will not do things that are “seen as offensive . . . [such as] ‘paper’ the file” and will be “strongly motivated to settle.”<sup>202</sup> In the words of an early proponent, CFL offers “a way to approach a person with whom one has a perceived conflict with a request for an honest and detailed examination of the problem in a way that also offers an absolute and irrevocable commitment to do so in a non-adversarial manner.”<sup>203</sup>

Whether the CFL movement is more hype than reality is an interesting question—good arguments exist on both sides—but the question also is well beyond the scope of this article. CFL methods do not seem to produce settlements that are very much different from those produced by traditional bargaining methods, even its practitioners acknowledge that,<sup>204</sup> but they might have a “value-added” dimension that makes them more satisfying and effective to use.<sup>205</sup> Be that as it may, the relevant question for our purposes is whether Doctor Macfarlane’s study tells us anything new about the comparative effectiveness of communitarian bargaining. Like the Williams and Schneider studies before it, the Macfarlane study is based on data collected from lawyer

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<sup>198</sup> Macfarlane, *supra* note 89, at vii.

<sup>199</sup> Macfarlane, *supra* note 89, at vii (“If the client decides that legal action is ultimately necessary . . . the collaborative lawyer . . . must withdraw and receive no further remuneration for work on the case”).

<sup>200</sup> That is, each client and each client’s lawyer in the default two-party dispute.

<sup>201</sup> Macfarlane, *supra* note 89, at 29.

<sup>202</sup> Macfarlane, *supra* note 89, at 29.

<sup>203</sup> Robert W. Rack, *Settle or Withdraw: Collaborative Lawyering Provides Incentives to Avoid Costly Litigation* (Spring 1998), [http://www.collablawtexas.com/article\\_settle\\_or\\_withdraw.cfm](http://www.collablawtexas.com/article_settle_or_withdraw.cfm).

<sup>204</sup> Macfarlane, *supra* note 89, at 57. They also admit that they revert to adversarial methods on occasion, usually when communitarian methods are not reciprocated and in “endgame” situations. Macfarlane, *supra* note 89, at 31-32. This is reminiscent of Professor Ury’s hostage negotiator who brought his adversary to his senses only because it was not necessary to bring him to his knees. *See* note 83 *supra*, and accompanying text.

<sup>205</sup> At least this is what CFL practitioners claim. Macfarlane, *supra* note 89, at 58-59 (quoting CFL practitioners describing these value-added features as including “enhance[d] communication between the parties which enable[s] them to explore their understanding of what [feels] ‘fair,’” the opportunity to “negotiate creative alternatives to support, custody and access,” the ability to “explore [certain kinds of issues] more deeply,” and “more effective involvement and joint decision making in co-parenting”). On the other hand, Macfarlane concludes that “the level of emotional resolution achieved via the [CFL] process was perhaps not as great as the lawyers had anticipated or hoped for at the outset—nor as deep as they believed was achieved by the end.” Macfarlane, *supra* note 89, at 60. As one client put it, “Trust building is a big . . . and . . . deep issue in a 20 year relationship and this is probably too deep for a legal process [CFL] to handle.” Macfarlane, *supra* note 89, at 60. Or, as another said, sometimes “the CFL process is not that different from a traditional lawyer-to-lawyer negotiation, ‘mostly lawyer-talk, just more polite,’” particularly if “cooperation [is] not forthcoming from the other side.” Macfarlane, *supra* note 89, at 31.

responses to opinion surveys and interviews. The difference is that Macfarlane's questions were more open-ended than those of her predecessors and the answers she received were correspondingly more wide-ranging. This, along with the fact that her respondents were selected for their self-identification with CFL practice rather than randomly, may account for the fact that the answers often read more like testimonials to CFL methods than descriptions of effective bargaining procedure generally. The responses frequently are vague, conclusory, a little overwrought, and lacking in the evidentiary detail needed to explain what they mean or why they should be believed.<sup>206</sup> Many also have a kind of "peace, love and harmony" aura about them that reminds one of the Sixties (and an accompanying authoritarian shadow also reminiscent of that period),<sup>207</sup> and that seems to say, "Technique is bad, rights talk contaminates, all disputes have right answers and you will find your way if you just chill out."

To her credit, Macfarlane interprets these answers rather than accepts them. She appreciates that many CFL practitioners want to believe that their methods work and have convinced themselves that they do based on limited if not non-existent data. She points out gaps and inconsistencies in the answers, describes considerations left out, and constructs a reasonably complete picture of CFL practice, warts and all. She sees the question of CFL's effectiveness as a debatable one, and ends up describing a qualified and enhanced version of the method as a more attractive option than the original. She presents a "for and against" case with balance and integrity, shows how communitarian and adversarial practices can work together to supplement one another, and how the two

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<sup>206</sup> Macfarlane, *supra* note 89, at 30-31 ("there is much [less] opportunity for polarization and mistrust [in CFL];" "the dynamics of [CFL] change how people behave, once they start hearing the reality of their case from other people;" "I actually find [CFL] quite different;" there is "a conscious avoidance of . . . adopting the extremes;" "I have the confidence to say to my client 'Let's not talk about [inflated demands], it's a waste of your time;" "positional bargaining simply does not work in CFL"). See also Menkel-Meadow, *supra* note 7, at 500 ("I believe that 'small is beautiful' and 'local is global.' . . . [and that] we should all keep working . . . to make the world a better, more peaceful place through negotiation").

<sup>207</sup> Comments by CFL clients illustrate the method's authoritarian side. For example, some clients saw the constant reminders by CFL attorneys to remain cooperative and focus on the interests of the group as "an attempt to impose a false 'harmony' on the situation," and forced community can be oppressive. Macfarlane, *supra* note 89, at 34. Others were "sometimes mystified by the lengths to which their lawyers believe[d] they must go to remove the possibility of litigation, and wonder[ed] why counsel could not simply be trusted to use their best judgment in this eventuality." Macfarlane, *supra* note 89, at 39. Another didn't

quite understand the need for such a strong bias against the CFL attorney representing [the client] in the case of later litigation. . . . After the CFL process has failed, [the dispute] becomes just another type of case and . . . having all the background information and knowing the other parties would make for a smoother litigation.

Macfarlane, *supra* note 89, at 40. Yet another client explained how CFL representation could be constraining. "After an estimated \$24,000 in professional fees and nine months of negotiations—with little accomplished—it was difficult to switch tacks and litigate. 'Now that we're this far, it's hard to leave.'" Macfarlane, *supra* note 89, at 39. Surprisingly, CFL representation often was as expensive as traditional representation and as time consuming as well. Macfarlane, *supra* note 89, at 79. Finally, and in the best traditions of authoritarianism generally, CFL lawyers were encouraged to report one another to the CFL group when they became "unnecessarily adversarial" and violated the CFL "club culture." *Id.* at 33. Some CFL groups had even begun to develop expulsion procedures, though there was no indication yet that the procedures would be conducted in public, to a drum roll background, and in front of the entire Post. Macfarlane, *supra* note 89, at 33.

approaches in combination can be more effective than either standing alone. She could do more to describe this conjoined point of view and probably will if she continues to work in the field,<sup>208</sup> but even if she does not, her present study demonstrates that both adversarial and communitarian bargaining methods have value, and that it is possible to construct a hybrid method of bargaining based on the best features of each. Her study is an example of a genuinely communitarian approach to the discussion of bargaining theory, one which is inclusive, collegial, and bilateral. It is an example of communitarian theory being communitarian.

#### d) Future Studies

There are dozens of additional empirical studies of both communitarian and adversarial bargaining,<sup>209</sup> some more carefully conducted than those just described and others less so, but invariably they are based on either lawyer opinions about bargaining effectiveness or patterns in the way law and business students play bargaining games. Judgments based on lawyer opinions are not trustworthy because lawyers do not always

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<sup>208</sup> It is not clear whether collaborative law practice is a long-standing research interest of Macfarlane's, or just an occasion for writing a commissioned report. Her study appears to be a one-time event, prepared for presentation to the Family, Children and Youth Section of the Department of Justice for Canada.

<sup>209</sup> See note 129 *supra*, for a description of the burgeoning body of social science literature on bargaining. There is another large body of work, nominally about mediation, that also contains a good deal of comparative analysis of different bargaining methods (because mediation and bargaining do not differ to any significant extent—mediation is just multi-party bargaining). It is common for articles of this sort to make the “value added” argument, that parties prefer communitarian methods because they provide greater party control over the settlement process, permit a wider range of possible resolutions, make the experience of bargaining more personable, and produce greater party compliance with agreed upon outcomes. These claims are noteworthy as much for the number of times they have been repeated as for the evidence marshaled in their support. Most of the early work of this sort was grounded, directly or indirectly, on a 1981 study of mediation in Maine that subsequent studies did not always support (leaving generations of dispute resolution scholars free to speculate about the disputing practices of Maine residents). Compare Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981) (mediation more likely to produce greater party compliance with agreements than litigation), with Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515 (1984) (whether defendant admits partial liability more important characteristic than type of procedural forum in predicting extent of party compliance with agreements). The debate continued for one more round. See Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986), and Neil Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987). Though McEwen and Maiman did not give up. See Craig A. McEwen & Richard J. Maiman, *Explaining a Paradox of Mediation*, 9 NEGOT. J. 23 (1993) (mediation particularly powerful and effective when parties reluctant to enter the process voluntarily). See also Pearson & Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J. L. & SOC. PROBS. 451 (1985) (finding greater compliance with mediation awards than adjudicated judgments), Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995) (compliance not significantly related to defendants' outcome). For the best background discussions, see THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Laurens Walker et al. *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295 (1974).

bargain in the manner they say (or think) they do. Their descriptions of bargaining often are more self-tribute or self-deception than self-examination, shaped by hopes, expectations, defenses and preconceived notions more than what happens on the ground.<sup>210</sup> Judgments based on student game-playing, on the other hand, ignore the effects of professional socialization and institutional setting on bargaining behavior, the distinctive personal and social networks within which lawyers work and the practices and values they internalize while being assimilated into a professional community.<sup>211</sup> Students live in a world of networks, institutions, values and practices as well, of course, but one peculiar to schooling, and while they often bargain in interesting ways they do not do so in the same ways as lawyers. In the end, neither lawyer opinion surveys nor student game-playing patterns provide the type of data needed to construct an accurate profile of lawyer bargaining.

The best way to study lawyer bargaining is to study it directly, based on recordings and transcripts of actual lawyer negotiation. This kind of data would eliminate debates about how lawyers behave in negotiation and permits commentators to focus on the more interesting questions of what the behavior means, how it is perceived, and what are its effects. Most commentators do not work with such data because it is too difficult to collect. Clients and lawyers would have to consent to having negotiations recorded, for example, and most won't. Information exchanged in negotiation may or may not be privileged,<sup>212</sup> but it is at least private and in most instances there is no particular reason clients would want to make it public.<sup>213</sup> Lawyers also will be reluctant to reveal the strategies and techniques they think give them an advantage in bargaining with others, though this advantage is easily overestimated.

If live bargaining data is not an option, therefore, scrupulously faithful facsimiles are the next best possibility. The most useful of these alternatives is the well constructed simulated negotiation, one based on an actual bargaining case, conducted spontaneously (i.e., not according to a script) by practitioners experienced in the matters being negotiated, working with actual case materials (e.g., documents, physical evidence, live

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<sup>210</sup> Condlin, *Bargaining with a Hugger*, *supra* note 6, at 60-71.

<sup>211</sup> Alexander, *supra* note 30 (as example of study that takes this complexity into account); Orr & Guthrie, *supra* note 2, at 622-23 ("anchoring effects are somewhat less pronounced among experienced negotiators"); Hazard, *supra* note 193; Guernsey, *supra* note 193; Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

<sup>212</sup> Rule 408 of the Federal Rules of Evidence and its state law analogues, are the principal regulations governing the availability in discovery of information disclosed during settlement negotiations. For excellent discussions of these rules, see Jane Michaels, *Rule 408: A Litigation Mine Field*, 19 LITIG. 34 (Fall 1992); Wayne Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Russell Korobkin, *The Role of Law in Settlement*, in Michael L. Moffitt & Robert C. Bordone (eds.), *THE HANDBOOK OF DISPUTE RESOLUTION 254* (2005). Private information disclosed in negotiation also can be regulated by contract though confidentiality agreements between the parties, though there are many policy objections to such agreements and state laws often preclude them. See Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11:6 ALT. TO THE HIGH COST OF LITIG. 85 (June 1993); Laurie K. Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

<sup>213</sup> Even if statements made during a negotiation retain their privileged status under state or federal evidence law, permitting a negotiation to be taped would waive the privilege because the person doing the taping would not be a necessary party to the attorney-client relationship.

witnesses and the like), in real life contexts, and under real time conditions.<sup>214</sup> Such simulations won't reproduce actual negotiation perfectly, of course, since it is almost impossible to simulate the social relationships and interpersonal histories of the parties, witnesses and lawyers that make up an extended real life negotiation.<sup>215</sup> But simulations will reproduce the full range of skill maneuvers that constitute the bargaining conversation, and these maneuvers are the central focus of much negotiation scholarship.

With data of this sort it would be possible to discuss such questions as whether an adversary's comments were threatening or the listener unduly defensive, whether an adversary's demands were excessive or the listener excessively stingy, whether an adversary was loud and belligerent or the listener overly sensitive, whether an adversary was arrogant or the listener unusually insecure, and the like. Each of these topics triggers strong emotions in lawyers and relying on negotiation participants both to describe such behavior accurately and evaluate it objectively, often produces a kind of vicious analytical circle. To avoid circularity one needs a record of what happened that is constructed independently of the parties' beliefs about the effectiveness of the behavior involved, and tape recordings and transcripts of simulated negotiations hold out the greatest hope for producing such a record.

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The empirical arguments for communitarian bargaining differ in numerous respects but they also have several qualities in common. They generalize to bargaining practice from cartoon data about stylized, overly simple and non-legal disputes in a manner that is more often gimmicky than real. They tout maneuvers and techniques that work in limited contexts and have little application to ordinary bargaining problems as examples of best bargaining practice across the board. And they defend these claims in a manner that bespeaks more of prestidigitation than reasoned elaboration. In addition, the complete case for the communitarian method, both its normative and critical dimensions rejects the possibility of intractable conflict and the existence of incommensurable values and beliefs, ignores the compressed time frames and constricted social relationships within which bargaining is conducted, and closes its eyes to many of the practical constraints of real-life possibilities that do not fit easily onto its idealized communal model of bargaining interaction. It also is gratuitously competitive and unfair in way it describes and dismisses adversarial approaches, misleading in the manner it reports and uses empirical data, and imperialist in the attitude it takes toward the world of bargaining

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<sup>214</sup> Orr and Guthrie based their analysis of anchoring effects in negotiation on observations of simulated negotiations and excluded data taken from survey reports. Orr & Guthrie, *supra* note 2, at 614. Bargaining scholarship needs dozens, if not hundreds, of such negotiation case studies. Collectively, they would constitute a phenomenology of bargaining providing images of all of the variations present in bargaining styles.

<sup>215</sup> It also is not possible for a simulated negotiation to trigger all of the motivational forces present in real-life bargaining. In simulations there are no sympathetic clients to be helped, no large fees to be earned, and no causes to advance. The complete absence of real world consequences and relationships takes these factors out of the picture. A simulated negotiation triggers only the lawyer's ego interest in bargaining successfully. Ego is a powerful and pervasive force, however, and in some circumstances it has more influence on lawyer behavior than any of the above factors.

theory generally. It is based mostly on prescriptive writing grounded in aesthetic and ideological preferences with little in the way of empirical evidence to back it up. As an argument, it seems based on the assumption that life imitates (communitarian) theory, if it knows what's good for it.

If communitarian theory is warmed over adversarial technique, aggressiveness with a post-modern face, so to speak, one reasonably might wonder what the shouting is all about (and there has been quite a bit of shouting). Surely there must be something new here or we would not have had the furor of the last twenty years. There is one way in which communitarian theory is different, though it may not help much: it is much better at promoting itself than is adversarial theory. Testimonials of communitarian scholars trumpet the contributions of the theory to such things as deliberative democracy and personal transformation with an extravagance that goes well beyond anything found in the literature on adversarial bargaining. In colloquial terms, communitarians talk a much better and bigger game. One should always be careful, however, around those who extol the purity of their motives and the sophistication of their practice before either is called into question. Such qualities, if real, usually do not need to be pointed out. Others notice on their own. Rather than wait for that to happen, however, communitarians have engaged in a kind of pre-emptive campaign to credit the character of their method using their own aesthetic preferences and personal beliefs as evidence. This is another instance in recent times in which it would be better to count all of the votes.

Given these difficulties, it is remarkable that so many legal academics have accepted the argument for communitarian bargaining at face value. Communitarians seemingly have been given a free pass on the issue of proof at a time when the demand for empirical justification is greater than ever in the academy. The legal professoriate must think nothing very important is going on in the debate over bargaining theory, or they must have a very great hatred for adversary methods generally, to be so quick to embrace the communitarian alternative. On the other hand, communitarians may owe their success more to their own tactical cleverness than to any particular feature of the legal bargaining world. In a sense, they outflanked adversarial bargainers, avoiding an intellectual "Pickett's Charge" that would have left both sides bloodied (and that communitarians probably would have lost since face-to-face confrontation is not their strong suit), by reconstituting (in communal terms) the world in which adversarial bargaining operated. This, in turn, permitted them to redefine the nature of bargaining effectiveness and make adversarial bargaining obsolete, to supplant it without ever having proved it wrong. And they did all of this principally by means of a virtuosic, rhetorical, *meta* move. They "changed the game by changing the frame."<sup>216</sup> Jim White would be proud.<sup>217</sup>

### III. Conclusion

If the twenty-five year debate between communitarian and adversarial theories of bargaining effectiveness is a negotiation of sorts, it is hard to resist the conclusion that

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<sup>216</sup> See URY (rev. ed.), *supra* note 65, at 168-69.

<sup>217</sup> See note 15 *supra*.

communitarians are the better bargainers. They have advanced their interests and defended their turf much more aggressively and successfully than their adversarial counterparts, and in the process even taught the latter a thing or two about what it means to be adversarial. The irony in this will not surprise anyone familiar with the ways of the world. Only a communitarian would be shocked to learn that he was as competitive and self-interested as the next person when his own interests were at stake. But it does raise an interesting question of whether the success of the communitarian assault on bargaining theory should cause us to rethink our understanding of effective bargaining. It is still at least an open question whether communitarians have constructed a new, more communal conception of the bargaining universe on which all can build, or instead, created simply a new linguistic orthodoxy based on the re-labeling of familiar bargaining technique in communitarian terms. Given the academic hazards involved in trying to answer such a question, perhaps it would be better to let go of the adversarial-communitarian dichotomy altogether. It is a phony dichotomy after all. We are all both adversarial and communitarian as our situations and interests dictate, and a complete theory of bargaining effectiveness would draw extensively on both schools of thought. We need a hybrid conception of bargaining, in other words, one that makes room for both individualist and communal strategies and goals, if our bargaining theory is to reflect all of the dimensions of our bargaining practice.<sup>218</sup> Hybrids are not as attractive as pure types, of course, particularly in the academy, but then beauty must make its peace with truth or neither will survive. Glass slippers are pretty, but we learn in childhood that they also can pinch, and that one size does not fit all.

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<sup>218</sup> *Accord*, Menkel-Meadow, *supra* note 25, at 572-76 (describing new “hybrid” processes “for human governance” that point “the way forward” to more effective dispute settlement).