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Power Differentials in Negotiation: Don't Let 'em Push You Around

By Stephen Frenkel

Participants in MWI's Collaborative Negotiation Trainings often ask how they should handle significant power differentials. Most frequently, this question is asked by those who perceive themselves to be in a position of lower power. "A collaborative approach is all well and good," they say, "but what happens when the other side doesn't need to buy into that approach because they have the upper hand?"

My first approach is to challenge them on the assumption that they have little or no power in their negotiations. Negotiators often see the "grass as greener on the other side" and, in our experience (having worked with both sides of the table), we find negotiators most often buy into the false assumption that they are the more vulnerable party.

It's essential to point out that, even if one party has less power by certain standards (resources, level of influence, etc.) they still have *some* power which can be leveraged. When we consider that the entire purpose of a negotiation is to create and extract as much value as possible from the *combined* experience or resources of all players, this becomes more apparent. After all, if either party could go it alone, why would they be negotiating with each other in the first place? They're negotiating because they need each other (or could at least see the possibility of benefiting from each other) in some form or fashion. In other words, they're already aware that the value that can be created between them is greater than the value they can create on their own.

Our challenge is to make this understanding explicit. We must confirm that both parties recognize the value of taking a collaborative approach to negotiating and, through this confirmation, incentivize them to continue conversations in a productive manner that enables both parties to benefit from the interaction. We build our capacity to do this through systematic pre-negotiation preparation that takes the following into account:

Effective preparation begins with an analysis of your and their Interests (i.e., their needs, concerns, goals, and fears). Define what's important to them and ask yourself – how does working with you meet those needs better than working with any of your competitors? Though many choose to focus on price, I'd caution you against this. Price wars tend to do little but drive down the bottom line for your entire industry and train your negotiating counterpart to threaten to walk so you'll give in. Rather, shift the focus to the other matters that are important to them: customer service, access, time to market, quality of product or services, payment terms, and other tangible or intangible aspects of the deal that make up the total value of the arrangement.

It's vital to find out what's important to your counterpart and to articulate, however you can, how you meet those needs better than anyone else they might work with. This is essentially your *value proposition*. In this way, you make yourself as indispensable as possible and limit their power as they realize that they need you as much as you need them or that they benefit more from your involvement and contribution than from anyone else's. You're no longer a "commodity;" you're a rare exception that brings more value to the partnership than anyone else in the field.

Second, at the same time that you're articulating your value proposition to them and therefore limiting the attraction of their Alternatives (i.e. what they'll do to meet their needs if they don't come to agreement with you), you should be researching and improving your own Alternatives. Who else could you meet with and work with that would satisfy your Interests as well as your counterpart can? Unfortunately, in instances such as business development in which you're already pursuing other business regardless, Alternatives seem limited. In these instances, you can't necessarily find a replacement (as you could in a negotiation over a car). Admittedly, however, should you happen to win all other business pursuits, you become much less "desperate" for theirs.

Knowing how you define success, and what you'd do if you don't reach agreement, can prepare you to walk away if the proposed outcome does not meet your needs. Furthermore, if they're pushing unfavorable terms (such as unreasonable risk or liability without appropriate rewards), knowing you have the Alternative of walking away and turning down business that's potentially harmful to you can be empowering in and of itself.

This brings us to our third source of power in negotiation – Objective Standards. Objective Standards are benchmarks, industry norms, precedents, and other ways that negotiators determine if an idea or potential resolution is fair. Researching Objective Standards and raising them at appropriate times can protect you from susceptibility to unreasonable requests. You should know what’s fair – as determined not by you or your counterpart, but by others – your industry, laws, expert opinions, and other facts aren’t capable of being manipulated by either you or your counterpart. Understanding what’s fair and reasonable and having the capability to inform yourself and your counterpart on what’s “reasonable” is a source of power.

In conjunction with the Objective Standards you raise, it’s important to Communicate your level of Commitment and the consequences for them and for your Relationship should they try to coerce you to accept unfavorable terms. Help your counterpart take a long-term view, pointing out the short-term benefits of their taking advantage of their power as well as the long term consequences – which can include but are not limited to: a damaged relationship, your looking to extract value elsewhere in the process, both of you developing a damaged reputation for business in your industry, etc. It’s important for your counterpart to realize that a bad deal for you is essentially a bad deal for them.

Once it’s clear that you’re interested in a deal that’s fair, reasonable, durable and sustainable, together you can generate the Options that satisfy both of your needs. Your success depends not only on your ability to prepare for the negotiation and to execute it effectively, but also on your ability to engage with your counterparts and to educate them on the value of taking a collaborative approach. Securing a commitment from your counterpart to negotiate collaboratively is a critical first step in dealing with perceived power imbalances. Negotiations should be viewed as an opportunity for sustained partnership generation and long-term value creation. Failing to persuade your counterpart to negotiate collaboratively with you will result in outcomes that are based not on the strength of your combined ideas, but rather on who can exert more power over the other. Whether either of you realize it at the time or not ,this results in multiple casualties over the long-term.

Stephen Frenkel is the Director of Negotiation Programs at MWI, a negotiation training and consulting firm based in Boston, Massachusetts. Stephen can be reached at sfrenkel@mwi.org or at 800-348-4888 x24. More information about MWI can be found at www.mwi.org/negotiation.

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ABOUT HNLR

Negotiation, not adjudication, resolves most legal conflicts. However, despite the fact that dispute resolution is central to the practice of law and has become a “hot” topic in legal circles, a gap in the literature persists. “Legal negotiation” – negotiation with lawyers in the middle and legal institutions in the background – has escaped systematic analysis.

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Article

WHEN DAVID MEETS GOLIATH: DEALING WITH POWER DIFFERENTIALS IN NEGOTIATIONS

Robert S. Adler¹; Elliot M. Silverstein^{dd1}

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[T]he fundamental concept in social science is power, in the same sense in which energy is the fundamental concept in physics.

Bertrand Russell¹ Power is America's last dirty word. It is easier to talk about money-and much easier to talk about sex-than it is to talk about power.

Rosabeth Moss Kantor²

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*4 I. Introduction

As social animals,³ we negotiate⁴ constantly, usually on a daily basis.⁵ When we negotiate, we typically recognize-albeit rarely with *5 explicit acknowledgement-the underlying power configuration that applies to each negotiation. The degree of power that each party brings to the negotiation affects the room for maneuver that each feels is available in bargaining situations. To pick the simplest of examples, assume a "negotiation" between a robber and his or her victim regarding the victim's wallet. If the would-be robber-slight and unarmed-demands the wallet from a large, stout-hearted, and strong victim, the transaction may be marred for the robber by the victim's refusal to hand over the wallet. If, however, the robber flashes a loaded pistol accompanied by sufficient threats to convince the victim of his willingness to use the weapon, he or she is much less likely to encounter resistance. In this case, the operative dynamic is power-the victim complies with the robber's demands because the armed robber has so much more power than the victim.⁶

Few negotiations present such a stark contrast in power--where one party literally has life-or-death control over another--but most carry some disparity in the degree of leverage between the parties. The power differential can occur by happenstance, but often results from the conscious actions of the negotiators. Almost without exception, parties preparing for or engaged in negotiation seek greater power to improve the outcome for themselves.⁷

As teachers of negotiation both to law and business students, we have long sought to understand and explain the proper use of power in negotiation settings. In particular, we have tried to prepare our students for situations in which they perceive themselves to face significantly more powerful opponents. To our surprise, few useful sources address this critical topic.⁸ We find this distressing because we believe the proper use of power to be one of the most valuable *6 lessons that one can learn about negotiation.⁹ This topic is particularly important because certain common assumptions about the use of power turn out, upon close scrutiny, to be flawed. For instance, greater power, by itself, does not necessarily produce more favorable agreements for the powerful.¹⁰

In this article, we explore the concept of power disparities in negotiation. To assess this issue properly, we examine the concept of power, identify effective sources of power, review the legal protections available to those who face disparities of power, and offer a set of suggestions that bargainers (both lawyers and non-lawyers) may find useful in negotiating situations

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involving power disparities.¹¹

At the outset, we note that the prevailing legal paradigm for negotiated contracts assumes that two or more rational parties bargain *7 at “arm’s length” to reach agreement.¹² Disparities in power leading to agreements that favor one party are generally permitted¹³ unless the disparities produce an “unconscionable” or otherwise improper bargain.¹⁴ Precisely when and how this occurs remains unclear,¹⁵ but superior bargaining power, by itself, rarely stands as a basis for invalidating a contract unless this power is somehow abused.¹⁶

That the law redresses imbalances in bargaining power only in fairly extreme cases means that knowing one’s legal rights, while essential,¹⁷ is not enough. Dealing with power disparities—even as the party with greater power—also requires developing and improving one’s negotiation skills.¹⁸

*8 II. Power: What it is and Where it Comes From

A. Power Broadly Characterized

To effectively address the challenges presented by power disparities, one first needs to understand the basic concept of power.¹⁹ In the broadest and most elemental sense, power is the “ability to act or produce an effect.”²⁰ But what does it mean when we say that a person has power? Most observers agree that the critical element of power is the ability to have one’s way, either by influencing others to do one’s bidding or by gaining their acquiescence to one’s action.²¹ This necessarily includes the ability to achieve one’s ends even in the face of opposition.²² Power does not exclude the ability to persuade or to inspire others. Although the ability to persuade and inspire is an important element of power, the critical test of power is whether one’s goals can be met even when charm and persuasiveness prove inadequate to the task. This is a decidedly unsentimental view of *9 power. Yet, we cannot see any other way to capture its essence and to distinguish it from closely related, but less compelling, concepts such as influence²³ or charisma.²⁴

B. Power as Social Interaction

The type of power that most of us are concerned with is social in nature.²⁵ We are routinely influenced by power in a social context: negotiating with bosses, colleagues, business associates and family *10 members. Thus, power as discussed in this article is a relational concept, pertaining to use between two or more people.²⁶ Without social relationships,²⁷ power becomes a fairly limited and uninteresting topic.

C. The Nature of Power

Having defined power and having narrowed our inquiry to social interactions, we now advance several principles that are critical to a proper understanding of power differentials in negotiation.

1. Power is complex and situational

If one observed two individuals negotiating in a room and then attempted to calculate the precise power of each, one would find the task daunting. Given the numerous factors, both subtle and obvious, required for the calculation, the task may prove impossible. For example, the computation might include such factors as the physical strength, intelligence, organizational authority, confidence, deadlines, attractiveness, focus, instructions, group represented, stubbornness, and financial stake of each of the parties.²⁸ Moreover, even if one quantified the respective power of the parties, it is likely that *11 another observer might well draw a different conclusion based on different criteria or differing weights. In short, the analysis of power can be extremely complex.²⁹

This complexity has led one researcher to describe the concept as a “bottomless swamp”³⁰ that renders impossible the creation of easily studied operational models.³¹ Power’s complexity stems no doubt from its highly situational nature—even slight changes in a setting may substantially affect the underlying power dynamics.³² For example, the chief executive officer of a large multinational corporation will likely have little power over a state trooper who has stopped the CEO for speeding. Similarly, even the President of the United States *12 will generally defer to directives concerning his health from his doctor.³³ We cannot overemphasize this point. Parties who fail to understand the situational nature of power will perform poorly when they negotiate because they will look only to which side has greater strength and resources in an absolute sense. Instead, the critical test should be which party controls more of what the other party wants or needs³⁴ at any given moment.³⁵

2. Perceptions play a key role in power dynamics

During the Civil War, Confederate Major General John Bankhead Magruder, a well-known amateur actor, used his dramatic skills to thwart a threatened Union advance at Yorktown, Virginia.³⁶ Despite having only 15,000 troops arrayed against 90,000 troops commanded by Union General George McLellan, Magruder boldly paraded his men before the advancing army in such a visible and **13* menacing manner that he convinced McLellan that a large force awaited him. Thoroughly intimidated, McLellan halted and prepared to lay siege, unnecessarily losing a month's time in his campaign. In this case, perceptions played a greater role than the underlying reality.

Perceptions play a similar role in more traditional negotiations.³⁷ The critical test of one's effectiveness in a negotiation is what one has convinced an opponent that one can do, whether or not one can actually do it. Unless exposed as bluffers, parties that convince their opponents that they have more power than they really do will generally be able to exercise the power they have asserted.³⁸ As a practical matter, the successful bluffer has the power that his or her opponent cedes in the negotiation. This phenomenon extends to an almost infinite number of settings: from the "poker-faced" card player who defeats a full house with a hand that holds a mere pair to the timid soul who manages to convince the playground bully that he has studied a lethal form of karate and will not hesitate to use it.

Why is negotiation power such a matter of perceptions? We believe it is because negotiation substitutes for the actual exercise of power,³⁹ leaving each party to calculate, without knowing, the other's **14* resources, determination, skill, and endurance. Absent the actual contest, each side must guess about the other's power. This "guess," mistaken though it may be, becomes the reality in each negotiator's mind. Thus, power becomes a perception "game."⁴⁰ Depending on the situation, this can either work for or against a party. If one has successfully bluffed, one gains leverage in the situation, while if the other party has successfully bluffed, one loses leverage.⁴¹

Perceptions can also play a critical and confounding role even when no bluffing occurs. One of the most common and deadly perception traps is what we call a "negotiator's bias" in bargaining situations.⁴² By this, we mean that the natural tendency of negotiators to enter deliberations with trepidation often leads to judgments, based on little or no evidence, that their opponents are negotiating aggressively and competitively, despite the negotiators' sincere efforts to bargain cooperatively.⁴³ These judgments, in turn, may be used to **15* rationalize combative behavior against an opponent that would otherwise not be justifiable.⁴⁴

In a similar fashion, negotiators too often perceive, without good reason, that their opponents enter into a deliberation with substantially more power than the opponents actually have.⁴⁵ Effective negotiators must learn to avoid these common perception traps and instead substitute clear and rational assessments. One must always seek to determine in as accurate a manner as possible the strength of the other side and whether the other side understands and appreciates its strength.⁴⁶

**16* 3. To have effective power, one must be willing to use it or be able to convince an opponent that one will use it

Given the fact that during the Vietnam War, the United States possessed a formidable nuclear arsenal and could have annihilated North Vietnam, one might ask why this greater "power" did not result in a U.S. victory.⁴⁷ The answer is that the use of such awesomely destructive weaponry would have triggered a world-wide backlash and would have threatened international order. Indeed, the United States never seriously entertained using its nuclear arsenal. This unwillingness to use superior weaponry, coupled with the opponent's recognition of such unwillingness, effectively neutralized this particular power advantage.

Similarly, individuals who possess great power, but who for one reason or another refuse to use it, lack effective power. For example, a compassionate boss who feels unable to fire a malingering employee or a timid judge who shies away from disciplining disruptive attorneys in the courtroom cannot be said to be powerful figures despite holding powerful positions. This point is particularly important in negotiation settings.⁴⁸

4. Having greater power does not guarantee successful bargaining outcomes

Repeated studies confirm that power symmetry, rather than disproportionate power, is the most favorable condition for reaching agreement.⁴⁹ Disproportionately greater power on the part of one **17* party in a negotiation often reduces the likelihood of a favorable outcome for the powerful party, producing what Professor William Ury calls the "power paradox": "[t]he harder you make it for them to say no, the harder you make it for them to say yes."⁵⁰ Several reasons seem to account for this phenomenon. First, parties with greater power are often tempted to achieve their goals through coercion rather than persuasion, and this leads to resistance from those with less power.⁵¹ Second, those with less power and under pressure to acquiesce often will scuttle agreements perceived to be demeaning—even to the point of rejecting deals that give them more

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benefits than no agreement.⁵² Third, while weaker parties are initially more **18* likely to employ conciliatory tactics in negotiation,⁵³ they may feel provoked to shore up their positions by making threats, adopting stubborn positions, or using punitive tactics in response to power plays by stronger parties.⁵⁴ Finally, weaker parties may be so suspicious of the stronger parties' intentions that they will refuse to agree even to terms that most observers would characterize as reasonable.

Why is it that interactions between parties of equal bargaining power are more likely to produce favorable outcomes than those with disparate power? In addition to removing the negative factors detailed above, symmetrical power tends to encourage good feelings between the parties,⁵⁵ open parties to creative, deal-enhancing suggestions,⁵⁶ and remove the temptation to use force and threats.⁵⁷ Of course, there is no guarantee that power equality will result in favorable agreements, but it does tend to produce optimal conditions for such agreements.

**19* In pointing out the pitfalls associated with power disparities, we do not mean to suggest that greater power is necessarily to be eschewed or that it is undesirable. We do contend, however, that greater power is not an unmixed blessing nor is it guaranteed to produce expected results. In short, exercising greater power calls for subtle and nimble skills that are almost as demanding as those required for negotiating with less power.⁵⁸

5. Power in negotiations typically arises from the dependence that each party has on the other

Most power involves the dependence of parties on one another.⁵⁹ For example, one who negotiates the purchase of an automobile depends on the dealer to supply a suitable vehicle while the dealer relies on the customer to pay money for the car. Each depends on the other for a vital part of the transaction.⁶⁰ In most relationships, power flows from the more dependent to the less dependent party.⁶¹ In the automobile sale example above, the price agreed upon might favor the dealer if the car is highly sought after and supplies limited, but tilt in the opposite direction if the car is widely available, especially from a nearby dealer with a large inventory. In the former case, the buyer would be highly dependent on the dealer; in the latter, just the reverse. The notion of mutual dependence is critical in negotiation. Those who focus only on their own dependence while **20* ignoring the other side's needs and vulnerabilities should not be surprised to find that they end up in a weaker position than those who appreciate the parties' mutual needs.⁶²

6. Negotiation power depends less on the other side's strength than on one's own needs, fears, and available options

As a corollary to the previous point, we note that the essence of determining the relative power of the parties in a negotiation depends less on how powerful each party is in any absolute sense than on how badly each party needs or fears the other. This is where the concept of BATNA (Best Alternative To a Negotiated Agreement) proves useful. If one has a number of attractive alternatives to a deal with one's opponent, one has great power regardless of the tremendous resources that the other side might have within its control.⁶³

A full assessment of the parties' power, however, requires a look beyond their BATNAs. Alternatives give negotiators leverage by establishing ways they can function without one another. But a proper power calculus also includes an assessment of what each party can do for and to the other. Professor Richard Shell calls the former "positive leverage" and the latter "negative leverage."⁶⁴ Positive leverage is "needs based" and negative leverage is "threat-based." Positive leverage arises when one party can satisfy the other's desires, especially if one has the unique ability to do so. For example, owning a particular plot of highly desired land or a record-setting homerun ball hit by a famous baseball player would make even the lowliest citizen **21* powerful in the eyes of one who desperately craves that particular item. Negative leverage arises when one can inflict damage on another or reduce his or her alternatives.⁶⁵ For example, one of the ways that the Wal-Mart Department store chain has proved powerful in business is by drawing so many customers from small local stores in rural areas that the small competitors become unprofitable and go out of business. Thereafter, given the lack of convenient alternatives, even shoppers who might otherwise wish not to shop at Wal-Mart become customers out of necessity.⁶⁶

In short, those who calculate the parties' relative power by comparing one side's strength to the other's miss the subtleties of the power dynamic. Power in negotiation stems from what each side can do for and to each other, not from what each side can do compared to one another.

7. Power is neither inherently good nor bad

Although ever mindful of Lord Acton's admonition that "[p]ower tends to corrupt, and absolute power corrupts absolutely,"⁶⁷ we do not view the exercise of power as inherently bad⁶⁸ or good.⁶⁹ The **22* ability to do good things may require the use of power just as much as the ability to do bad things. During World War II, the Allies defeated the Nazis

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through their greater military and industrial might, not their superior moral standing. Similarly, those who have committed war crimes in the Balkans in recent years will face justice only if a suitably powerful force is deployed to arrest, indict, and try them. Much the same point can be made regarding negotiation. Those who lack power (or the appearance of power) in negotiation are unlikely to attain much success when they bargain.

D. Sources of Power

Before entering into a negotiation, parties to the process should always assess the power both they and their opponents bring to the table. Without a clear picture of the power dynamic, parties will either underestimate or overestimate the degree of flexibility they have in bargaining.

Given the situational nature of power, one should not be surprised to find that it flows from an almost infinite set of sources.⁷⁰ Over the years, various commentators have classified the sources of power in different ways depending on the perspectives from which they have viewed it.⁷¹ In perhaps its broadest sense, power flows ^{*23} along pleasure/pain channels. That is, those who can dispense the most desired pleasures or mete out the greatest unwanted pain are likely to be the most powerful in human interactions. In the context of negotiation power, we see at least four sources of power that bear discussion and analysis: (1) personal power, (2) organizational power, (3) informational power, and (4) moral power.⁷²

1. Personal Power

When we refer to personal power, we mean the inherent individual traits that a person brings to a negotiation not directly associated with his or her organizational status.⁷³ We include things such as a person's intelligence, persistence, courage, physical strength, appearance,⁷⁴ celebrity, memory, confidence, awareness, education, interpersonal skills, emotional control, intuition, friendliness, and willingness to take risks.⁷⁵

In most negotiations, the parties try to "size the person up" by assessing the other's personal power. Because personal power derives from so many sources, a proper assessment involves a complex weighing of the numerous strengths and weaknesses that each side brings to the interaction. Interestingly, brute strength—either physical or mental—may not be the key to successful negotiation. To the ^{*24} contrary, studies of successful negotiators demonstrate that the key to favorable outcomes depends more on the ability to plan effectively, to persuade, to remain flexible, and to avoid unnecessary attacks than it does on raw displays of power.⁷⁶ Recent studies of "emotional intelligence" tend to confirm that even in scientific research settings, where "brain power" would appear to be the most highly prized attribute one could possess, success attaches to those with excellent interpersonal skills as readily—if not more so—as it does to those with superior intellects.⁷⁷

2. Organizational Power

Given the situational nature of power, it should surprise no one that organizations, which by their very nature are hierarchical and interactive (with power typically concentrated at the top and flowing downward), should play as large a role in power dynamics as personal power does.⁷⁸ Organizations produce and enhance power for ^{*25} fairly obvious reasons. They provide financial and human resources that vastly exceed those that can be mustered by isolated individuals. At the extreme, access to the controls of an organization or a nation can help an individual move from the position of an easily-ignored fanatic to a totalitarian dictator.⁷⁹

Power flows to individuals in organizations simply by virtue of their position. A certain amount of power inheres in positions irrespective of the individual in the position,⁸⁰ but motivated individuals can often increase the power of their positions by working hard and seizing available opportunities.⁸¹

Assessing power in an organization involves looking both to the formal power of a given position and to the actual control a position has within an organization. In many organizations, power is not necessarily distributed along the lines set forth in the organizational chart. This reflects the dynamic nature of these bodies, where ^{*26} changes in the flow of information or resources may shift power from one sector to another as the organization evolves.⁸² For example, as information technology continues to grow in importance and to fuel productivity gains, one can foresee that information technology positions will grow in influence in most organizations.⁸³

3. Information Power

We give special attention to information power⁸⁴ because it so often tips the scales in favor of one party and because it is the power source most easily increased in negotiations. Negotiators may not change their looks, personality, job, wealth or

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strength overnight, but they can often obtain information that dramatically changes the negotiation dynamic in a relatively short time.⁸⁵ The more information that a party has, the more likely it is that he or she can see the context of a given situation clearly and respond accordingly. This is particularly critical where decisions must be made quickly with limited resources. Warfare, where decisions carry life-or-death consequences, offers some of the most compelling examples of the strategic use of information. Two critical information sources—radar⁸⁶ and the *27 “Enigma” decryption machine⁸⁷—may well have meant the difference between an Allied victory or defeat in World War II. In similar fashion, accurate information about an opponent’s intentions, strength, or vulnerabilities can dramatically alter the power dynamic of a negotiation. For example, a buyer who knows an automobile dealer’s costs for a car and a sense of what a reasonable markup on the vehicle is stands a substantially better chance of obtaining a good deal than one who lacks this information.⁸⁸ Similarly, one who has gone to the Internet to compare prices for similar products will be well situated to bargain for the purchase of the products.

Expertise is one of the most critical and powerful sources of information. Those who are viewed as having mastered an area of knowledge can often influence a proceeding by expressing an opinion about a critical point in contention, often without justifying the basis of their opinion.⁸⁹ For example, the ability of experts to sway juries has long been recognized, so much so that it has drawn increasing court scrutiny of expert testimony.⁹⁰

The explosion in access to information brought by the Internet will no doubt make information an even more potent source of power *28 in negotiations. Research costs in time and money likely will drop significantly with the growth of this electronic medium, perhaps dramatically shifting power in negotiations from sellers to buyers.⁹¹

4. Moral Power

We use the term “moral power” to refer to those instances in which negotiators achieve gains through appeals to fairness or morality. In some instances, moral claims may be the only source of leverage available against those with greater power.⁹² For example, a POW held in captivity may convince a guard to provide minimum amenities simply by appealing to the guard’s basic humanity. Moral appeals seem likely to carry the greatest impact when they employ empathy to persuade opponents to place themselves in one’s shoes. Contemplating how one would like to be treated if the situation were reversed constitutes the heart of ethical appeals. Obviously, moral power depends primarily on the willingness of those with the upper hand to exercise restraint, but this fact should not lead to a too-quick dismissal of moral power. In fact, it can be operated in an extremely effective manner. Moral power carries a degree of sincerity that may be lacking in other negotiation approaches.

III. Power Imbalances in Negotiations: Legal Issues

One additional source of power is legal authority. That is, statutory or common law provisions may shift the power balance by *29 prohibiting either side from overreaching. We now turn to an exploration of legal protections that apply in negotiation situations involving power imbalances.

Although the superior bargaining power of one party, standing alone, does not generally provide the basis for invalidating an agreement,⁹³ the law does set limits within which bargainers must operate. These limits apply both with respect to the terms that can be negotiated and to the methods one can use to influence an opponent to agree to the terms.⁹⁴ They are premised on the assumption that at some point in the bargaining process, power advantages can produce inequities so pronounced that the law must step in to protect the weak.⁹⁵ In negotiations involving power imbalances, most abuses arise when the stronger party, either through threats or other overt displays of power, intimidates the other into entering an agreement so one-sided that it offends reasonable sensibilities. Of course, not all bargaining abuses result from overt power displays.⁹⁶ Some arise from shifting the balance of power by exploiting trust⁹⁷ or employing deceit.⁹⁸

Depending on the nature of the abuse, the law may take different approaches—regulating modestly where “arm’s length” conditions exist or expansively where a “special relationship” requires protection for particularly vulnerable individuals. Where special relationships exist, special protections apply.

A. Undue Influence

When a relationship of trust and dependency between two or more parties exists, the law typically polices the relationship closely *30 and imposes especially stringent duties on the dominant parties. For example, although tort law generally imposes no obligations on citizens to assist those in danger,⁹⁹ the courts take the opposite position when they determine that a special relationship exists.¹⁰⁰ In those cases, the courts unhesitatingly find an affirmative duty to rescue.¹⁰¹

Contract law imposes similar duties in the case of agreements involving undue influence in special relationships. Where one

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party-because of family position, business connection, legal authority or other circumstances-gains extraordinary trust from another party,¹⁰² the courts will scrutinize any agreements between them with great care to ensure fairness. Common examples of special relationships include guardian-ward, trustee-beneficiary, agent-principal, spouses, parent-child, attorney-client, physician-patient, and clergy-parishioner.¹⁰³ To treat negotiations in these settings as arm's length interactions would invite "unfair persuasion" by the dominant parties either through threats, deception, or misplaced **31* trust.¹⁰⁴ Accordingly, the law imposes special obligations on those who play the dominant role in such relationships,¹⁰⁵ requiring them to exercise good faith¹⁰⁶ and to make full disclosure of all critical facts¹⁰⁷ when negotiating agreements with dependent parties. In determining whether a dominant party in a special relationship exerted undue influence, the courts generally look to the fairness of the contract, the availability of independent advice, and the vulnerability of the dependent party.¹⁰⁸ An agreement entered into as a result of undue influence is voidable by the victim.¹⁰⁹

B. Protections in Arm's Length Transactions

Under the "bargain theory" of contracts,¹¹⁰ parties negotiate at arm's length to exchange consideration. An arm's length transaction is one in which the parties stand in no special relationship with each other, owe each other no special duties, and each acts in his or her **32* own interest.¹¹¹ The vast majority of contracts fall within the arm's length category, which means that no special obligations of disclosure, fair dealing or good faith are generally required. This is not to suggest that parties are free to operate without rules, but it does mean that they are accorded substantial leeway in negotiating contracts.¹¹² They certainly maintain the freedom to assume even foolish and shortsighted contractual obligations, so long as they do so knowingly and voluntarily.¹¹³ Once one of the parties acts in a patently abusive manner, however, the law does provide protection, as, for example, with fraud, duress, and unconscionability.

1. Fraud

Negotiated agreements, to be binding, must be entered into by the parties in a knowing and voluntary manner. Lies undermine agreements by removing the "knowing" element from the bargain. That is, one induced by misrepresentations to purchase a relatively worthless item of personal property typically buys the product "voluntarily" -in fact, eagerly-with enthusiasm generated by the false promise of the product's value. The catch is that because of the defrauder's lies, the victim has unfairly lost the opportunity to "know" the precise nature of what he or she has bought. Lies of this nature clearly alter the normal contractual dynamic, unfairly shifting power **33* from the victim to the defrauder.¹¹⁴ Because of the dramatic impact that fraud has on the power balance in negotiations, we necessarily review this doctrine.

In its classic formulation, common law fraud¹¹⁵ requires five elements: (1) a false representation of a material fact made by the defendant, (2) with knowledge or belief as to its falsity, (3) with an intent to induce the plaintiff to rely on the representations, (4) justifiable reliance on the misrepresentation by the plaintiff, and (5) damage or injury to the plaintiff by the reliance.¹¹⁶ Fraud entitles the victim to void the transaction and permits him or her to pursue restitution or tort damages.¹¹⁷ A false representation may be made in several ways-through a positive statement, through misleading conduct, or by concealing a fact that the defrauder has a duty to disclose.¹¹⁸

**34* The law generally does not impose a duty on the parties to disclose information harmful to their positions,¹¹⁹ leaving it to each on his or her own to discover whatever he or she can that will help in the negotiation. For example, a real estate broker who secures an option on a parcel of land generally need not disclose to the land owner that the option is for a supermarket chain's new store.¹²⁰ In some instances, however, the courts have imposed a common law duty of disclosure¹²¹ and Congress, in various consumer protection statutes, has **35* done the same.¹²² Typically, the courts and legislatures have done so in areas where information acquisition is extremely expensive and where fraud has been rampant.¹²³ In most cases, governmental action seeks to equalize otherwise disproportionate power balances.

Sadly, it appears that lying in negotiations occurs frequently¹²⁴ - often to the great advantage of the liar¹²⁵-and dramatically shifts **36* the power balance when it goes undetected.¹²⁶ Unfortunately, those who fail to appreciate and take precautions against lies set themselves up to be victimized in their dealings.

Compounding the issue of lying in negotiations is drawing the distinction between what is permissible bluffing,¹²⁷ or harmless puffing,¹²⁸ and what is truly improper. Traditionally, the distinction, although difficult to draw with precision,¹²⁹ is between a factual representation and mere generalized praise or opinion. Factual misrepresentations may constitute fraud, while generalized opinions usually do not.¹³⁰ One legal scholar, Professor Charles Pierson, insists that although legal commentators seem tolerant of "puffs," the courts are not. To the contrary, he argues, most courts find "sales **37* talk," if exaggerated, to be actionable.¹³¹ Although Pierson's claim is debatable in light of the many rulings that continue to find sales

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talk to be puff,¹³² he is correct that a number of courts treat attempted puffs as misrepresentations.¹³³ We find his logic persuasive. As Pierson argues, if so-called puffs did not create legitimate expectations in the minds of prospective purchasers, salespeople would not so often resort to them.¹³⁴

***38** Lawyers have not always improved the moral climate of bargaining. Indeed, lawyers have adopted ethics rules that permit misrepresentations in certain negotiation settings¹³⁵ based on the questionable premise that since the other side has no “right” to know this information, attorneys should not be held to speak honestly about it.¹³⁶

We acknowledge that the lines between proper and improper behavior are difficult to draw at times. We also recognize the general human proclivity to lie, including in negotiations.¹³⁷ Nonetheless, we find ourselves persuaded by a careful analysis by Professor Richard ***39** Shell that, despite the casual approach that negotiators sometimes take towards the truth, the law actually has adopted a much stronger stance against misrepresentations than is generally recognized.¹³⁸ Accordingly, we conclude that there is less room for playing with the truth than many negotiators believe possible.

2. Duress

Coercion, whether express or implied, takes many forms. One party, for example, might threaten to take its business elsewhere if its terms are not met. Another might threaten to file suit if its financial claims are not resolved. Still another might insist that it will no longer provide a discount or expedited delivery if a deal cannot be struck. These threats, designed to exert pressure on an opponent to secure his or her cooperation, generally fall into a category that the law would consider to be hard bargaining, but not illegal.¹³⁹ At some point, however, coercion becomes objectionable. How does one distinguish between proper and improper behavior? Unfortunately, there is no clear dividing line. As various commentators and courts have stated, threats per se are acceptable; only wrongful threats are forbidden.¹⁴⁰ What makes one threat “wrongful” and another not depends on the circumstances of each case. To constitute duress, threats must be of a particularly virulent nature.

***40** In assessing what makes agreements prompted by duress illegal, one is tempted to emphasize the coerced party’s lack of assent.¹⁴¹ As Professor John Dalzell points out, however, consent of a perverse sort exists even when there is duress. For example, when a parent pays a kidnapper to save his daughter’s life, his action may be the “expression of the most genuine, heartfelt consent.”¹⁴² Admittedly, this form of consent is with respect to a set of extremely unpleasant alternatives, but that one dislikes life’s available alternatives does not, by itself, make the case for duress. Unhappy souls faced with the choice between paying a debt or being sued might find both options unpalatable, but could not argue successfully that improper coercion led to their choice.¹⁴³ The extreme and improper nature of the threat constitutes duress within a given scenario.¹⁴⁴ In the kidnapping example, a threat to harm the victim is sufficiently extreme.¹⁴⁵

Threatened action need not be illegal—even acts otherwise legal may constitute duress if directed towards an improper goal.¹⁴⁶ For ***41** example, a threat to bring a lawsuit—normally a legitimate form of coercion—becomes abusive if “made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.”¹⁴⁷ Similarly, a threat to release embarrassing, but true, information about another person, although abhorrent, would not constitute duress (in the form of blackmail) unless accompanied by an improper demand for financial or other favors.¹⁴⁸

Should negotiators with a decided power advantage feel inhibited from pushing for as hard a bargain as they can in light of the law of duress? Generally, no. Judging from the language in the courts’ opinions, hard bargainers should have little to fear from the doctrine of duress. Nothing in the law¹⁴⁹ of duress prevents negotiators from pushing to the limits of their bargaining power¹⁵⁰ or from taking advantage of the economic vulnerabilities or bad luck of their opponents.¹⁵¹ Trouble arises only when a party makes threats that lapse ***42** into the illegal,¹⁵² immoral¹⁵³ and unconscionable.¹⁵⁴ Of greater impact on negotiators concerned about legal protections is the law of unconscionability, to which we now turn.

3. Unconscionability

The doctrine of unconscionability functions to protect bargainers of lesser power from overreaching by dominant parties. Invoked in a variety of cases under the Uniform Commercial Code¹⁵⁵ and elsewhere,¹⁵⁶ the term has never been precisely defined, no doubt to provide greater flexibility in its use.¹⁵⁷ Although the doctrine traces its ancestry to Roman law,¹⁵⁸ its modern incarnation arises generally ***43** from equity law¹⁵⁹ with its emphasis on fairness.¹⁶⁰ To the drafters of the UCC, establishing unconscionability marked a major step forward in promoting judicial honesty. For the first time, they felt, courts no longer needed to stretch or distort legal rules to invalidate unfair contracts.¹⁶¹ Unconscionability provided courts with the means to reject oppressive agreements on that basis alone. This point is made explicit in the official comment to section 2-302:

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This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.¹⁶²

What is an unconscionable contract? Given that the UCC drafters deliberately avoided an explicit definition, one cannot simply and easily capture the concept. At a minimum, an unconscionable contract is one “such as no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other.”¹⁶³ Unconscionability seeks to prevent two evils: ^{*44} (1) oppression and (2) unfair surprise.¹⁶⁴ In a seminal analysis, Professor Arthur Allen Leff labeled these two concepts “substantive” and “procedural” unconscionability, respectively.¹⁶⁵ Substantive unconscionability includes the actual terms of the agreement; procedural unconscionability refers to the bargaining process between the parties. Substantive unconscionability occurs where the terms of the contract are so onerous, unreasonable or unfair¹⁶⁶ that someone with common sense hearing the terms could not help exclaiming at the inequality of the agreement.¹⁶⁷ Common examples of contract provisions that raise substantive unconscionability concerns include excessive price, termination-at-will clauses, add-on security clauses, limitations on damages for breach, and short time periods for filing claims.¹⁶⁸

Procedural unconscionability, what Professor Leff calls “bargaining naughtiness,”¹⁶⁹ arises when contracts involve the element of unfair surprise. This typically takes the form of terms hidden in a mass of contract language, terms hidden in small print, or on the back of an agreement where one would not think to look, or the like.¹⁷⁰ Procedural unconscionability also assumes another, less clearly delineated form, that of “oppressive” tactics. When the dominant party ^{*45} uses high-pressure tactics in circumstances that result in unfair control of the situation, the courts will intercede.¹⁷¹ Although perhaps fully cognizant of the terms, the victim has to accept what the other party demands because of the victim’s limited bargaining power. The abuse falls short of duress, but qualifies for judicial relief under the doctrine of unconscionability.¹⁷²

While it is theoretically possible to have substantive unconscionability without procedural unconscionability and vice-versa,¹⁷³ both elements not unsurprisingly usually find their way into the same contract.¹⁷⁴ In fact, a number of courts insist that both be ^{*46} present before they will make a determination of unconscionability.¹⁷⁵

Virtually all cases in which unconscionability arises as an issue involve significant disparities in bargaining power, but that, standing alone, rarely justifies a finding of unconscionability according to most courts¹⁷⁶ and commentators.¹⁷⁷ What draws judicial fire is when the party endowed with superior bargaining power imposes an extremely unfair and one-sided agreement on the weaker.¹⁷⁸ In effect, the stronger party oppresses the weaker party through the application of brute power, thereby removing any real “choice” from the victim.¹⁷⁹ Accordingly, inequality of bargaining power seems a generally necessary, but not sufficient, condition of unconscionability.¹⁸⁰

^{*47} One contract form that alerts judges to look for unconscionability is the so-called contract of adhesion.¹⁸¹ These contracts, used ubiquitously by commercial entities such as banks and large retailers,¹⁸² typically offer terms on a printed form on a non-negotiable basis.¹⁸³ Contracts of adhesion, although not unconscionable per se,¹⁸⁴ invariably signal that a substantial disparity in bargaining power exists between the parties.¹⁸⁵ When the power differential in an adhesion ^{*48} contract results in a bargain that unnecessarily or unreasonably favors the stronger party, the courts may rule the contract unconscionable.¹⁸⁶

How concerned should a negotiator be—especially one with superior bargaining power—that pursuing an advantage in a contract will result in a court ruling that the agreement is unconscionable? Our best answer: some, but not much. For the most part, the courts have taken a cautious approach to finding unconscionability in negotiated agreements.¹⁸⁷ The vast majority of successful unconscionability claims involve poor, often unsophisticated, consumers challenging oppressive adhesion contracts foisted on them by retail merchants or credit sellers.¹⁸⁸ In fact, the courts have generally been unreceptive to unconscionability claims by middle class purchasers or by merchants against other merchants.¹⁸⁹ No doubt this reflects the general view that persons of greater sophistication suffer less contractual abuse and need less protection.¹⁹⁰

^{*49} 4. Good Faith and Fair Dealing in Contractual Performance and Enforcement

Reaching an agreement without committing or falling prey to undue influence, fraud, duress, unconscionability, or violations of various consumer protection statutes does not end the law’s scrutiny. Having entered into a contract, the parties assume obligations to perform and enforce their duties in good faith.¹⁹¹ Virtually every contract that a person enters into in the United States carries an implied obligation of good faith.¹⁹² Accordingly, even parties with a decided power advantage in a contract face legal limits on the degree of freedom their power permits them to exercise.¹⁹³ For example, employment-at-will

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contracts, usually interpreted to permit employers to terminate workers for no reason, nonetheless, often have been held to be subject to an obligation of good faith.¹⁹⁴

Good faith requirements arise both under the Uniform Commercial Code and the Restatement of Contracts.¹⁹⁵ The Uniform Commercial Code states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”¹⁹⁶ The Restatement provides “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance *50 and its enforcement.”¹⁹⁷ Good faith appears to be a fundamental building block of agreements, applicable to virtually all contracts¹⁹⁸ and expressly non-disclaimable.¹⁹⁹ The UCC refers to good faith in thirteen of the sections on sales alone and in at least 60 of the 400 sections of the whole Code.²⁰⁰

The UCC defines good faith generally as “honesty in fact in the conduct or transaction concerned.”²⁰¹ In Article 2, for merchants, the definition is more demanding: “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”²⁰² The Restatement goes beyond the UCC—it imposes a duty of good faith and fair dealing on all parties, not just merchants.²⁰³

The concept of good faith, because it is so general, carries substantial ambiguity with respect to how it is supposed to police contracts.²⁰⁴ To address this, Professor Robert Summers has offered the *51 most widely adopted interpretation of the term in an extremely influential law review article.²⁰⁵ In the article, he describes good faith as an “excluder,” namely a “phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.”²⁰⁶ The wide variety of acts in performing contractual terms that give rise to “bad faith” findings by the courts include: evasion of the spirit of the deal, lack of diligence, willful rendering of only substantial performance, abuse of power to specify terms, abuse of power to determine compliance, and interference with or failure to cooperate in the other party’s performance.²⁰⁷ With respect to enforcing contract terms, bad faith acts would include: conjuring up a dispute, adopting an overreaching or over-stretched interpretation and construction of contract language, and taking advantage of another to get a favorable readjustment or settlement of a dispute.²⁰⁸ In these cases, the failure to act in good faith, although not an independent cause of action, constitutes a breach of contract, giving rise to remedial action by the innocent party.²⁰⁹

Many, if not most, of the bad faith acts set forth in Summers’ examples involve some form of abuse of power. That is, one with superior power acts insincerely in some fashion that produces an unfair advantage for him or her. Although insincerity is difficult at times to document, the courts have shown increasing willingness to police bad behavior, especially as the doctrine of caveat emptor²¹⁰ declines in the United States.²¹¹ This serves as a reminder that merely avoiding the more extreme forms of contractual abuse (such as fraud, duress or *52 unconscionability) does not provide a green light for those with greater power to do as they wish once they have consummated a deal.

5. The Special Case of Good Faith in Precontractual Negotiations

There is debate about whether the requirements of good faith and fair dealing apply to negotiations that do not lead to contractual agreements. By their terms, the UCC²¹² and the Restatement²¹³ ignore contract formation: both expressly apply the concept of good faith to the “performance” and “enforcement” of contracts, but neither mentions precontractual negotiations where they do not lead to a contract. Based on this approach, most courts have refused to imply good faith obligations in precontractual negotiations.²¹⁴

One might be tempted to ask whether judicial policing of precontractual behavior even matters. After all, if the negotiations result in a contract, then the precontractual words and deeds can be scrutinized to see whether undue influence, fraud, duress, unconscionability or the like played a role in the deal’s formation. If not, one might ask, where is the harm? In many cases, other than some lost time and bruised feelings, there might be none. On the other hand, in some instances, one can imagine substantial harm. For example, someone trying to choose between two parcels of land to purchase might be misled as to one owner’s intentions to sell and thereby lose the opportunity to purchase the other plot of land. Similarly, a party might invest substantially in inventory in anticipation of purchasing a business only to discover that the owner had lied about his intention to sell. In these and other cases, the damage from bad faith in negotiations might be severe even though the parties never entered into a contract.

Notwithstanding the general view that negotiations are excluded from coverage of good faith and fair dealing concepts, there is some authority to the contrary. Professor Summers, for example, cites a number of pre-Restatement cases that suggest that good faith concepts apply at least to some negotiations, such as negotiating without serious intent, abusing the privilege to withdraw a proposal or an *53 offer, entering a deal not intending to perform (or recklessly disregarding the prospective inability to perform), and taking advantage of another in driving a bargain.²¹⁵ These examples demonstrate at least a nascent beginning in protecting precontractual interests.²¹⁶

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Another commentator, Professor Nicola Palmieri, schooled in the Civil Law system in Italy, is disturbed by the thought that the American legal system²¹⁷ would not extend good faith concepts to negotiations.²¹⁸ Professor Palmieri has argued forcefully in favor of applying good faith to precontractual negotiations. On the basis of a broad review of the law,²¹⁹ Palmieri concludes that neither the UCC nor the Restatement preclude applying good faith and fair dealing to precontractual negotiations²²⁰ and that current tort law—as opposed to contract law—supplies substantial protection to those who might be exploited in precontractual negotiations.²²¹

***54** We believe that Palmieri is correct that the current tort system provides some safeguards to those engaged in contract negotiations. Nonetheless, given the degree of uncertainty in the law, we believe that one who faces the prospect of extensive negotiations without the guarantee of an agreement at the other end needs to proceed with particular caution. The other party to a negotiation may be more free to act ignobly than one might initially assume. At a minimum, one should be on alert.

6. Legal Protections for Negotiators Facing Power Disparities: Final Thoughts

Having reviewed the legal protections available to negotiators, we now pause to reflect on the points thus far covered. As a general matter, we believe it clear that, notwithstanding the general movement away from caveat emptor, the law continues to accord parties in negotiations wide discretion to craft deals, even foolish ones, when the parties bargain with relatively equal power. Once inequality of bargaining power enters the picture, however, judicial scrutiny increases substantially.²²² Unequal bargaining power does not automatically invalidate agreements, but it does make them more vulnerable to challenge if they are excessively one-sided or unfair. Nonetheless, the likelihood of successful legal challenge to a negotiated agreement remains small in our judgment,²²³ which strongly suggests that weaker parties must rely on their own resources when they negotiate. Accordingly, we now move to a discussion of strategies that parties, both weak and strong, may want to consider when they negotiate on an uneven playing field.

***55** IV. Strategic Bargaining in Unequal Power Settings: General Considerations

As anyone who has studied negotiation theory even to a mild extent knows, there are hundreds, if not thousands, of general techniques that various experts and commentators offer to assist bargainers. Having reviewed a large number of them and their relevance to our analysis of power disparities, we have concluded that some are so critical that we must discuss them if we are to provide meaningful advice on the topic. Accordingly, before addressing unequal power in bargaining situations specifically, we discuss several selected techniques that apply to negotiations generally.

At the outset, we note a critical point: given the wide variety of situations in which people bargain, no one negotiation technique works all the time. In fact, there may well be times in which doing the exact opposite of what we counsel will prove to be a better approach than what we suggest in this section. As frustrating as it may be to hear, the only advice that applies universally to negotiations is “it depends.”²²⁴ That said, we nonetheless believe that the approaches we describe offer significant advantages in helping negotiators reach achievable agreements.²²⁵

A. Characteristics of Effective Negotiators

A good way to understand how to negotiate effectively is to try to learn what successful negotiators do that makes them successful. Somewhat surprisingly, few studies have been conducted that address this point.²²⁶ Of the studies that have been done, perhaps the ***56** best known are those conducted by Neil Rackham and his associates in England over a period of years beginning in 1968.²²⁷ Starting with a base of observations of real-life business negotiations and numerous assessments of those negotiations by the participants, Rackham identified a number of consistently successful bargainers.²²⁸ He and his associates then studied them to see the particular characteristics that permitted them to bargain to such advantage. Rackham found that successful negotiators tended to exhibit the following attributes:

- They considered many options, including those suggested by opponents.²²⁹
- They devoted substantial time to refining and expanding areas of agreement.
- They considered the “long-term” implications of agreements.²³⁰
- They adopted very flexible approaches in reaching agreements.
- They avoided irritating words and phrases.²³¹
- They made few immediate counterproposals.²³²

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- They refrained from emotional attacks on opponents.

- They tested their understanding frequently.
- They asked many questions.²³³

- *57 • They shared their feelings with their opponents.²³⁴

Dr. Chester Karass, a practitioner turned researcher (and later a successful entrepreneur), conducted another of the significant studies of effective negotiators. Based on his years of experience as a negotiator for Hughes Aircraft Company, Karass organized 120 professional negotiators from four aerospace companies to undertake a series of negotiations, and to record their assessments of their own and their rivals' performance.²³⁵ On the basis of these observations, Karass reached a number of conclusions about how skilled negotiators bargain:²³⁶

- They entered negotiations with high aspiration levels.²³⁷

- They made high initial demands, avoided making first concessions, conceded slowly, and avoided making as many large concessions as their opponents.

- *58 • They used concessions in a dynamic way. That is, they tested the validity of their assumptions and the intent of their opponents through concessions.

A third study by Gerald Williams, a law professor at Brigham Young University, also merits mention. Professor Williams focused on attorneys²³⁸ identified by their peers as effective negotiators.²³⁹ This study led to several findings. The majority of attorney negotiators, about sixty-five percent, turned out to be what Williams called "cooperative" negotiators, i.e., those who consider fairness and ethical behavior to be the most important element in bargaining.²⁴⁰ The other major group consisted of those identified as "aggressive" negotiators, i.e., the attorneys for whom maximizing a client's settlement is the top goal.²⁴¹ Upon careful analysis, Professor Williams concluded that neither side could properly claim "a monopoly on effectiveness."²⁴² To the contrary, he determined that each style could either be effective or unsuccessful depending on the skill of the individual. Effective "cooperatives" and "aggressives" shared several key characteristics:²⁴³

- Prepared on the facts

- Prepared on the law
- Observed the customs and courtesies of the bar²⁴⁴

- Took satisfaction in using legal skills

- Effective trial attorney

- Self-controlled

Williams sought to determine which approach, cooperative or aggressive, proved more successful to negotiators. His conclusion: neither could be said to be consistently superior. Rather, the most *59 effective bargainers adopt either mode depending on the type of opponent the negotiator faces.²⁴⁵ If one deals with an aggressive negotiator, one needs to be able to respond aggressively; if bargaining with a cooperative negotiator, one needs to adopt a cooperative mode.²⁴⁶

These studies provide several lessons. First, effective negotiators prepare carefully and approach negotiation methodically. Second, contrary to the general impression that many students bring to our courses, one need not negotiate aggressively to be effective (although aggressiveness can be effective). Third, effective negotiators control their emotions during negotiations. Fourth, effective negotiators engage in comprehensive questioning when they bargain. Fifth, an ability to respond flexibly to different circumstances proves to be one of the most critical negotiation skills one can have.

B. "Know Thyself": Self Awareness and Self-Assessment

Truly effective negotiators understand not only their opponents, but themselves as well. Because successful negotiation requires effective goal setting, emotional control, persistence, prudent risk-taking, and a variety of other personality traits, those who lack insight into themselves stand at a distinct disadvantage when dealing with others—especially others with more power. Self-awareness provides an indispensable guide for exercising self-control, and for understanding and dealing with others. This is critical for good bargaining results.²⁴⁷

What we mean by self-awareness is the ability to monitor one's own thoughts and emotions, with the resultant likelihood of

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being able to control them.²⁴⁸ Self-awareness and self-control are traits ***60** commonly associated with “emotional intelligence,” a characteristic increasingly considered as important for success in life as pure IQ, especially in activities involving interpersonal interaction.²⁴⁹

Negotiators who seek to gain a better measure of self-awareness should consider two separate approaches. First, they should undertake a personal self-assessment of their negotiation style, including strengths and weaknesses.²⁵⁰ Second, they should approach family and friends who will speak candidly to ask for feedback, good and bad, on their interpersonal styles, including their negotiation behavior. Although we all have self-images about how we interact with others, our peers do not necessarily share those impressions.²⁵¹

It is critical to obtain as clear a picture as possible about how others see us. Without such a perspective, negotiators cannot be effective in communicating their concerns and persuading others to agree to their proposals. This seems particularly so in negotiations with more powerful parties where a brave face may be called for and where showing fear may be fatal. The ability to remain calm at moments when an opponent is flexing muscles requires a strong measure of confidence and self-control. Without a clear sense of self, one will find such control difficult to achieve.

***61 C. The Need for Careful Preparation**

When asked for suggestions of useful negotiation tricks and techniques, we usually respond that the “dark” secret of effective bargaining is that there are no surefire tricks²⁵² other than the need for careful preparation. Those who have prepared carefully and thoroughly, we believe, rarely find themselves taken advantage of by opponents’ ploys and dirty tricks.

Of all the advice proffered by experts in the field, both academic and practitioner, none matches in strength and unanimity the call for careful planning and preparation in negotiation.²⁵³ Preparation in this context means more than just learning as many facts as possible ***62** about the issues likely to arise in the discussions, although that is certainly important. It also includes carefully crafting a flexible set of thoughts and plans for upcoming negotiations, including an attempt to look at the deal from the opponents’ perspective. Because preparation is so critical, many commentators have developed useful checklists and planning guides.²⁵⁴ We think it helpful to review some of the advice they offer, especially as it relates to preparing for bargaining in situations with power imbalances.

1. Determining Goals and Interests

Before entering a negotiation, one needs to be clear what it is that one seeks from the deal. Although this may appear to be simple, most knowledgeable observers suggest that it is not.²⁵⁵ Goals determination involves more than describing a desired end position; it also requires assessing why one seeks a particular goal or goals. As Roger Fisher and William Ury, in their classic exposition on negotiation, *Getting To Yes*, so insightfully observe, those who negotiate over positions without focusing on the underlying interests behind the positions,²⁵⁶ create enormous and unnecessary obstacles to reaching ***63** effective agreements.²⁵⁷ Identifying and sharing interests with one’s opponents injects a substantial degree of flexibility into a negotiation because there are typically a number of ways to satisfy interests, many of which both sides find completely compatible.²⁵⁸ For example, two sides that vie for a tract of land may find that one wants it for logging purposes and the other to convert it into a pasture for raising livestock. In this case, the parties should be able to accommodate each other’s interests without substantial conflict. Unless they reveal their interests to one another, however, they may never get past their competing positions.

Identifying one’s own interests is only part of the planning process. One also needs to assess, as well as can be done, the likely goals and interests of one’s opponent.²⁵⁹ This requires a degree of research and information gathering.²⁶⁰ The payoff is obvious. Determining what one’s opponent seeks enables a negotiator to develop ways to guard against overreaching and to satisfy an opponent’s interests in the most effective and least costly manner possible.

***64 2. Target Points, Aspiration Bases, Walkaway Points, BATNAs, and MSPs**

Because it is not possible to ascertain with certainty what one’s adversary seeks and why, astute negotiators rarely approach bargaining with an absolutely fixed goal in mind. To the contrary, effective bargaining requires a degree of flexibility in selecting goals, with most successful negotiators choosing a range of possible satisfactory deals and then trying to attain those most favorable to them.

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As a starting point, one needs to identify what experts call a “target point,”²⁶¹ “maximum plausible position (MPP),”²⁶² or “aspiration base.”²⁶³ These terms all refer to the most favorable outcome of negotiation that is achievable. While it may be unlikely that one’s highest aspirations can be achieved, selecting a lofty goal still makes sense since high aspirations, other things being equal, tend more often to produce favorable results.²⁶⁴ Accordingly, we urge negotiators, especially those inclined to timidity, to be expansive in this calculation. To do this successfully, one needs to do more than just select a high target; one needs both to develop persuasive arguments in support of the goal and then to press those arguments on the other party with conviction.

Beyond developing one’s target point, MPP, or aspiration base, one next needs to determine those terms or points that, although not ideal, appear realistic and most likely to be acceptable to the other ^{*65} side.²⁶⁵ Because one’s opponent is likely making the same calculation from the opposite direction, these are the points at which agreement is most probable.

Finally, one needs a bottom line. This is particularly crucial against an opponent with superior bargaining power who seems determined to push his or her advantage to the fullest. It also helps where a negotiator finds that an adversary has goals and interests that fail to overlap with his or hers at all. Sometimes an opponent will insist on an agreement that is actually worse for the negotiator than if no deal had been struck. Bargainers need always to keep the “no deal” option in mind, especially because the time and energy they have invested in bargaining too often tug them towards reaching an agreement-any agreement.²⁶⁶ To avoid favoring bad deals over no deals, therefore, one needs to determine in advance of a negotiation what we call a “walkaway point,” i.e., the point at which rejecting a deal constitutes a superior alternative to taking the other side’s best offer. Virtually all negotiation experts advise this, although they often use different terms to describe walkaway point. Fisher and Ury use the term “BATNA,” or the “Best Alternative to a Negotiated Agreement,” to describe the concept.²⁶⁷ Schoonmaker calls it “MSP,” or “Minimum Settlement Point.”²⁶⁸ Craver refers to it as the “resistance point.”²⁶⁹ All, however, advance the same notion: notwithstanding the temptation to justify sunk costs by accepting a ^{*66} bad deal, sometimes the only reasonable thing to do is to reject an offer.

It is not enough to determine one’s own BATNA or walkaway point. One must, in addition, try to assess the other side’s walkaway point as well. Interpreting another’s interests and goals obviously involves a degree of speculation, with the possibility of substantial miscalculation. Nonetheless, computing an opponent’s walkaway point helps steer the impending discussion towards the proper issues²⁷⁰ and provides a realistic sense of the awaiting bargaining challenges.²⁷¹

Calculating one’s BATNA or walkaway point is central to the bargaining power that each party brings to the table. For example, assume the case of a prospective employee negotiating a starting salary with a multinational corporation. Given the mismatch in resources, one might assume that the individual would have virtually no ability to push for high pay against such a powerful entity. Consider, however, how the calculation changes if the prospective employee carries a highly sought after skill set and has two other pending job offers at extremely high starting salaries. At that point, the employee has an extremely powerful walkaway point and can afford to press the company hard for salary or other concessions. Given the prospective employee’s potent walkaway point, the power equation in the negotiation has shifted dramatically.²⁷²

One final comment about walkaway points: it does little good when negotiating to trip across one’s walkaway point and end the bargaining with no advance warning to the other side. Instead, as this point is approached, one needs to give increasingly emphatic signals that one’s limit is being reached, so that the other party is fairly alerted before crossing it. Unexpectedly terminating a negotiation ^{*67} typically serves only to annoy one’s adversary and to harden his or her resistance to one’s proposals.²⁷³

3. Information Exchange: Seeking Answers and Resisting Inquiries

Preparing for a negotiation presents a number of complex information exchange issues. Because information constitutes one of the most significant ways to boost power in a negotiation, acquiring information becomes vital to any negotiator, especially one who senses that the other side brings substantially greater power to the table. Accordingly, researching one’s opponent, all relevant market conditions, one’s alternatives, the other side’s alternatives, and so on helps meet the critical need of shifting power in a favorable direction.

In addition to conducting basic research prior to bargaining, one must prepare thoroughly for seeking and disclosing information during the negotiation. Parties rarely step immediately into discussing proposals with no preliminaries. Rather, they typically exchange pleasantries, engage in small talk, and then move to exploring each other’s goals and interests. Excellent negotiators thoroughly plan for these exchanges, identifying the information they will seek, assembling the data they are willing to disclose and developing responses to resist revealing matters they wish to keep confidential.

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We strongly recommend planning how to disclose information to the other side. There are often things, such as price and terms, that one wishes to disclose, but how and when to do so requires careful thought. An overly eager or premature disclosure may well signal insecurity or weakness; an unduly late or cryptic disclosure may indicate a desire to cover up damaging information. Similarly, it is useful to anticipate what the other party should want to disclose and then determine whether he or she in fact does so. For example, if one is purchasing a used automobile, the seller should want to share the good news about how well the car runs and how carefully it has been maintained. The seller's failure to disclose this information is often as important as what he or she actually reveals.

***68** A word of caution: while positive information exchanges almost always enhance the opportunities for excellent agreements, parties should not begin disclosing sensitive information immediately and unilaterally. Those who do can fall into a deadly trap. Unless the other side reciprocates, one becomes vulnerable to exploitation. For example, the timid negotiator who confesses how nervous he or she is invites bluster and threats from an opponent. Similarly, the negotiator who reveals how badly he or she wishes to purchase an antique automobile presents an almost irresistible temptation for the dealer to raise the price by a substantial amount.

In short, when it comes to exchanging information, the parties face what we call a "negotiator's dilemma."²⁷⁴ The negotiator's dilemma is not unlike the classic "prisoner's dilemma" in game theory.²⁷⁵ That is, when both parties fully disclose information, the chances for an excellent agreement rise dramatically because each better understands and can accommodate the other's needs. However, if only one of the parties discloses information, he or she becomes vulnerable to exploitation by the other. When neither party discloses, the chances for an effective agreement are dimmed because neither party knows what the other wants, and it is therefore difficult to explore "win-win" options. This is illustrated below:

Although there is no perfect solution to the negotiator's dilemma, we advise negotiators to adopt an incremental approach to information exchange. That is, as the parties explore each other's willingness to share facts about their respective situations, each should adopt an implicit "quid pro quo" approach towards the other.²⁷⁶ Each should take the risk of revealing some significant information to the other ***69** and then test the other's willingness to reciprocate.²⁷⁷ Only if the other responds with similarly useful information should a party continue revealing information. For example, one side might reveal that, indeed, he or she strongly wishes to buy the property, but then ask how firmly set the purchase price is. If the other side responds that the price is negotiable, then the parties can move to further information exchanges about price, repairs, financing, and a closing date. At any stage of the process, however, should one party stop reciprocating, the other should check to see whether further unilateral information disclosure makes sense.

How does one go about seeking information in a negotiation? Before entering into the bargaining, a party should have independently sought as much information about the other side's situation, interests and goals as possible.²⁷⁸ This should be done from all available sources, including the Internet,²⁷⁹ newspapers, books, as ***70** well as the opponent's friends and enemies.²⁸⁰ With this pre-negotiation research completed, one should next identify the information to be sought from the opponent during the negotiation. For example, one might know that the other party wishes to sell a house because he or she plans to move to another state. Knowing this, one might then seek information during the bargaining process about when and why the other side wishes to move.

Other things being equal, we advise asking for information directly (politely, in most cases).²⁸¹ In doing so, one should generally begin with broad, open-ended questions such as "Will you tell me about this property?" rather than more closed, narrow questions such as "Does the basement flood when it rains?" Open-ended questions prompt the respondent to talk, and permit the questioner to acquire more information than narrow inquiries.²⁸² Only after the open-ended questions have raised or eliminated issues should one move to more specific queries.²⁸³ Moreover, one should always be prepared to return to open-ended questions as new information needs arise or as promising information trails emerge.

Some open-ended questions work better near the end of a negotiation than at the beginning. For example, on those occasions where one has developed a sense of unease about whether the other side has been forthcoming, we suggest asking what we call the "Come Clean" question: "Is there something important known to you, but not to me, that needs to be revealed at this point?" Because of its all-encompassing nature, this question used at a critical moment can surface ***71** vital information.²⁸⁴ Even if the other party deflects the question, his or her body language may speak volumes.

Although there are times when indirection is called for, we suspect that excessive subtlety in questioning caused by a reluctance to offend too often leads to misunderstanding and a lack of effectiveness.²⁸⁵ So long as one asks for information in a friendly and non-threatening way, he or she is unlikely to trigger a hostile response.²⁸⁶ And one needs particularly not only

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to listen to the answer, but also to observe the other side's body language during responses. Body language sometimes conveys more useful information than spoken words because it is often involuntary and, therefore, revealing.²⁸⁷ In some cases, the nervous refusal to answer or the inability to give direct eye contact when stating a demand discloses more than the actual words of the response.²⁸⁸

Another reason that negotiators refrain from aggressive questioning is because they fear triggering equally aggressive questioning ^{*72} in return. But timidity provides no guarantee that one will be spared a grilling-it may happen anyway. Accordingly, one should always prepare to be questioned exhaustively even if one has no plans for questioning the other party.²⁸⁹ And, in anticipation of being interrogated, one should determine what information he or she is willing to disclose and under what conditions.

In addition to providing critical strength and minimizing disclosure errors, careful preparation regarding information-seeking by one's opponent serves another key function: it reduces the temptation to lie. Those who prepare inadequately-including even the most ethical and well-intentioned-regrettably are likely to become disingenuous or worse when faced with tough questions they have not anticipated.²⁹⁰ Careful preparation permits negotiators to respond to tough questions without their lies jeopardizing the process.²⁹¹

To avoid information difficulties when one is questioned, one should have a prepared set of responses to deal with inquiries about information he or she does not wish to disclose. On this point, we offer a number of suggested responses:

- Offer to return to the question once the negotiation has made greater progress.²⁹²
- Offer to answer part, but not all, of the question.²⁹³
- ^{*73} • Answer part of the question now, and offer the rest if progress is made in the negotiation.²⁹⁴
- Explain why you will not answer the question.²⁹⁵
- Negotiate the circumstances under which you will answer the question.²⁹⁶
- Occasionally, simply remain silent.²⁹⁷

In addition, to our suggested responses, Professor Charles Craver has developed a similar list of ways to avoid answering questions that we draw to the reader's attention:²⁹⁸

- Simply ignore the intrusive question.
- Answer the beneficial part of compound questions.²⁹⁹
- Over- or under-answer the question.
- Misconstrue the question and answer the reframed inquiry.³⁰⁰
- Answer the opponent's question with a question.³⁰¹
- Rule the question out of bounds.³⁰²

^{*74} Craver's suggestions strike us as particularly useful when a negotiation has taken a negative turn, and one is trying to avoid an aggressive questioner. Parties engaged in information exchange must always keep in mind, however, that the more antagonistically one engages in and responds to questioning, the less likely the atmosphere will be favorable for effective bargaining. The critical part to remember is that unless the parties reveal useful information to one another, they are not likely to develop collaborative solutions to bargaining problems.

4. "First Offer" and Concession Strategy

Negotiation experts worry about who makes the first offer and what the first offer should be. Most declare that the astute negotiator should never make the first offer.³⁰³ Those who make the first offer, the experts argue, too often make themselves vulnerable by demonstrating ignorance,³⁰⁴ by making offers meant to be rejected that instead are immediately accepted,³⁰⁵ by seeking unduly modest ^{*75} agreements,³⁰⁶ or, conversely, by demanding insultingly large amounts.³⁰⁷ The risks, the experts allege, are simply too great.³⁰⁸

Although we agree that the pitfalls of making first offers are many-leading us to prefer not to do so as a general rule-we can see counter-arguments that return us to our universal rule of "it depends." In some instances, one can gain an advantage by making the first offer. Going first permits one to seize the initiative and to set the range for bargaining,³⁰⁹ especially for deals where there are few "market" indicators.³¹⁰

Regardless of which side makes the first offer, there is virtual unanimity among the experts regarding the size of one's opening offer: it should be as high (or as low) as reasonably possible.³¹¹ Doing ^{*76} so avoids leaving any bargaining surplus

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on the table³¹² and capitalizes on findings from psychology. Researchers in that field have identified what they call an “anchoring” effect that works in favor of those who make aggressive opening demands.³¹³ That is, individuals will look to the offers made by the other side in determining their aspirations and bargaining range. A strong opening position by one side may well move the other to moderate its expectations, to the benefit of the aggressive opener. Of course, this may not always occur. If the other side has a clear sense of what a reasonable offer should be, an extreme offer may simply convince them that the other party is unreasonable or bluffing, and provide no clear advantage.³¹⁴

Once the parties have declared their opening offers, assuming that each remains willing to deal, they then must begin making concessions to reach an agreement. Again, there is virtual unanimity among the experts regarding how this should proceed. Concessions, they insist, should be made grudgingly and with increasing resistance. This strategy reflects another psychological insight: negotiators value what they painfully extract from an opponent more than what they easily acquire.³¹⁵ Accordingly, however little one values a ^{*77} concession granted to the other side, one should always treat each bit of ground relinquished as though it were valuable, and painfully released.

Moreover, we recommend a specific approach to making concessions. To the extent possible, one should not simply concede points with little said about the reasons why. One should give substantive reasons for shifting position, perhaps also seeking concessions from the other side while doing so. For example, “Yes, I’m willing to drop the asking price for the house by \$5,000 given that you’ve already arranged financing for the purchase. But, I’m going to have to take the washer and dryer with me because of the lower purchase price.” Giving reasons for making concessions helps one avoid a “free-fall” in which one’s adversary, without offering anything in return, insists that one keep sweetening the deal.³¹⁶ When one has given a reason, one can respond that the conditions that permitted the previous concession no longer exist, and therefore he or she has no basis for improving the offer.

V. Bargaining With More Powerful Parties: Specific Approaches

We now turn to specific advice for those facing opponents with greater power. As a starting point, we stress several thoughts about this negotiation challenge. First, our suggestions cannot change certain features of the bargaining landscape. Although taking particular steps, such as acquiring greater information, can enhance one’s ^{*78} leverage in a given situation, there are usually aspects of the underlying power differential that remain fixed.³¹⁷ This means that even when optimizing opportunities in a negotiation, one may still end up with an agreement that tilts substantially in the other side’s favor when substantial power disparities exist. A “weak” agreement may be the best obtainable option under these circumstances—perhaps better than no agreement. This result does not necessarily mean that one is a poor negotiator. Conversely, merely because one is able to force a one-sided deal on a relatively weaker party does not mean that one is a good negotiator. What matters in these situations is whether one has achieved the optimal agreement under the circumstances.

Moreover, our suggestions do not guarantee a “happy” ending to most negotiations. In fact, paradoxically, they may lead to less contentment than not following them. For instance, we advise negotiators to raise their aspirations, which is an approach that may produce fewer joyous bargaining moments, but better overall deals. In this sense, happiness will depend more on achieving one’s goals than on attaining a particular objective outcome.

Further, everyone approaches negotiation with a unique personal style, which he or she must strive to understand and master.³¹⁸ To be an effective bargainer, one must work within one’s given personality and negotiation style.³¹⁹ But, one must be careful not to make hasty or unduly pessimistic judgments about style and one’s ability to improve it. Aside from the fact that negotiators sometimes do not truly understand how others perceive them, they also do not always realize the capacity that they have for improvement. It is possible for those who believe themselves timid to become more assertive and for those who view themselves as aggressive to become more sensitive.³²⁰

Finally, we note that there is no omniscient scorekeeper who will blow a whistle when one has underperformed or ring a bell when one ^{*79} has done well. Once a deal has been struck, asking the other side whether we have extracted all of the concessions they were prepared to give is unlikely to trigger a full and honest response. In short, one has to operate somewhat blindly in the real world when it comes to assessing success or failure.³²¹

With these caveats in mind, we now turn to a set of suggestions for negotiators facing more powerful opponents.

A. Determine Whether the Other Side Really is More Powerful

Determining one’s power in a negotiation requires more than a simple calculation and comparison of each party’s individual

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power. Power depends on a complex interplay of the parties' perceptions about what each can do to or for-or without-each other. Accordingly, one always needs to assess how much each side needs or fears the other, and what each side's alternatives are to striking a deal.

How does one make this determination? As a starting point, one must set aside any tendency to translate his or her anxiety about negotiating into an unproven assumption that the other side carries greater power.³²² Moreover, even if the other side is powerful, we must still decide whether the opponent has power over us. To make this judgment, one must ask the following questions:

- What is it that I want and need from the other side?
- What negative action can the other side take against me if no agreement is reached?
- What alternatives do I have to entering into this agreement?

Asking these questions helps avoid the natural, but misguided, approach of simply assessing the other side's power in the abstract. The fact that the other side is rich, handsome, and famous has little relevance to a power determination where we hold something that they desperately want, and they have little that we desire. But, there is more. Equally important, but often overlooked by nervous bargainers, is an assessment of the other side's dependence on us.³²³ Accordingly, one needs to question further:

***80** • How badly does the other side want or need something that I have?

- What negative action can I take against the other side if no agreement is reached?
 - What alternatives does the other side have to reaching an agreement with me?
- One who has calmly and realistically addressed these questions will have a far better sense of the underlying power dynamic in a negotiation than one who merely looks to how powerful an opponent is in the abstract. In some cases, having undertaken such an analysis, one may conclude that one's power with respect to the upcoming transaction is greater than previously estimated.³²⁴

B. Determine Whether Adversaries Understand and Will Use Their Power

Given what we believe to be a negotiator's natural tendency to assume that the other side has superior power in a given situation, negotiators should look to whether their opponent has entered into the bargaining in an extremely fearful or awed manner. This possibility seems so far-fetched to some bargainers that they miss obvious signs of their opponents' anxiety or misread them as indicators of hostility. At such moments, opportunities for gain will be missed if one fails to assess the other side's perception of the power dynamics accurately. What is critical is not just a reading of the opponent's power in a given negotiation, but also of his or her perception of the power dynamic.

Similarly, if the other party, although aware of his or her power, is nonetheless unwilling to use it, then the opponent lacks effective power. Effective power requires the realistic likelihood that some sort of forcing action will be taken if necessary. For example, during World War II, German General Dietrich von Choltitz, commandant of occupied Paris, received a direct order from Adolf Hitler to burn the ***81** city and to blow up all of its bridges. Mindful of Paris' grandeur and of the inevitability of Germany's defeat, von Choltitz refused and evacuated his troops, leaving the city intact. Lacking the will to destroy the city, von Choltitz had only the option of retreat.³²⁵ In short, if one wishes to make an accurate assessment of the power dynamics of a negotiation, he or she must determine both the other side's leverage and the opponent's willingness to use it.

C. Use Opening Moves to Set the Tone and to Deflect Power Plays

First impressions matter. Research suggests that parties typically establish the entire tone of a negotiation through the first array of moves and gestures.³²⁶ This so-called "primacy effect"³²⁷ means that negotiators concerned about a power imbalance in an impending deal need to be particularly concerned about how they come across to the other side. If they demonstrate nervousness, tentativeness, or hesitation in their introduction or if their voice trembles³²⁸ and they cannot give

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proper eye contact,³²⁹ their opponents may seize upon their perceived weakness and seek to exploit it. Accordingly, one needs to prepare physically and psychologically for making an appropriate first impression.³³⁰ The trick, if one exists, is not so much to *82 look intimidating as it is to appear thoroughly comfortable in the negotiation setting.

Deciding on the proper tone of a first meeting is critical. If one wishes to have the bargaining proceed in a cooperative manner, one needs at the outset to take steps to set a mood of trust and collaboration; if one wishes to use a “power-dominant” approach, one needs to set that tone at the earliest stage of the interaction.³³¹ Different openings will depend on the setting in which one wishes the negotiating to proceed.³³² Regardless of the mood one selects, however, one must generally attempt to appear strong and confident. This does not mean that one needs to attack or display hostility. It does mean that one should present a demeanor indicating that one is prepared for all eventualities and able to cope easily with the pressures of the bargaining.³³³

Most experts counsel that one of the first goals of impression management is creating trust between the parties. Trust is essential for effective negotiation in all settings, even those involving elements of competition and aggression.³³⁴ Although trust more often than not arises when positive feelings exist between parties, liking someone is not the same as trusting that person.³³⁵ Trust involves more. Trust means that one is willing to become vulnerable to action by the other side. As Professor Thompson points out, trust generally arises when *83 the parties risk exploitation by each other, not when they remain isolated and protected.³³⁶ Accordingly, to trust the other party, one must believe that the opponent will not take advantage when one’s guard is dropped.³³⁷

How is trust established? Available research indicates that negotiators tend to approach those whom they do not know (or know about) warily. Until given evidence that the other side can be trusted, many will not risk making themselves vulnerable.³³⁸ This suggests a cautious strategy involving a high degree of reciprocity—one trusts on small matters and looks to see whether the other side takes advantage of one’s vulnerability. One then sees whether the other side will take a similar trust-creating step. In this way the bonds of respect and support grow.³³⁹

Suppose, instead of seeking to create trust, the other side appears to want to establish his or her dominance through threats and demands? We believe that this is the point where an appropriate response can make or break the negotiation. First, one needs to be certain that an opponent truly intends a power play. In some cases, our anxieties can lead us to conclude that we have been attacked when the other side simply wishes to make a point or ask a question. For example, consider the statement, “We don’t seem to be getting anywhere. Let me make a suggestion.” Depending on the circumstances and context of this statement, one might be justified in concluding that the other side is attempting to seize control of the situation or that he or she is simply trying to be helpful. It is critical to understand which approach is contemplated.

Second, assuming that a power play is at hand, one needs to suppress any immediate reaction to respond in kind, to submit, or to *84 abandon the negotiation. Instead, according to Professor Ury, without showing fear or acting defeated,³⁴⁰ one needs to respond in as positive a manner as possible to advance the negotiation rather than to derail it.³⁴¹ Because power is so much a matter of perception, one must show confidence even if one does not feel it.

Third, one needs to reveal one’s own power in careful fashion to demonstrate that a pure power approach to resolving the issues will be costly for both sides. Merely because the other side carries a power advantage rarely means that one is completely without power.³⁴² As we shall discuss, one often has more leverage than might be initially thought.

D. Use Information Strategically to Increase Power

We reiterate that information is crucial to the bargaining process. More so than any other power source, information provides the greatest opportunity to shift the dynamics of a negotiation. Properly gathered information permits negotiators to discern their opponents’ weaknesses, vulnerabilities, likes, dislikes, strategies, and aspirations. This permits negotiators to meet the other side’s needs effectively, and to anticipate and block power plays by the other side. Accordingly, one facing a more powerful opponent needs to devote extraordinary effort prior to the day of bargaining to acquire information that might enhance his or her leverage.³⁴³ For example, consider the impact of careful preparation in a negotiation between a South African coal company and Nippon Steel Company, as reported by one of the coal company executives:

We arrived at the venue well prepared (we thought) and soon got down to business, quoting our price, which we knew was cheaper than anything else in the world. Then the dreaded words from Mr. Shibuya that I’ll remember until my retirement “Please, Mr. Smith, explain to us how you worked out your *85 price, because we also worked out your price for you and get a different figure” Shibuya then commenced to put an impressive document on the table: on that they had detailed figures of SATS tariffs, on tonnage, on insurance, on the cost of our administration. What audacity! Yet they were right: on

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closer inspection we could not fault them on a single point. Their figures were even more recent than ours. They had better information on our own product than we ourselves! How on earth do you counter this across a table?³⁴⁴

What makes this example so illustrative of the strategic use of information is that, prior to entering the negotiation, the South African coal company appeared to enjoy a substantial power advantage, given that it could offer Nippon Steel the lowest price of coal obtainable in the world. Notwithstanding that, Nippon Steel, invoking its research results, seized the power advantage.

Assuming that one has done sufficient homework and acquired critical information, one needs to ponder carefully how to put such information to use. One of the most effective approaches is to test the other side's trustworthiness. For example, prior to the Cuban missile crisis in 1962, President John Kennedy met with Soviet Foreign Minister Andrei Gromyko. Prior to the meeting, Kennedy had obtained Air Force photographs of Russian missiles in Cuba. At the meeting, Gromyko repeated his country's insistence that they would never introduce offensive weapons into Cuba. With clear evidence to the contrary, Kennedy concluded that the Russians had acted duplicitously and, several days later, imposed a United States' "quarantine" on the introduction of offensive weapons into Cuba.³⁴⁵

In other instances, one needs to share information openly and immediately, especially at a point where one has learned of the other side's needs and interests. In such cases, revealing that one can meet those needs will hasten the development of an excellent deal. For example, if a real estate agent who has unsuccessfully sought waterfront property for a couple determines that they seek such property only for the view (as opposed to recreational use), the agent might be able to sell them a lot that overlooks a lake but does not actually abut the water.

***86** In still other cases, one might disclose some, but not all, of the information one holds at an early stage of the negotiation. One might disclose more as the negotiation progresses. Revealing more and more of what one knows can impress the other side and convince him or her that one holds more information than one might actually have.

E. Develop Additional Alternatives to Improve One's "Walkaway Point"

As we have discussed,³⁴⁶ one extremely effective way of dealing with more powerful parties is by creating attractive alternatives to an agreement with the stronger party. Creating alternatives, i.e., improving one's "walkaway point" or BATNA, enhances power by reducing one's dependence on the other side. By seeking additional alternatives, one may look for other ways to meet one's needs or to counter the negative actions that an opponent can take. In so doing, one can substantially affect the relative power of each party. That is, one who has acquired new alternatives becomes more powerful, and the other party less so, with respect to the transaction at hand.

One of the most positive aspects of developing alternatives is that in many cases they can be pursued outside of the immediate negotiation setting, without a high-powered adversary's knowledge or interference. For example, an employee who has quietly secured several attractive job offers before asking for a raise has enhanced his or her leverage without having to confront the employee's boss. With a tightfisted or overbearing superior, this may be the most effective strategy available. Not only has the employee improved the prospects for a raise, he or she may appear more valuable to the company because of the outside hiring interest.

Because attractive alternatives may take time to create, one who seeks to develop them needs to plan in advance what they will be and how to secure them.³⁴⁷ In addition, one needs to prepare for whether and when one will reveal them to the other side. Sometimes, parties openly and aggressively seek alternatives. In the case of the 1980 Olympics hosted by the Russian government, for example, the Soviets insisted that there be multiple bidders, ensuring that if one network dropped out, another would be available to buy. Publicly pitting the three major American television networks against one another, the ***87** Russians substantially enhanced Soviet leverage in the negotiations.³⁴⁸

One should also be alert to the possibilities of an opponent trying to maintain his or her leverage by eliminating one's alternatives. Suppressing or eliminating an opponent's alternatives affects power dynamics in reverse fashion to that of adding them. The party who succeeds in doing so effectively increases his or her power by making the other weaker. To illustrate, we cite another example of Russian negotiating tactics. In the mid-1950s, the Soviets wished to purchase a tract of land on Long Island, New York to provide a recreation site for its embassy employees. As an initial step, they obtained an exclusive one-year option on the land for a small amount of cash, and insisted that the option be kept secret. They then began negotiating with the land owners, but, to the owners' dismay, the Russians offered only pitifully small amounts. Slowly, it dawned on the owners that, by signing the option, they had given up any ability to turn to other purchasers. Saddled with no

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immediately available alternatives and needing cash immediately, the owners eventually sold to the Russians at a substantially reduced price.³⁴⁹

Sometimes even the unsuccessful pursuit of alternatives can produce positive results if it intimidates an opponent or demonstrates the tenuous nature of an opponent's power position. For example, in 1937, after the U.S. Supreme Court had declared eleven of President Roosevelt's New Deal laws unconstitutional,³⁵⁰ the President took the extraordinary step of seeking legislation to expand the number of Justices on the Court. Expanding the Court would have permitted him to appoint enough liberal Justices so that his legislation would be upheld. Despite Roosevelt's immense popularity, the Congress refused to pass the bill. Nonetheless, the initiative evidently unsettled ^{*88} the Court enough so that it suddenly reversed itself and began upholding legislation that it had previously invalidated.³⁵¹

We cannot overemphasize the power of seeking alternatives. The more desperate a weaker party's position, the more aggressively we would advise him or her to seek alternatives. For example, the British almost overnight assembled a rag-tag fleet of ships and boats to rescue the 300,000-plus soldiers stranded in Dunkirk, France at the beginning of World War II. Without such an alternative, those soldiers would either have been killed or captured, perhaps turning the tide of war for the Nazis. Faced with imminent defeat, the British crafted a last-minute alternative that few would have thought possible. The worried negotiator should similarly search for options in the midst of adversity.

F. Research Available Legal Protections

As we have discussed, although common law protections for weaker parties exist, they typically require the stronger party to have inflicted some form of overreaching or abuse.³⁵² While our review suggests that the number of instances in which courts will invalidate agreements is limited, we still counsel a careful examination of existing law when one confronts a more powerful party-particularly when one is a consumer facing a commercial entity.

In many instances, federal and state legislatures have enacted specific consumer rights protections in response to consumer complaints about imbalances in bargaining power with merchants. As a result, many common consumer transactions are covered by some sort of protective legislation. Purchases of real estate, cars, consumer durables, cable and satellite television services typically fall under one or more consumer protection statutes.³⁵³ In many cases, the statutes require specific disclosures designed to reduce overreaching by sellers. In others, legislation provides specific redress that goes far beyond common law protections.³⁵⁴ One can substantially enhance negotiation leverage by determining that the other side must ^{*89} comply with specific statutory provisions before entering into a contract.

G. Explore Interests As Alternatives to Power Plays

As unabashed admirers of Fisher and Ury's "principled negotiation" model,³⁵⁵ we endorse the approach of actively seeking to satisfy mutual interests, whenever possible, over engaging in power displays. Under a principled negotiation approach, bargainers seek ways, regardless of which side holds a power advantage, to sidestep conflict and to focus on exploring and meeting each other's needs. Anything that distracts the parties from pursuing interests undermines the likelihood of reaching agreement. In fact, the parties may discover that their interests do not conflict and that both may be satisfied. Moreover, few negotiators enter a round of bargaining with the goal of simply overwhelming the opposition. That is not to say that negotiators never seek to pulverize the other side. Clearly, they sometimes do (triggering one's walkaway point if one is prepared). But, annihilation, if attempted, is usually a means to reach negotiation goals, not an end in itself. Powerful parties, lacking patience or negotiation expertise, may resort to brute force if not shown another way. They may, however, be drawn to more collaborative means if convinced that these means will satisfy their goals. This is where principled negotiation, if done well, proves to be so powerful. Because it focuses on meeting needs, not on power plays, it should hold more allure for the parties truly interested in reaching substantive agreements.³⁵⁶

^{*90} H. Avoid Unnecessary Conflict, But Retaliate If Necessary

One way to ensure that the parties will stay focused on pursuing interests is to avoid unnecessary conflict. We stress the term "unnecessary" because we realize that some level of conflict neither can be nor should be avoided. Our point is that if one loses his or her temper in a negotiation, the likelihood of an acceptable agreement diminishes rapidly. In particular, one should try to avoid reacting destructively to another's annoying style, especially when the other side attempts to play a power game. One generally needs to react, but in a way that promotes positive movement.³⁵⁷ Rather than accuse, one should describe the situation and one's feelings to alert the other side that the bargaining has become more tense. We offer the

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following advice for communicating displeasure to another:³⁵⁸

- explain the behavior that upsets you in specific and objective terms;³⁵⁹
- describe your feelings about what bothers you;
- try to get your opponent to view the matter from your perspective;
- do not accuse your opponent of misbehavior;
- show respect for your opponent; and
- apologize for any misunderstanding that your own behavior might have caused if that will help move the discussion without making you appear weak.

What is critical in situations where one party has unleashed a power play or has acted in a way that offends an opponent is to provide feedback that the behavior will not be tolerated, but to do so in a manner that does not begin a cycle of attack and retaliation.³⁶⁰ Much ^{*91} of Professor Ury's book, *Getting Past No*, focuses on ways of doing this. He freely acknowledges that power plays often occur in negotiations and, in fact, advocates that one employ power in appropriate ways. But, he argues for a judicious and strategic approach:

Treat the exercise of power as an integral part of the problem-solving negotiation. Use power to bring the other side to the table. Instead of seeking victory, aim for mutual satisfaction. Use power to bring them to their senses, not to their knees Use your power to educate the other side that the only way for them to win is for both of you to win together. Assume the mind-set of a respectful counselor. Act as if they have simply miscalculated how best to achieve their interests. Focus their attention on their interest in avoiding the negative consequences of no agreement.³⁶¹

The way one brings the other side to their senses is by using power to educate, to convince the other side that a negotiated agreement that satisfies both sides' interests is a more sensible solution than mutual destruction.³⁶² How does one do this? There is no guaranteed approach, of course, but we advise that one speak in sadness about how a resolution through conflict would be deplorable-making sure to describe the tools in one's arsenal that could be deployed in such a circumstance. Doing this sends a signal that although one is not defenseless, one prefers a negotiated settlement.

Moments when power ploys have been attempted or when emotions run high require careful attention to subtle signals from the other side. By pushing hard for concessions in a visible manner, the other party has made it difficult for himself or herself to back down without embarrassment. This is the point when one needs to provide an easy way for the other side to retreat³⁶³ and to look for small, indirect signs that one's opponent has decided to do so.³⁶⁴

In those cases where a subtle approach does not deter a power ploy, one may well have to move from hints of dire consequences to ^{*92} more explicit approaches. Even here, however, we urge a low-key approach. Research suggests that careful warnings are less likely to escalate conflict than express threats.³⁶⁵ The trick is to show the capability to take effective action against an opponent, but always to indicate a preference for a negotiated agreement.

Finally, in some instances, one may have no choice but to take punitive action against an opponent who has launched an attack as a means of gaining advantage in a negotiation. Failure to retaliate, unfortunately, invites exploitation.³⁶⁶ The form of punitive action that one takes is critical. One should always characterize one's action as defensive in nature and point explicitly to the action that provoked it. Simultaneously, one should insist that one seeks to resolve differences by negotiation, not by power plays. Defensive actions lessen the chance for conflict escalation (in contrast to offensive actions designed to establish dominance).³⁶⁷

I. Identify and Counter Power Ploys

Perhaps the most commonly cited reason given by our students for taking a course about negotiation is to learn how to use and to counter bargaining "tricks" and "ploys." Virtually every expert who has written on the topic of negotiation has offered advice on negotiation tricks.³⁶⁸ The number of potential ploys is enormous,³⁶⁹ leading some, we fear, to conclude that those who learn the largest number of tricks will "win" the negotiation. We disagree. Although one should certainly be alert for power ploys and tricks, we remain skeptical that ^{*93} most can prove successful against negotiators who have planned carefully and who have thought out their strategies thoroughly.³⁷⁰

Most power ploys and tricks aim to gain a psychological advantage. Some do so by tricking opponents into lowering their guards and revealing valuable information; others seek to intimidate or disorient adversaries so that they lose focus and open themselves to exploitation; still others attempt to maneuver other parties to negotiate against themselves, i.e., to engage in a series of unilateral offers that are not reciprocated. We briefly describe below several of the more commonly used ploys and then offer some suggestions for countering them.

1. Intimidating Atmosphere

Because negotiation power arises from perceptions, those who effectively manage the image they present can substantially enhance their leverage when they bargain. They seek “impression management” through a combination of tactics.³⁷¹ They dress in “power” clothing, they work in large, elegant offices,³⁷² and they sprinkle their discussion with important names and events with which they have personal connections. Other more aggressive measures include: insisting that meetings be held on one’s home turf, scheduling meetings for inconvenient times, seating opponents in uncomfortable chairs, seating opponents with the sun in their faces, making opponents wait for extended periods for meetings to start, interrupting meetings with “important” phone calls to impress or intimidate opponents, engaging in side conversations that demonstrate “toughness” while knowing that one’s opponents are overhearing the conversations, or asserting that certain issues are “non-negotiable.”³⁷³

**94* Perhaps the most effective way to deal with these annoying ploys is to act confidently and ignore them.³⁷⁴ In some cases, however, it may be necessary to take specific steps to counter them. In most cases, merely identifying the tactic and asking that it cease will put an end to the ploy. For example, if one has been kept waiting for a meeting to start, one might pleasantly, but firmly, inform the other side that one does not appreciate being kept waiting and ask whether future meetings will start late.

2. “Good Guy/Bad Guy”

One of the most widely recognizable power ploys, the so-called “good guy/bad guy” technique, appears to command a large following despite the fact that its use rarely surprises any of those subjected to it.³⁷⁵ The approach is simple: A team of at least two negotiators subjects the target to “tough” and then to “kind” treatment. Or, one negotiator treats the person harshly while another treats him or her gently. The trick is for the “bad guy” to get the victim sufficiently intimidated, disoriented, or angered that the person looks to the “good guy” for guidance or support. The victim, bonding with the good guy, then makes damaging concessions or admissions to his “buddy.” Numerous “B-movies” have depicted this technique as invariably effective during police interrogations.

Despite the popularity of the ploy, we know of no empirical research demonstrating that it produces anything other than annoyed or amused reactions among those subjected to it. Most negotiations in which “good guy/bad guy” is used occur outside of police custody, which means that, unlike the criminal suspect, most negotiators can walk away from the table. Given that the ploy is almost instantly recognizable, we find ourselves skeptical that it operates very effectively with negotiators of even moderate sophistication.

We offer two responses for dealing with this technique. The most simple is to identify its use and to call for the parties to end the **95* ploy.³⁷⁶ Another, more subtle, response is to adopt a “divide and conquer” approach by negotiating primarily with the more accommodating party. The benefit of this latter approach is that occasionally one will encounter opponents who genuinely carry differing personality traits and who are not trying a power play. In this case, focusing on the accommodating party may well produce an agreement heavily weighted in one’s favor.

3. Anger, Threats and the Madman’s Advantage

We can think of no greater deal breaker than runaway emotions. In fact, we suspect that as many negotiations terminate because of lost tempers and hurt feelings as from irreconcilable goals.³⁷⁷ Once triggered, emotional spirals tend to follow predictable patterns, typically escalating rapidly and often irretrievably.³⁷⁸ Given the explosive nature of emotions, one might imagine that negotiators would hesitate to use angry displays to achieve negotiation results. Yet, this seems to happen all the time. Most negotiators at one time or another have encountered opponents who react angrily at even the slightest objection to their offers—often with great success. Anger, it seems, can be extremely effective at times by breaking impasses, emphasizing

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points, and dissolving opposition. Anger may work because *96 parties see angry opponents as being particularly sincere and committed on the points that have triggered their temper.³⁷⁹ Facing such strong feelings, the parties may seek to accommodate them by making concessions that they otherwise might not have made.

At the more extreme levels of fury lies what Professor Schoonmaker refers to as the “Madman’s Advantage.”³⁸⁰ That is, negotiators can sometimes achieve their goals by acting irrationally. This approach works, he notes, because irrational parties appear indifferent to the possibility of retaliation or revenge that might deter others, thus raising the cost of conflict to potentially unacceptable levels.

Effective responses to anger vary widely.³⁸¹ If an opponent’s anger has disoriented a negotiator, it makes sense to call a break in the negotiation in order to give both sides an opportunity to regain their composure. In some cases, ignoring the temper tantrum can embarrass and quiet the angry opponent. In other instances, responding with a temper display of one’s own can lead the angry opponent to abandon the approach. Humor can also defuse a tense situation.³⁸² Similarly, an apology may dissipate tension. An apology, however, may be misperceived as weakness or concession and therefore must be done in a way that avoids an appearance of weakness.³⁸³ Finally, if one’s opponent has a reputation for angry outbursts, it may be wise at the outset to negotiate the “rules of engagement” -such as no personal attacks, no yelling, and no smirks or scowls.

***97 4. Boulwarism, or “Take It Or Leave It”**

The “take-it-or-leave-it” approach to bargaining undoubtedly goes back to antiquity, but seems to have been refined to an unprecedented degree by Lemuel R. Boulware, head of labor relations for General Electric from the late 1940s through the late 1960s.³⁸⁴ Prior to each labor negotiation, Boulware would meticulously research the company’s productivity, the cost of living, and other financial factors and then would enter each negotiation with a fixed-and what he believed, fair-offer to the union. Thereafter, Boulware would invite the union to examine his analysis, but would not budge from this number unless his facts and figures were shown to be incorrect. This take-it-or-leave-it approach worked for nearly twenty years until G.E.’s thirteen unions joined forces and undertook a long and costly strike against the practice.³⁸⁵ Simultaneously, they filed a complaint with the National Labor Relations Board alleging that Boulware’s approach constituted a failure to bargain in good faith and obtained a ruling that this approach violated the National Labor Relations Act.³⁸⁶

What made Boulwarism unique compared to many other take-it-or-leave-it negotiations is that Boulware opened the bargaining with the “final” offer. Although the unions put up with this approach for many years, ultimately it led to intense labor strife. The reason, we suspect, was that the approach appeared to be arrogant and demeaning. Most people have a need to play a role in the final outcome of a deal.³⁸⁷ Boulware’s approach rendered them almost irrelevant-not a helpful feeling for one side to be left with when bargaining. In contrast to Boulware’s approach, one who gently unveils a “take-it-or-leave-it” offer near the end of the negotiation after extensive back-and-forth discussion may not trigger a negative reaction. Instead, *98 this approach signals to the other side that one has approached the walkaway point.³⁸⁸

To counter a “take-it-or-leave-it” approach, one needs first to probe the underlying assumptions of the party who has made such a statement to see whether such assumptions can be disproved. Demonstrating the fallacies underlying an offer can open the negotiation to further bargaining. One should also assess the commitment that the other side has made to a take-it-or-leave-it approach. In some cases, this is merely a power ploy that can be ignored or rejected out of hand. If the other side seems emotionally committed to the approach at the moment, calling a halt to the proceedings may permit both sides to return at a later date and re-commence negotiations. Further, depending on the circumstances, one might appeal to the other side’s sense of fairness, asking how a deal can ever be struck if one side becomes or remains intransigent. Finally, if the other side refuses to budge, one needs to consider in as calm a fashion as possible, whether accepting the offer is better than walking away. If this negotiation is the beginning of a long-term relationship, one needs to assess the precedential value of agreeing to this type of offer. It may be that one simply does not want to encourage the other side to assume that such tactics will work in future dealings, so one may reject a deal that otherwise appears acceptable.

5. Limited Authority

Those who bargain with “limited” authority present a power paradox. That is, the less authority they carry in bargaining, the greater their power actually may be.³⁸⁹ Limited authority negotiators cannot make concessions, thereby forcing the other side to accept deals to which they might not otherwise agree. We have all encountered the *99 sales clerk or company representative who is fully authorized to refuse every alternative we might offer, but who has no power to grant even reasonable requests for contractual adjustments. In effect, these low-level personnel carry substantial power-the ability to say

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no.

Automobile sales representatives sometimes practice a particularly toxic and unethical form of the limited authority ploy known as “low-balling.”³⁹⁰ Under this approach, the salesperson reaches the best deal that he or she can with a customer. The salesperson then indicates that the manager must approve the deal. Of course, the manager rejects it, insisting that the customer must pay more. In the meantime, the customer, encouraged by the salesperson, has become emotionally committed to the purchase. If so, the salesperson may be able to lead the customer to pay hundreds or thousands of dollars more to buy the car. What makes the ploy so effective is that the customer never blames the salesperson for the deal’s rejection. The salesperson plays the customer’s friend, which permits the salesperson to gain the customer’s trust and perhaps discover the customer’s walkaway point, thereby exploiting the deal for every last dollar.³⁹¹

We recommend several responses to these “limited authority” ploys. In some cases, a useful reaction is to request a meeting with the individual who has been identified as having the authority to reach an agreement on the terms that one seeks.³⁹² In cases where one suspects that the other side truly has adequate authority, one might simply continue negotiating as though the other person had adequate authority, all the while insisting that one retains the right to modify one’s own offer so long as the other side has not committed to the deal.³⁹³ The key to most authority issues is to avoid becoming either legally or psychologically committed while the other side remains free to reject or modify the deal.

A final word of advice: negotiators who face bargaining with high power opponents should seriously consider entering the talks with **100* some limits on their own authority. This will give them time to ponder offers made by the other side and may well moderate the heavy pressures exerted by the other side to reach an agreement.³⁹⁴

6. Artificial and Actual Deadlines

Time limits in negotiation can arise in a number of ways. The parties can set them or an outside authority can do so.³⁹⁵ Time limits may be explicit or implicit, and they may be flexible or rigid. A solid body of research confirms that deadlines often play a significant role in leading parties to agreements.³⁹⁶ Deadlines increase the likelihood of favorable deals because, as time grows short, “bargaining aspirations, demands, and the amount of bluffing that occurs” diminish substantially.³⁹⁷

Depending on how a deadline has been set and by whom, weak parties in negotiations may either benefit or suffer. If one faces a party with superior bargaining power who has set a deadline on a “take-it-or-leave-it” basis, one might be forced to agree to terms that might have been avoided if more bargaining time been available. On the other hand, if the benefits of an agreement substantially outweigh the benefits of the powerful party’s BATNA (or if the costs of no agreement appear particularly large), the powerful party may be especially accommodating when faced with an unavoidable deadline.

One of the most effective “deadline” ploys that we have encountered arises when one of the parties has scheduled a flight home at a specific time. If the other side knows this, he or she may focus endlessly on minor details and then, at the penultimate moment, make a marginally reasonable offer heavily stacked in his or her favor. One who faces this tactic may have concluded that no deal was possible. Realizing that a deal might be struck after all, but facing a need to race to the airport, one may have little choice but to make a number of substantial concessions that he or she otherwise would not have **101* made.³⁹⁸ If one knows of the other side’s use of deadlines with airlines, one should consider making a reservation for a later flight without informing the other side. If the ploy is attempted, one can then indicate one’s willingness to stay and continue negotiating.

There are numerous other examples of using deadlines to enhance power. One of the most effective instances occurred during the negotiations between the United States and the North Vietnamese during the War in Vietnam. Under marching orders from President Lyndon Johnson to secure an immediate peace accord, Ambassador Averell Harriman rented a suite at the Ritz Hotel in Paris on a week-to-week basis. In contrast, Vietnamese negotiator Xuan Thuy, in a deliberately public manner, secured a two-and-one-half year lease on a villa in the French countryside. The message was clear: the Vietnamese had all the time in the world to bargain and took advantage of the election pressures that weighed heavily on the U.S. negotiators.³⁹⁹

Negotiating under a deadline requires skill, persistence, patience, and brinkmanship to be successful. Because deadlines can help as well as hurt weaker negotiators, we cannot offer a “one remedy fits all” suggestion. When facing deadlines, one needs constantly to weigh the benefits of agreeing versus not agreeing. One particularly needs to monitor the other side to see how much harm they will suffer, or how much benefit they will receive, from the deadline. Those who suspect that the other side is playing the deadline game, need to call the opponent on the tactic and indicate that one’s flexibility will lessen as the time approaches.

7. Other Power Ploys and General Responses

We note the existence of numerous other power ploys-some with delightfully exotic names such as the “Nibble,”⁴⁰⁰ the “Salami,”⁴⁰¹ the “Krunch,”⁴⁰² “Brer Rabbit,”⁴⁰³ the “Bogey,”⁴⁰⁴ the “Flinch,”⁴⁰⁵ the *¹⁰² “Puppy Dog,”⁴⁰⁶ the “Belly-Up,”⁴⁰⁷ and so on. All seek in some fashion, with varying degrees of dishonesty, to mislead or disorient unprepared negotiators into one-sided agreements in the ploy-user’s favor.

It is not possible-nor is it necessary in our view-to devise specific counterploys to the entire multitude of tricks and tactics that an opponent might attempt to perpetrate in a negotiation. Instead, we offer several general thoughts to consider when powerful opponents use annoying or unethical tactics:⁴⁰⁸

*¹⁰³ Negotiate about the negotiation: Try to agree on how the negotiation will be conducted.⁴⁰⁹ For example, the parties might agree that only one person at a time will be permitted to get angry or that no personal attacks will be permitted.

Ignore the ploy: Recognizing that an opponent is engaged in a negotiation “trick” is often sufficient to render it ineffective. One can then simply take quiet steps to deflect whatever the ploy is.

Call the ploy: Sometimes it is useful to call one’s opponent on the ploy as a way of showing that one recognizes the trick and will not be either intimidated or taken in by it.

Halt the negotiation: Sometimes one should simply leave the room when a ploy is being attempted as a way of stopping it. It is very hard for an adversary to act outrageously in an empty room.

In all negotiations, one needs to be on guard to the possible use of ploys. On the other hand, not every slight or act that annoys is deliberate on the other side’s part. Before responding, one needs to be certain that an act truly is a ploy. We believe that far too much time is spent devising or worrying about negotiation ploys. We reiterate: carefully prepared negotiators will rarely suffer from the other side’s tricks.

J. Involve Mediators to Balance Power Differentials

Mediation is “facilitated negotiation.”⁴¹⁰ In mediation, the parties retain the right to make their own decisions, but look to a mediator to help move the disputants to agreement through a process of prodding and cajolery. Although mediation occupies a central role in various “alternative dispute resolution” commentaries,⁴¹¹ our focus lies in its ability to moderate power disparities in negotiations. Given that the parties typically are not bound to anything proposed in a mediation, one might assume that power shifts are unlikely to occur in this process. Once a party, however, has agreed to participate in a mediation, he or she has ceded power to the process and to the mediator. As one experienced mediator argues, “the mediator . . . has the *¹⁰⁴ most power in the room,”⁴¹² and can use this power to move the parties to work out an agreement. The ways a mediator exercises power include:⁴¹³

- creating the ground rules
- choosing the topic for discussion
- deciding who may speak
- controlling the length of time each party may speak
- determining which party may present a proposal to the other
- interpreting what each party has said
- ending the negotiation, and
- writing down the agreed-to proposal

Because mediators control much of the process and can comment on each party’s position, they are particularly well placed to discourage raw power plays, emotional outbursts, and deceptive ploys. This serves to equalize the parties’ power.⁴¹⁴ In

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addition, mediators often can often help weaker parties understand the power they actually possess, thereby enhancing their leverage in the negotiation.⁴¹⁵ While this may not make the parties' power equal, it can shift it significantly in the weaker party's favor. Effective mediation can also help a weaker party become more realistic about what he or she seeks in a negotiation. This is typically done through a series of hypothetical questions such as "what if," "what about," "do you think," and "why do you believe."⁴¹⁶ These questions help parties rise above the emotions of the moment and to see the consequences of unduly stubborn positions.

Accordingly, one of the most difficult negotiations that one faces may be convincing a more powerful party to agree to have a dispute mediated in the first place.⁴¹⁷ To do this successfully, one should seek to persuade the other side that mediation is sought for grounds **105* other than evening out the power disparities. For example, one might argue that a mediator could add useful expertise in an area or that a mediator might expedite the process. Or, if negotiations to date have proceeded in a contentious manner, one might persuade the other side that a mediator will help reduce the level of acrimony in the process.

K. Form an Alliance Against the More Powerful Party

The adage that there is strength in numbers holds particularly true for negotiations. One way to equalize or exceed the power of a stronger party is to form an alliance with others who share an interest in working against the stronger party.⁴¹⁸ This principle extends from those who are friendly allies through those who dislike a common enemy only slightly more than they dislike one another.⁴¹⁹

Organizing a coalition against a common adversary requires careful planning and openness, particularly if one is seeking allies from unlikely sources. For example, one may ask what the American Paper Institute, National Coffee Association, Milk Industry Foundation and American Council on Education ever had in common. The answer in this case is: opposition to "sewer user charges." At one time, all of these groups objected to the industrial cost recovery provisions of the Federal Water Pollution Control Act. Acting jointly, they **106* worked effectively to oppose the federal government's method of imposing charges.⁴²⁰ In similar fashion, we suggest that those who face a powerful adversary in an upcoming negotiation consider whether it would be useful to organize a coalition against the other side. In particular, one needs to consider approaching even those with whom one does not have a good relationship if they might be inclined to put aside their hostility in the interest of facing a common enemy.

There is a step short of coalition building that one should consider in negotiating with a powerful opponent. Sometimes it helps to organize a team of negotiators or, at a minimum, to have a friend or colleague attend the negotiation as a source of advice and as an extra set of eyes and ears. In addition to providing valuable emotional support, teams can bring a measure of objectivity and fresh ideas to the negotiation.⁴²¹ Research suggests that teams produce better agreements, not so much because of the extra threat of power that they bring to the table, but rather because team members can identify overlooked ways of expanding the total value of the deal to both sides.⁴²²

L. Appeal to a Powerful Adversary's Sense of Justice and Fairness

People do not operate exclusively on the basis of economic efficiency, notwithstanding the economic models that would suggest otherwise.⁴²³ Nor do most people act exclusively on the basis of pure, **107* brutal power. To the contrary, most individuals carry internal values, standards, and norms that govern how they interact with others and which limit their willingness to take advantage of particular situations.⁴²⁴

As we earlier discussed, moral power can function as effectively in negotiation settings as other, rawer forms of power.⁴²⁵ The fact that one has the ability to overwhelm the other side does not automatically mean that one will do so. Appeals to fairness and justice can operate powerfully under the proper circumstances.⁴²⁶ In fact, we suspect that most negotiations involve elements of moral appeals to a greater or lesser extent.

In some cases, virtually an entire claim rests upon a moral foundation. For example, fifty years after the end of World War II, a number of Nazi-era slave laborers have pressed claims for compensation against the corporations (or their successor entities) that "employed" them during the war. Given the passage of time, one might **108* consider these demands legally dubious, but the horror of the practice, as well as the moral stigma that companies would suffer from rejecting the claims, has led a group of roughly sixty-five companies to contribute to a 10 billion mark (\$5.19 billion) fund to compensate the laborers.⁴²⁷

M. Use Weakness as a Source of Strength

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Few things better illustrate the situational nature of power than the point that weakness can sometimes be a source of power. Weakness provides substantial leverage in several situations. First, a weak party with little or nothing to lose can bring a powerful weapon-indifference-to bear. For example, an indigent debtor faced with demands for payment by a creditor may convince the creditor to accept a settlement of pennies on the dollar by convincing the creditor that the debtor is “judgment proof,” i.e., the debtor has few assets against which the creditor could execute a judgment. Second, the plight of a weaker party may trigger feelings of sympathy and concern in the stronger party. This may lead the stronger party to forbear from taking action against the weaker person.⁴²⁸ We offer a somewhat unusual example to illustrate this point. In 1944, his health rapidly failing, President Franklin Roosevelt implored his daughter Anna to arrange a rendezvous with Lucy Mercer Rutherford, his lover from thirty years before. Although undoubtedly capable of thwarting a reunion and inclined to do so because of loyalty to her mother, Anna, upon reflection, eventually agreed to help. Why? As described by historian Doris Kearns Goodwin:

Anna knew that her father’s strength was failing and she understood how important it would be for him to enjoy some evenings that were, as she put it, “light-hearted and gay, affording a few hours of much needed relaxation.” If seeing Lucy again provided the inspiration he needed to assuage his loneliness and *109 buoy his spirits, then who was she to sit in judgment? . . . At thirty-eight years of age . . . she was learning to accept his weaknesses and enjoy his strengths.⁴²⁹

Once again, one sees the situational nature of power. In this example, despite being arguably the most powerful person in the world, Roosevelt had to achieve his goal through weakness, not strength.

Third, weakness can trump a stronger party’s power if the powerful party faces public criticism for taking action against the weaker. Publicity can often shift the balance of power when television and newspapers treat a powerful party’s actions as exploitative. For example, during the Montgomery bus boycott by blacks during the mid-1950s, media coverage from across the country exposed the oppressive nature of segregation in the south, slowly leading to reform efforts. Moreover, the publicity discouraged white violence and emboldened the black boycotters, eventually leading the city government to accede to their demands.⁴³⁰

Finally, weakness can lead to desperate acts, which in turn may make coercive behaviors by powerful parties very costly-so much that the battle may not be worth it.⁴³¹ Rosa Parks, a black woman in Montgomery whose refusal to move from her seat to permit a white man to sit down triggered the historic boycott, had not sought a confrontation on the day that she was arrested. She was just tired and frustrated. As David Halberstam describes it:

Perhaps the most interesting thing about her was how ordinary she was, at least on the surface, almost the prototype of the black woman who toiled so hard and had so little to show for it. She had not, she later explained, thought about getting arrested that day. Later, the stunned white leaders of Montgomery repeatedly charged that Park’s refusal was part of a carefully orchestrated plan on the part of the local NAACP, of which she *110 was an officer. But that was not true; what she did represented one person’s exhaustion with a system that dehumanized all black people. Something inside her finally snapped.⁴³²

In such acts of desperation by the oppressed are sometimes born mighty movements that forever shift the power dynamics of a community, a city, and, ultimately, a nation. It, therefore, should not surprise that they can easily change the dynamics of a negotiation.

VI. Bargaining With Weaker Parties: Advice For the Powerful

Those who have a power advantage in a negotiation face challenges of a different sort than those with less power. As a starting point, they may find dealing with a weaker party difficult because of the weaker party’s natural hesitancy to negotiate from such a vulnerable position. They may also find weaker parties more inclined to lash out when pressed too hard.⁴³³ Moreover, even if the stronger party can force an agreement on the weaker party, the stronger party may find the deal undermined and nitpicked after the parties have signed a contract. A short-run advantage may well turn into a long run disaster.⁴³⁴

We offer three pieces of advice to more powerful parties to negotiations. First, do not always press advantages to the fullest. In a gracious manner, let the weaker party realize some gains that one could have taken for himself or herself,⁴³⁵ especially if there is even a slight *111 possibility that one will do business with the weaker party in the future. We urge this both on ethical and prudential grounds. Not only we do find overreaching to be unfair, but also we suggest that those who oppress today will find few supporters when the tables are turned-as often they are. Moreover, oppressive agreements are inherently unstable.⁴³⁶ To be successful in business, one needs not only to be viewed as tough and shrewd, but also as fair.⁴³⁷

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Second, when one has done well in a negotiation, without appearing obsequious or patronizing, one should go out of his or her way to reassure the other side how well they have done.⁴³⁸ One of the secrets of being a “powerful” negotiator is convincing opponents to trust you during the negotiation⁴³⁹ and then showing them that they also have done well.⁴⁴⁰

Finally, we remind those with more power about the critical need to permit the weaker negotiators to “save face.”⁴⁴¹ Fisher and Ury make a compelling argument that preserving each side’s dignity in a negotiation should be one of the main goals of a successful interaction.⁴⁴² Time after time, they argue, individuals in the midst of a **112* bargain will refuse to agree to terms they otherwise find acceptable because they cannot accept the perceived humiliation of backing down in front of an opponent.⁴⁴³ Accordingly one of the most important steps one can take is to assist the other side in accepting the terms one has sought without losing face.

VII. Conclusion

George Bernard Shaw once said, “Power does not corrupt man; fools, however, if they get into a position of power, corrupt power.”⁴⁴⁴ By this, we take it Shaw meant that power can be misused, but it can also accomplish important and useful things. We have discussed the complexity and subtlety of power in negotiations, and we hope to have convinced the reader that one’s first assessment of the parties’ power in a negotiation may well be mistaken. Power above all is a matter of perception—and perceptions are highly changeable. One should not despair about the power dynamics, but should work aggressively to change them (including one’s own confidence level) if it appears that one brings a deficit of leverage to the table. We believe that power in negotiation can be used wisely and well, and that it can promote excellent collaborative agreements. But, as we have argued, power must be invoked carefully and wisely not only by those who are weak, but also by those who are strong.

Footnotes

- d1 Professor, Kenan-Flagler School of Business, University of North Carolina; B.A., University of Pennsylvania; J.D., University of Michigan. The authors gratefully acknowledge the invaluable comments and suggestions of Walker Blakey, Professor of Law, UNC Law School; Lissa Broome, Professor of Law, UNC Law School and Rebecca Ratner, Assistant Professor of Marketing, Kenan-Flagler Business School. We also wish to thank the Mr. and Mrs. John L. Townsend, III Faculty Development Fund for research support.
- ddl Director of Psychological Services, Dorothea Dix Hospital, Raleigh, North Carolina; B.S. University of Pennsylvania; J.D., Harvard University; Ph.D., Psychology, University of North Carolina. Dr. Silverstein is an adjunct faculty member in the School of Medicine, the Law School, and the Kenan-Flagler School of Business at the University of North Carolina.
- 1 Bertrand Russell, *Power: A New Social Analysis* 12 (1938).
- 2 Rosabeth Moss Kantor, *Power Failure in Management Circuits*, 57 *Harv. Bus. Rev.* 65 (1979).
- 3 This is a bit of an overstatement. Other animals are social and do not negotiate. As Gavin Kennedy has pointed out, “[n]obody ... has ever seen two dogs negotiate over a bone and nobody ever saw an animal signify to another that it was willing to give ‘this for that.’” Gavin Kennedy, *Kennedy On Negotiation* 9 (1998).
- 4 We use the term “negotiate” in a broad sense to mean the act of communicating formally or informally to reach agreements. Typically, this requires identifying and working out differences. Most commentators in the field define the term similarly. See, e.g., Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* xi (1981) (“[Negotiation] is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.”); Kennedy, *supra* note 3, at 5 (“Negotiation is a process by which we search for terms to obtain what we want from somebody who wants something from us.”); G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 6 (1999) (“A negotiation is an interactive communication process that may take place whenever we want something from someone else or another person wants something from us.”); David A. Lax & James K. Sebenius, *The Manager As Negotiator: Bargaining for Cooperative and Competitive Gains* 11 (1986) (“[Negotiation is] a process of potentially opportunistic interaction by which two or more parties, with some apparent conflict, seek to do better through jointly decided

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action than they could otherwise.”); Roy Lewicki et al., *Negotiation* 6 (3d ed. 1999) (“[Negotiation is a] formal process that occurs when parties are trying to find a mutually acceptable solution to a complex conflict.”); Gerald I. Nierenberg, *The Art of Negotiating* 8 (1981) (“Whenever people exchange ideas with the intention of changing relationships, whenever they confer for agreement, they are negotiating.”); Wynand Pienaar & Manie Spoelstra, *Negotiation: Theories, Strategies & Skills* 3 (1991) (“Negotiation is a process of interaction between parties directed at reaching some form of agreement that will hold and that is based upon common interests; with the purpose of resolving conflict, despite widely dividing differences”); Dean G. Pruitt, *Negotiation Behavior* 1 (1981) (“Negotiation is a process by which a joint decision is made by two or more parties.”); Leigh Thompson, *The Mind and Heart of the Negotiator* 2 (1998) (“Negotiation is a decision-making process by which two or more people agree how to allocate scarce resources.”).

- 5 Virtually all commentators note the frequency and ubiquity of negotiation. See, e.g., Fisher & Ury, *supra* note 4, at xi (“Everyone negotiates something every day. Like Molière’s Monsieur Jourdain, who was delighted to learn that he had been speaking prose all his life, people negotiate even when they don’t think of themselves as doing so.”); Roy J. Lewicki et al., *Think Before You Speak: A Complete Guide to Strategic Negotiation* 1 (1996) (“[M]any of us negotiate more than once in every waking hour, but we do not recognize the majority of these ‘negotiations’ as such.”); Shell, *supra* note 4, at 6 (“All of us negotiate many times a day.”); Michael C. Donaldson & Mimi Donaldson, *Negotiating for Dummies* 1 (1996) (“You negotiate all day long, not just on the job but in every situation you encounter—with your boss or your employees, with your vendors or your clients, with your spouse or your kids, even with the serviceperson who comes to your house but doesn’t repair that refrigerator after all.”); William Ury, *Getting Past No: Negotiating Your Way From Confrontation to Cooperation* 3 (1991) (“We all negotiate every day.”); Lewicki et al., *supra* note 4, at 5 (“People negotiate all the time. Friends negotiate to decide where to have dinner. Children negotiate to decide which television program to watch. Businesses negotiate to purchase materials and to sell their products.”).
- 6 To us and others, the essence of power is the ability to get a person to do one’s bidding even when that other person is disinclined to do so—obviously the case with the robbery victim. See *infra* notes 21-22 and accompanying text.
- 7 See, e.g., Lewicki et al., *supra* note 4, at 175 (“Most negotiators believe that power is important in negotiation, because it gives one negotiator an advantage over the other party. Negotiators who have this advantage usually want to use it to secure a greater share of the outcomes or achieve their preferred solution.”).
- 8 Lewicki et al. note that “[r]emarkably few studies have focused on power and influence tactics in negotiation.” *Id.* at 176. See also Edward J. Lawler, *Power Processes in Bargaining*, 33 *Soc. Q.* 17, 20 (1992) (stating that “[a]fter some interesting early work by economists and social psychologists, most bargaining literature has given short shrift to power”); Kennedy, *supra* note 3, at 78 (noting that “a few books for theorists discuss power but still fewer books for practitioners mention power in any detail, usually mouthing blatantly obvious but non-practical maxims”); but see Phyllis Beck Kritek, *Negotiating at an Uneven Table: A Practical Approach to Working with Difference and Diversity* (1994). Professor Kritek’s book is the only one that we have found that addresses the topic of power disparities.
- 9 We find ourselves drawn to the point made by Professor Jeffrey Pfeffer that “[t]he inability to get things done, to have ideas and decisions implemented, is widespread in organizations today. It is, moreover, a problem that seems to be getting worse in both public and private sector organizations.” Jeffrey Pfeffer, *Managing With Power: Politics and Influence in Organizations* 7 (1992). To him, the solution lies in learning to be comfortable with how to use power: “[t]oday more than ever, it is necessary to study power and to learn to use it skillfully, since we cannot otherwise hope to gain individual success in organizations or the success of the organizations themselves.” *Id.* at 8.
- 10 Indeed, based on a number of studies, social psychologists have concluded that as the disparity in power between negotiators increases, the chances of reaching agreement diminish. See, e.g., Thomas Schelling, *The Strategy of Conflict* 22 (1960): “Bargaining power,” “bargaining strength,” “bargaining skill” suggest that the advantage goes to the powerful, the strong, or the skillful. It does, of course, if those qualities are defined to mean only that negotiations are won by those who win. But, if the terms imply that it is an advantage to be more intelligent or more skilled in debate, or to have more financial resources, more physical strength, more military potency, or more ability to withstand losses, then the term does a disservice. These qualities are by no means universal advantages in bargaining situations; they often have a contrary value. Why superior power does not always equal superior bargains is discussed *infra* at notes 49-57 and accompanying text.

- 11 We believe that a gap exists between academic and practitioner approaches to negotiation. Academic analyses proceed cautiously, often with little discussion given to practical implications that flow from research insights. Practitioner advice typically simplifies (and oversimplifies) data from research into punchy, vague maxims. In between lies what we hope to be a more effective approach, namely, useful advice stated clearly that draws from the best of the academic and practitioner literature. See Lax & Sebenius, *supra* note 4, at 25 (stating that “[m]ost academic studies tend toward careful, analytic description. And though bargaining has been widely studied outside organizations, with a few exceptions, systematic prescriptive approaches have remained underdeveloped. Unfortunately, most popular negotiation handbooks are little better”).
- 12 See, e.g., John D. Calamari & Joseph Perillo, *The Law of Contracts* § 1.3, at 6 (4th ed. 1998) (“Most of contract law is premised upon a model consisting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining.”).
- 13 As noted in a comment in the Uniform Commercial Code, “[t]he principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” U.C.C. § 2-302, cmt. 1 (1998) (citation omitted). See, e.g., *Fleming Cos. v. Thriftway Medford Lakes, Inc.*, 913 F. Supp. 837 (D. N.J. 1995) (holding that unconscionability is not intended to address allocation of risk because of superior bargaining power); *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929 (D. Mass. 1995) (same).
- 14 See U.C.C. § 2-302 (1998). For a discussion of the law of unconscionability, see *infra* notes 155-91 and accompanying text. For a discussion of other types of legally improper bargaining, see *infra* notes 98-154 and accompanying text.
- 15 The term “unconscionable” is too general to provide the kind of “bright line” guidance that would lead to the clear resolution of claims. See Calamari & Perillo, *supra* note 12, § 9.40, at 372 (“‘Unconscionable’ is a word that defies lawyer-like definition. It is a term borrowed from moral philosophy and ethics.”).
- 16 According to Calamari & Perillo:
Superior bargaining power is not in itself a ground for striking down a resultant contract as unconscionable. There must be additional elements, as for example, a lack of meaningful choice as in the case of an industry wide form contract heavily weighted in favor of one party and offered on a take it or leave it basis, or a situation where freedom of contract is exploited by a stronger party who has control of the negotiations due to weaker party’s ignorance, feebleness, unsophistication as to interest rates or similar business concepts, or general naivete.
Id. at 374.
- 17 For a discussion of the legal protections available to weaker parties in negotiations, see *infra* notes 98-91 and accompanying text.
- 18 Those with more power need advice as well as those with less power. See *infra* notes 434-48 and accompanying text.
- 19 In stating this, we are mindful of the endless academic debate about the meaning of terms such as “power” and “influence.” See Robert A. Dahl, *Modern Political Analysis* 15 (2d ed. 1970) (stating that “[t]he first and most salient fact one needs to know about ‘power’ is that neither in ordinary language nor in political science is there agreement on terms and definitions”); John Champlin, Introduction to *Power 5* (John Champlin ed., 1971) (noting that despite the time and energy that social scientists have devoted to studying power, “the results have produced controversy rather than consensus”). Despite the lack of consensus, we believe that meaningful insights can be found so long as one remains grounded in common sense. Dahl himself recognized that greater precision regarding the term might be self-defeating, noting that “precision may not always achieve what we want. For the more precision we seek, the more we may fragment the general concept so that a broad overview is impossible. Yet it is the overview, often, that we want.” Dahl, *supra* at 16.

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- 20 Merriam Webster's Collegiate Dictionary 913 (10th ed. 1993). Under this expansive definition, even inanimate objects can possess power. Automobiles, trains or aircraft, for example, would have great power—the ability to travel great distances at high speeds that dwarf anything that human beings can match. Similarly, nature would have great power—the capacity of hurricanes, tornadoes, and earthquakes to wreak havoc remains unconquered notwithstanding mankind's best efforts to control the elements. Despite the existence of these dramatic forms of power, our inquiry is a more limited one. We propose to focus on power in human interactions, most particularly as it pertains to bargaining and negotiation.
- 21 See Dennis Wrong, *Power: Its Forms, Bases and Uses* 2 (1979) (asserting that power “is the capacity of some persons to produce intended and foreseen effects on others”).
- 22 See, e.g., Lewicki et al., *supra* note 4, at 176 (noting that “[o]ne way of defining power builds upon the observation that, with power, one party can get another to do what the latter normally would not do”). See also Dahl, *supra* note 19, at 17 (stating that power is a “relation among actors in which one actor induces other actors to act in some way they would not otherwise act”); Stephen P. Robbins, *Essentials of Organizational Behavior* 154 (5th ed. 1997) (noting that power “refers to the capacity that A has to influence the behavior of B so that B does something he or she would not otherwise do”).
- 23 To us and others, “influence” is distinguishable from “power” in that the latter may involve coercion whereas the former typically relies on persuasion. See David Willer et al., *Power and Influence: A Theoretical Bridge*, 76 *Soc. Forces* 571, 573 (1997). According to the authors:
Other theorists have sought to demarcate power and influence. For Parsons, power derives from “positive and negative sanctions” through which “ego may attempt to change [another's] intentions” whereas “influence is a way of having an effect on the attitudes and opinions of others.” This distinction is like that drawn ... by Bierstedt, for whom “influence and power can occur in relative isolation from each other.” For Bierstadt, Karl Marx was influential upon the twentieth century, but he was not powerful. “Stalin, on the other hand, is a man of influence only because he is first a man of power.” Zelditch draws the distinction more sharply, “What distinguishes power is that it involves external sanctions Influence, on the other hand, persuades B that X is right according to B's own interests.
Id. (citations omitted).
- 24 “Charisma” as we use it here means extraordinary charm that inspires others to like a person or to want to follow the person's leadership. See Merriam Webster's Collegiate Dictionary, *supra* note 20, at 193. Charismatic figures can exert great power at times, but the appeal is primarily through persuasion, not force. See Pienaar & Spoelstra, *supra* note 4, at 115 (“[T]ruly charismatic people—those who have a unique blend of physical characteristics, speech, mannerisms and self-confidence—are able to influence very large groups of people by their actions.”). At some point, however, to achieve one's goals, charisma may not be enough. For example, in describing the effective persuasion that Chrysler and Daimler-Benz chief executives used in gaining the support of their workers and home governments for the companies' merger, a New York Times reporter expressed few doubts that Jürgen E. Schrempp, CEO of Daimler-Benz, would emerge as the head of the merged company:
[A] close confidant of Mr. Schrempp said that the German chief executive must sooner or later tell people that he and he alone runs the company. In other words, the heavy reliance on his charisma and the positive glow from the merger are coming to an end. To keep it going now, the other Mr. Schrempp has to come out, perhaps swinging.
Yousef M. Ibrahim, *Importance of Being Persuasive*, N.Y. Times, May 26, 1999, at C1.
- 25 Although power theoretically can be exercised in isolation—removed from society—power deployed in this manner provides little insight into the issues that confront us in our daily lives. For example, a mad scientist, working alone, theoretically could invent a powerful bomb and destroy the world. We see limited utility in exploring the concept of power in this context.
- 26 See Andrew Pettigrew & Terry McNulty, *Power and Influence In and Around the Boardroom*, 48 *Hum. Rel.* 845, 851 (1995) (noting that “[power] is a relational phenomenon. Power is generated, maintained, and lost in the context of relationships with others.”). See also Morton Deutsch, *The Resolution of Conflict* 84-85 (1973) (stating that “[p]ower is a relational concept: it does not reside in the individual but rather in the relationship of the person to his environment. Thus, the power of an actor in a given situation is determined by the characteristics of the situation as well as by his own characteristics.”); Dahl, *supra* note 19, at 16 (noting that “[t]here is general agreement that influence—terms [such as power] refer to relationships among human beings”); Pienaar & Spoelstra, *supra* note 4, at 108 (stating that “[p]ower involves a relationship between two or more people [and] has to

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be exercised or deployed or have the potential of being deployed in relation to some other person or group”).

- 27 We use the term “relationship” in its broadest sense. Two people who undertake a “one-shot” negotiation, such as the sale of a car between strangers, would still have a relationship for that transaction, especially if it becomes protracted.
- 28 Injecting cross-cultural considerations would add exponentially to the complexity. For example, Pfeffer points to the difficulties inherent in trying to assess power in Japanese corporations. According to him, it cannot be done by looking to the formal distinctions that might tip off a researcher to the hierarchy in U.S. corporations:
The best way to diagnose power in Japanese corporations is not ... to look at the formal distinctions conveyed by salary, rank, or office space. These are all quite equal, often based on age or seniority, and in many instances, they have been designed intentionally to mask the real distribution of power. Rather, particularly because of the importance of consultation in decisionmaking, the best diagnostic tool is the pattern of interaction among individuals involved in the decision. Who gets consulted, at what point, and with what result provides information about where the power resides.
Pfeffer, *supra* note 9, at 65.
- 29 See Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation*, 257-58 (1975) (describing power as a “complex, multidimensional parameter”).
- 30 Robert A. Dahl, *The Concept of Power*, reprinted in *Political Power: A Reader in Theory and Research* 79 (Roderick Bell et al. eds., 1969).
- 31 See *id.* See also Pruitt, *supra* note 4, at 89 (concluding “[t]he term power seems to be relatively useless as a scientific concept”). We agree that developing consistent, easily studied operational models of power is not possible. We do believe, however, that meaningful insights can be drawn from the accumulation of data by carefully drawn studies. In that respect (and at the risk of metaphor overload), we would liken the study of power to traversing a desert, not a bottomless swamp. That is, it is possible to navigate through to the end, but one must maintain careful bearings and be well prepared every step of the way; See Nina Burkardt et al., *Power Distribution in Complex Environmental Negotiations: Does Balance Matter?*, 7 *J. Pub. Admin. Res. and Theory* 247, 250 (1997) (pointing out the conflict among researchers about how best to study power). It seems clear that little consensus exists in the academic community about the meaning of the term “power” because of differing assumptions and methodologies that researchers have brought to bear in studying it. Despite the complexity of the topic and without losing sight of the difficulties involved, we nevertheless believe that useful insights and advice can be developed about it.
- 32 See Pettigrew & McNulty, *supra* note 26, at 852 (noting the importance of recognizing “the highly situational character of quests for power and influence Power displayed on occasion may not be transferable to other settings. Because power is inherently situational, it is dynamic and potentially unstable.”). See also Deutsch, *supra* note 26, at 85 (noting that the “power of an actor in a given situation is determined by the characteristics of the situation as well as by his own characteristics”); Lewicki et al., *supra* note 4, at 178-79 (“[N]ot only do the key actors and targets change from situation to situation, but the context in which the tools of power operate changes as well.”).
- 33 33 See Dianne Neumann, *How Mediators Can Effectively Address the Male-Female Power Imbalance in Divorce* 9 *Mediation Q.* 227 (1992), cited in *Alternative Dispute Resolution: Strategies for Law and Business* 429-30 (E. Wendy Trachte-Huber & Stephen K. Huber eds., 1996). Neumann states:
Power is ... situational, which means that an individual’s power is defined by particular circumstances. An individual has varying degrees of power in each of his or her roles Degrees of power shift according to circumstances. For example, at the workplace, the chief executive officer of the company has far more power than does his assistant. However, on a weekend trip to Maine, where both men participate in a whitewater rafting trip, the CEO’s greater power in relation to his assistant will not transfer to the new situation if the assistant is an expert white-water rafter and the CEO is on the rapids for the very first time.
See also Dahl, *supra* note 19, at 24 (criticizing researchers who fail to appreciate the situational aspect of power, and noting that “[a]s investigators became more concerned with differences in ‘scopes’ of influence, they began to discover that the influence of a community leader is often highly specialized: he influences decisions about schools, let us say, but not about zoning, or he is influential on urban development but not on political nominations or elections.”).

- 34 Professor Shell distinguishes between negotiation “leverage” and “objective power.” To him, leverage is the key concept because it captures the situational nature of the interaction: “Leverage is about situational advantage, not objective power. Parties with very little conventional power can have a lot of leverage under the right circumstances.” Shell, *supra* note 4, at 107. As an example, he cites the case of a parent trying to get a child to eat broccoli. According to Shell, “[y]ou may be big, rich, powerful, and strong, but your daughter has a lot of leverage in this situation. Why? Because she and only she can eat the broccoli.” *Id.* at 107.
- 35 As any experienced negotiator can attest, the power dynamic in bargaining situations can shift from moment to moment as point and counterpoint emerge. See *id.* at 110 (arguing that “[l]everage is dynamic, not static. Leverage changes as negotiations proceed. Some moments are therefore better than others for making your needs known and insisting that they be met.”).
- 36 See Bruce Catton, *The American Heritage Picture History of the Civil War 116-17* (1982) (providing a full description of General Magruder’s action).
- 37 See, e.g., Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 *Am. Beh. Sci.* 149, 159 (1983) (stating that “one can argue that my power depends upon someone else’s perception of my strength, so it is what they think that matters, not what I actually have. The other side may be as much influenced by a row of cardboard tanks as by a battalion of real tanks. One can say then that negotiating power is all a matter of perception.”); Shell, *supra* note 4, at 111 (“Leverage is based on the other party’s perceptions of the situation, not the facts.”); Lewicki et al., *supra* 4, at 178 (noting that “[p]ower is in the eye of the beholder Perceived power is what creates leverage, and many power holders go out of their way to create the image of power as the critical element of effective influence”); Kennedy, *supra* note 3 at 204 (arguing that “in real life there is no objective assessment of the degree of relative power. Power is a subjective judgment. If somebody acts as if they have power and your perceptions coincide with that belief, then [they have power].”). See also Margaret A. Neale & Max H. Bazerman, *Cognition and Rationality in Negotiation*, 7 (1991) (stating their belief that “it is not the objective, external aspects of the situation that directly affect negotiator judgment; rather, it is the way that the negotiator perceives the features and uses these perceptions to interpret and screen information.”).
- 38 See Lewicki et al., *supra* note 5, at 48 (stating that “[p]ower ... has a lot to do with perception. The other party may see you as having more power than you do. Further, they may believe you have the ability to use it. So, just the image of power can be effective in accomplishing your goals. Many will argue, in fact, that the image of power is more important than real power.”).
- 39 Even negotiations in the midst of battle substitute for conflict. Each combatant, having taken the other’s measure during the fight thus far, negotiates based on perceptions of the other party’s future strength and determination. For example, during World War II, Japanese General Tomoyuki Yamashita, with a force of roughly 30,000 men and desperately limited supplies, convinced British General A.E. Percival to surrender his garrison of 85,000 troops on the island of Singapore after only three days of struggle. Yamashita did so by persuading Percival through aggressive attacks and bluster that the Japanese vastly outnumbered him and would inevitably carry the day. See John Toland, *The Rising Sun: The Decline and Fall of the Japanese Empire* 315 (1971) (In an interview after the war, Yamashita described his strategy as “a bluff that worked.”)
- 40 Ury et al. make this point convincingly:
Determining who is the more powerful party without a decisive and potentially destructive power contest is difficult because power is ultimately a matter of perceptions. Despite objective indicators of power, such as financial resources, parties’ perceptions of their own and each other’s power often do not coincide. Moreover, each side’s perception of the other’s power may fail to take into account the possibility that the other will invest greater resources in the contest than expected out of fear that a change in the perceived distribution of power will affect the outcomes of future disputes.
William L. Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* 8 (1988).
- 41 See Shell, *supra* note 4, at 111 (noting that “the perceptual nature of leverage can also work against you. You may mistakenly assume the other party is stronger than they really are. You may also be in a good position, but the other side may not believe you.

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In such cases, you must find ways of proving your worth, importance, or power.”).

- 42 See Robert S. Adler et al., *Emotions in Negotiation: How To Manage Fear and Anger*, 14 *Negotiation J.* 161, 171-72 (1998) (describing how a “negotiator’s bias” can trigger runaway emotions if not guarded against).
- 43 See Kenneth W. Thomas, *Handbook of Industrial and Organizational Psychology* 681 (Marvin D. Dunnette & Leaette M. Hough eds., 2d ed. 1990) (citing various studies demonstrating that there “appears to be a strong tendency for a party to see the other as relatively competitive, while seeing oneself as relatively uncompetitive and cooperative”); Fisher & Ury, *supra* note 4, at 25 (“It is all too easy to fall into the habit of putting the worst interpretation on what the other side says or does. A suspicious interpretation often follows naturally from one’s existing perceptions. Moreover, it seems the ‘safe’ thing to do, and it shows spectators how bad the other side really is.”); Charles B. Craver, *Effective Legal Negotiation and Settlement* 91 (1993) (warning that negotiators “should ... consider the possibility that they are attributing unfounded meaning to what is actually being conveyed. They may simply be reading more into their opponent’s representations than is warranted-or intended-and this phenomenon may be the basis for their resulting confusion.”).
- 44 See Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 *Iowa L. Rev.* 1219, 1232 n.40 (1990) (“[B]y concluding that our adversaries are unworthy, we render defensible, even virtuous, the most viciously self-interested conduct in which we might want to engage [and] we grant ourselves permission to do those things that we may have wanted to do all along and for which we otherwise lacked permission.”).
- 45 We have observed this phenomenon repeatedly in our negotiation classes. All too often our students focus on the weaknesses of their positions without questioning whether the other side has shortcomings of its own. See also Alan N. Schoonmaker, *Negotiate to Win: Gaining the Psychological Edge* 42 (1989) (noting that “people are naturally aware of their own weaknesses. They know how badly they need a deal, or how poor their alternatives are, or how illogical their position is. However, they do not know the other side’s weaknesses.”); Kennedy, *supra* note 3, at 106 (stating that “we often accord greater relative power to other negotiators than the context warrants and we lower our expectations accordingly, and as often without thinking about what we are doing”). Social psychologists refer to this type of negotiator’s bias as “pluralistic ignorance,” i.e., the tendency that most people have to attribute different motives and thoughts to the other side when they engage in behavior similar to theirs. For example, people who put on a brave face during a negotiation may attribute courage, confidence and skill to others who act in a confident manner without stopping to think that the other side probably shares their anxiety, insecurity and fears. See Dale T. Miller & Cathy McFarland, *Pluralistic Ignorance: When Similarity is Interpreted as Dissimilarity*, 53 *J. Personality and Soc. Psychol.* 298, 299 (1987) (describing studies that demonstrate that people “do not believe that others are concealing their true feelings or perceptions but believe, on the contrary, that they are acting in accordance with them”).
- 46 As columnist David Sanger pointed out in the aftermath of the United States’ achievement in driving the Serbs out of Kosovo in 1999, most of the world looked at the U.S. as the world’s one great superpower. Yet, according to Sanger, “Americans don’t feel particularly powerful now, even with the Russians broke, the Chinese consumed with unemployment and slowing growth, and the Japanese unable to get their breath back.” David E. Sanger, *America Finds It’s Lonely At the Top*, *N.Y. Times*, July 18, 1999, at WK 1. Why is this? Sanger quotes Professor Michael Mandelbaum at Johns Hopkins University for part of the explanation, “If you are the 800-pound gorilla, you’re concentrating on your bananas and everyone else is concentrating on you.” *Id.*
- 47 See Lax & Sebenius, *supra* note 4, at 249 (noting that “the United States’ unquestioned capacity for the nuclear annihilation of North Vietnam did not yield Vietnamese submission before or during the peace talks”).
- 48 See Carsten De Dreu, *Coercive Power and Concession Making in Bilateral Negotiation*, 39 *J. Conflict Resol.* 646, 666 (1995) (noting that there must be “a communicated willingness to exercise one’s power for it to affect negotiation processes” and citing additional studies in support of this point). See also Burkardt et al., *supra* note 31, at 273 (describing successful and unsuccessful negotiations regarding hydroelectric power licenses between developers and government authorities and noting that several negotiations failed because the applicants, while “[recognizing their] sources of power... neglect[ed] to use them”).

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- 49 See, e.g., Rubin & Brown, *supra* note 29, at 199 (basing observations on a review of 27 studies on power symmetry, the authors conclude that “equal power among bargainers tends to result in more effective bargaining than unequal power”); Nimet Beriker & Daniel Druckman, *Simulating the Lausanne Peace Negotiations, 1922-1923: Power Asymmetries in Bargaining*, 27 *Simulation and Gaming* 162 (1996) (relying on a simulation of the historic Lausanne Peace Treaty, the authors concluded that negotiators in symmetric power positions “were more satisfied with the outcome, achieved faster resolutions, disagreed less, and made fewer competitive statements during [negotiations than those with power asymmetries]”); Lewicki et al., *supra* note 4, at 176 (observing that “negotiators who ... have matched power-equally high or low-will find that their deliberations proceed with greater ease and simplicity toward a mutually satisfying and acceptable outcome”); Burkardt et al., *supra* note 31, at 247 (a review of negotiations among the Federal Energy Regulatory Commission, developers, and state regulatory authorities demonstrated that all unresolved cases involved unbalanced power and all successful cases involved balanced power, leading the authors to conclude that “a balance of power among parties is necessary for successful negotiation.”); Kathleen Kelley Reardon & Robert E. Spekman, *Starting Out Right: Negotiation Lessons for Domestic and Cross-Cultural Business Alliances*, 37 *Bus. Horizons* 71, 75 (1994) (stating that “[power] asymmetry breeds instability”); Lawler, *supra* note 8, at 24 (concluding that power disparities tend to produce fewer agreements).
- 50 Ury, *supra* note 5, at 131-32 (arguing that using greater power to achieve goals is often self-defeating: “Even if you win the battle, you may lose the war. In the process you may destroy your relationship with the other side. And they will often find a way to renege or retaliate the next time they are in a position of power.”).
- 51 See e.g., Rubin & Brown, *supra* note 29, at 221 (citing numerous studies, authors conclude that under conditions of unequal relative power among bargainers, the party with high power tends to behave manipulatively and exploitatively); Lawler, *supra* note 8, at 30 (observing that unequal power in negotiations “tends to decrease conciliatory tactics and increase hostile tactics”); Pruitt, *supra* note 4, at 84 (citing research showing that “the bargainer with the greater capacity to penalize the other (greater threat capacity) will issue more threats”).
- 52 Some economists may argue that weaker parties will always agree to a deal, however humiliating, that proves more financially rewarding than failing to agree. Numerous studies and observers dispute this. See, e.g., Lax & Sebenius, *supra* note 4, at 129 (observing that “[a] number of studies suggest that when a bargainer attributes his concession to his own weakness and the counterpart’s strength, a blowup is likely. The bargainer would lose face or self-esteem by conceding. When this [occurs] he may find that no agreement, which retains self esteem, is better than an agreement that seems to sacrifice it.”); Ury, *supra* note 5, at 150 (asserting that “[a]n imposed outcome is an unstable one. Even if you have a decisive power advantage, you should think twice before lunging for victory and imposing a humiliating settlement on the other side. Not only will they resist all the more, but they may try to undermine or reverse the outcome at the first opportunity.”); Stephen M. McJohn, [Default Rules in Contract Law as Response to Status Competition in Negotiation](#), 31 *Suffolk U.L. Rev.* 39, 47 (1997) (noting that when weaker parties feel demeaned, they “may become unable to agree to a transaction that gives them what they actually want, simply because such agreement would cause loss of status”); Mark K. Schoenfield & Rick M. Schoenfield, *Legal Negotiations: Getting Maximum Results* 154-55 (1988) (noting that attorneys’ pride may prevent them from acting in their client’s best interest).
- 53 See Rubin & Brown, *supra* note 29, at 221 (noting that bargainers “with low relative power tend to behave more submissively” than those with high relative power); Beriker & Druckman, *supra* note 49, at 163 (“In contrast to stronger parties, weaker bargainers have been found to exhibit softer negotiating styles [and] behave more submissively”).
- 54 Weaker parties often adopt aggressive tactics to fend off stronger parties. See Rebecca Ford & Mary A. Blegen, *Offensive and Defensive Use of Punitive Tactics in Explicit Bargaining*, 55 *Soc. Psychol. Q.* 351, 355 (1992) (citing research demonstrating that lower-power parties will often resort to punitive tactics, but for different reasons than higher-power parties: “the higher-power party is more likely to use punitive tactics because doing so entails fewer retaliation costs, whereas the lower-party party is more likely to use punitive tactics to convey that offensive action will entail some costs, and to avoid as much as possible the prospect of continued aggression.”); Pienaar & Spoelstra, *supra* note 4, at 123 (noting that, at some point, negotiation “victims” will become aggressors and that “the worse the victimization, the worse the aggression”); Lawler, *supra* note 8, at 26 (observing that often “the lower-power party uses power because of higher expectations of attack, generated by the opponent’s power capacity. The confluence of a lower fear of retaliation for the higher-power party and a higher expectation of attack for the lower-power party produces more power use by both parties under unequal, as opposed to equal, power.”). Needless to say, the resort to threats and power behaviors in general undermines the likelihood for agreement. See Burkardt et al., *supra* note 31, at 40 (noting that

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“some uses of power, such as overt threats ... diminish the probability that the parties will be able to reach an agreement acceptable to all”).

- 55 See Rubin & Brown, *supra* note 29, at 215-16 (citing studies that show parties with equal bargaining power typically bargain more cooperatively than those with unequal bargaining power).
- 56 See *id.* at 217 (citing studies that show parties with equal bargaining power typically attain “higher joint payoffs than those with unequal power”).
- 57 See *id.*
- 58 See *infra* notes 434-47 and accompanying text for our advice regarding approaches to take when one has greater power.
- 59 See Terry Anderson, *Step Into My Parlor: A Survey of Strategies and Techniques For Effective Negotiation*, 35 *Bus. Horizons* 71, 72 (1992) (stating that “[t]he relative power of each negotiator is established by the extent of each party’s dependence on the other”); Kennedy, *supra* note 3, at 83 (noting that “bargainers negotiate not only the specific issues but also the nature of their dependence on each other”).
- 60 In the law of contracts, dependence in the form of mutually binding exchanges between parties constitutes the major element of consideration, a necessary part of most legally enforceable agreements. See Richard A. Mann & Barry S. Roberts, *Business Law and the Regulation of Business* 222 (6th ed. 1999) (stating that “[c]onsideration is the primary ... basis for the enforcement of promises in our legal system The doctrine of consideration ensures that promises are enforced only where the parties have exchanged something of value in the eye of the law.”). See also Calamari & Perillo, *supra* note 12, § 4.3 at 172 (stating that with respect to consideration “[t]he idea of ‘exchange’ is central to the law of contracts, as it is to any advanced economic system”).
- 61 See Lawler, *supra* note 8, at 22 (pointing out that “each party’s power is based on the other’s dependence on them, not their own dependence on the other”).
- 62 Job-hunting business students seem particularly prey to this pattern. When offered a job, too many confess to being so delighted with the offer and so reluctant to offend their new employers that they fail to bargain aggressively for salary and benefits. Yet, most employers, having sunk substantial costs into recruiting the students and fearful of losing their new recruits, feel particularly vulnerable at this time. This is the point that Professor Shell calls the “golden moment” when “job hunters should negotiate for extra benefits such as relocation expenses, bonuses, and company cars.” Shell, *supra* note 4, at 110. Once one has accepted an offer and begun working, personal costs set in, reducing the previous leverage.
- 63 See Ury, *supra* note 5, at 22 (stating that “BATNA is the key to negotiating power. Your power depends less on whether you are bigger, stronger, more senior, or richer than the other person than on how good your BATNA is. If you have a viable alternative, then you have leverage in the negotiation. The better your BATNA, the more power you have.”). See also, Lewicki et al., *supra* note 5, at 43 (arguing that “when you have a good alternative (or several), you gain power [H]aving alternatives—even ones that aren’t very good—gives you more power than having no alternative at all! The threat that you will exercise other options can help you persuade the other party to make a deal that meets your needs.”).
- 64 See Shell, *supra* note 4, at 102-03.
- 65 In arguing for a view of leverage that goes beyond the power of a BATNA, Shell cites the example of black Muslim leader, Hamaas Abdul Khaalis, who seized the national headquarters of the Jewish national organization, B’nai B’rith and held a number of the workers hostage. According to Shell:

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There is wisdom in the BATNA conception of leverage because good alternatives away from the table can increase your confidence when you are negotiating. But alternatives do not capture the essence of what leverage really is. Khaalis did not improve his alternatives by taking hostages. Instead, he got people's attention by making the authorities' alternatives worse. Id. at 101.

- 66 See Bob Ortega, In *Sam We Trust: The Untold Story of Sam Walton and How Wal-Mart is Devouring America* (1998) (detailing how the company has helped "hollow out" rural downtowns by establishing large discount stores on their fringes).
- 67 Acton, *Essays on Freedom and Power* 357 (Gertrude Himmelfarb ed., 1948). Lord John Emerich Edward Dalberg Acton wrote this in a letter in 1887. In fact, William Pitt, a British politician, made the same point over 100 years before Acton. According to Pitt, "[u]nlimited power is apt to corrupt the minds of those who possess it." See Gregory Y. Titelman, *Random House Dictionary of Popular Proverbs and Sayings* 280-81 (1996).
- 68 We do not dispute that the exercise of power can, at times, be bad. We agree with Lewicki et al., on this point: There is some indication that power is, in fact, corrupting [and] this may occur for several reasons. First, ... power is based on perception-creating the perception, or even the illusion, that you have power and can use it. In creating such an illusion, it is not uncommon for actors to deceive themselves as much as they deceive the target. Second, power can be intoxicating. This point is frequently lost on the naive and unskilled. Those who gain a great deal of power through rapid career success frequently overuse and eventually abuse it. Lewicki et al., *supra* note 4, at 178.
- 69 See Richard W. Brislin, *The Art of Getting Things Done* 44 (1991) (noting that "[l]ike fire, power can be used for beneficial or evil purposes [P]ower can be used to benefit individuals if leaders use their influence justly and wisely, and if they assist others in meeting their goals. Or it can be used for evil purposes when powerful people become more interested in benefiting themselves than benefiting others."); Leo Strauss, *Natural Right and History* 133 (1953) (noting that "[w]hile some men are corrupted by wielding power, others are improved by it"); Herb Cohen, *You Can Negotiate Anything* 52 (1980) (arguing that the exercise of power "may be delightfully 'good' or abominably 'bad,' but the power to implement the goals is a neutral force like electricity or wind").
- 70 As Lax and Sebenius note: Without trying, anyone could spin out a long list of [power sources]: having someone depend on you for resources; having a great deal of formal authority; owning the last parcel of land needed for a major development to start; knowing the maitre d'; possessing the secret of a new process; being able to withstand pain or delay; hearing about someone else's checkered past; enjoying a reputation for unswerving principle; having an uncle in the plumber's union; being owed a string of favors; having figured out a clever solution; being chauffeured by helicopter; and on and on. Lax & Sebenius, *supra* note 4, at 254-55.
- 71 See, e.g., id. at 255-57 (listing five bases of power: coercion, remuneration, identification, normative conformity, and knowledge); Bertram H. Raven & Arie W. Kruglanski, *Conflict and Power*, in *The Structure of Conflict* 73-77 (Paul Swingle ed., 1970) (listing seven sources of power: reward, coercive, legitimate, expert, informational, referent, and compounded); John R. P. French, Jr. & Bertram H. Raven, *The Bases of Social Power*, in *Studies in Social Power* 150-67 (D. Cartwright ed., 1959) (identifying five bases of social power); Burkardt et al., *supra* note 31, at 250 (citing numerous studies that list sources of power and listing eleven sources derived from these studies: skill and knowledge, a good relationship, a good alternative to negotiation, an elegant solution, legitimacy, commitment, certainty about outcome, consistent expectations among parties, congruence between an organization's goals and those of its representatives, risk tolerance, and low relative negotiation cost); Lewicki et al., *supra* note 4, at 181-86 (listing three sources of power in negotiation: information and expertise, control over resources, and location in an organizational structure).
- 72 These categories overlap to an extent. For example, one's personal power can result from one's access to critical information. Similarly, one's organizational power may stem from the fact that it provides him or her with scarce information.

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- 73 See Jerald Greenberg, *Managing Behavior in Organizations* 168 (describing personal power as “power derived from an individual’s own unique qualities or characteristics”).
- 74 This is a fact of life. Pfeffer cites several studies that purport to demonstrate a strong correlation between physical attractiveness and interpersonal influence. See Pfeffer, *supra* note 9, at 215. See also Lewicki et al., *supra* note 4, at 200 (citing studies that suggest that “[p]eople may have a tendency to let their guard down and trust attractive people more readily”).
- 75 Greenberg identifies four sources of personal power: (1) rational persuasion, (2) referent power (i.e., power derived from the fact that one is liked and respected), (3) expert power, and (4) charisma. See Greenberg, *supra* note 73, at 168.
- 76 Frustrated by years of bitter labor strife in Britain, one researcher undertook what remains to this day one of the most insightful studies of successful negotiation behavior. In a carefully controlled study, he assessed the behavior of individuals rated as effective by opponents in negotiation. He found that successful negotiators used a variety of techniques that relied on promoting collaborative results rather than on intimidating opponents into acquiescence. See Neil Rackham, *The Behavior of Successful Negotiators*, in Lewicki et al., *supra* note 4, at 393. See also Kennedy, *supra* note 3, at 130-36 (describing Rackham’s research methodology). See also *infra* notes 226-47 and accompanying text.
- 77 Goleman cites a study of star performers at Bell Labs, one of the world’s preeminent think tanks, that found neither academic talent nor IQ was a good predictor of on-the-job productivity; rather, those who had the greatest rapport with fellow workers tended to be standout performers. See Daniel Goleman, *Emotional Intelligence* 161-63 (1995). See also American Psychological Association, *Intelligence: Knowns and Unknowns*, 51 *Am. Psychologist* 77, 82-83 (1996) (Task force of psychology group established to produce report on IQ issues concluded that “[o]ther individual characteristics-interpersonal skills, aspects of personality, etc.-are probably of equal or greater importance” in predicting job performance than IQ).
- 78 Pfeffer believes that personal power is overrated compared to organizational power. According to him, “[n]ot only do we overattribute power to personal characteristics, but often the characteristics we believe to be sources of power are almost as plausibly the consequences of power instead.” See Pfeffer, *supra* note 9, at 73. He adds:
Without, for the moment, denying that [personal power] characteristics are associated with being powerful and politically effective, consider the possibility that at least some of them result from the experience of being in power. Are we likely to be more articulate and poised when we are more powerful? Are we likely to be more popular? Isn’t it plausible that power causes us to be extroverted, as much as extroversion makes us powerful? Aren’t more powerful and politically effective people likely to be perceived as more competent? Certainly power and political skill can produce more self-confident and ever aggressive behavior. And considering that people usually adjust their ambitions to what is feasible, people who are more powerful are probably going to be more ambitious, and to be viewed as such.
Id. at 73-74. Social psychologists refer to the phenomenon that Pfeffer describes as “fundamental attribution error,” i.e., attributing to an individual characteristics that can more readily be explained by the situation. In this case, the fundamental attribution error would be ascribing personal power to one whose power is organizational. See David G. Myers, *Exploring Social Psychology* 53-61 (1994).
- 79 We, of course, do not suggest that giving an individual greater power in an organization will turn him or her into an abusive fanatic. But, as the now infamous Zimbardo prison experiment at Stanford illustrates, placing one in a setting in which the norms sanction or invite abuse can trigger abusive behavior. In that experiment, college students were assigned make-believe roles either as prison guards or as inmates. Within one to two days, the student guards began devising cruel and degrading routines for inmates, leading a number of student inmates to break down or rebel. As a result, Professor Zimbardo canceled the experiment after only six days. See Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 *Int’l J. Criminology & Penology* 69, 80-81 (1973) (describing the experiment).
- 80 See *id.* at 93-94 (observing that in some cases one possesses power simply by being in the right place-by being in a position of authority, in a place to resolve uncertainty, in a position to broker among various subunits and external vendors-almost regardless of one’s individual characteristics).

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- 81 History is replete with stories of those who have expanded relatively powerless positions into vast empires. See, e.g., Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (1974) (describing how, over the course of his 44-year career, Moses transformed the job of parks commissioner in New York into one of the most powerful positions in New York); Robert A. Caro, *The Path to Power: The Years of Lyndon Johnson 261-68* (1982) (describing how, as a congressional staff member, Johnson expanded an organization founded to help congressional secretaries improve themselves as public speakers into a group that held hearings that congressmen and national press correspondents flocked to attend, thereby establishing a power base for Johnson); John Dean, *Blind Ambition: The White House Years* (1976) (describing how he, as counsel, rose within the Nixon Administration by steadily increasing the duties assigned to his office-and describing the price he later paid for his ambitions).
- 82 As Lewicki et al. note:
[A]s organizations change form to meet the demands of changing markets, environmental conditions, economic turbulence, and worldwide competitive pressures, individuals may find themselves in tasks, duties, and functions that become critical to their organization's ability to meet the challenges. The job may not have a fancy title, a big budget, or a large corner office, but it can confer a significant amount of power by virtue of the amount of information and resource control associated with it.
Lewicki et al., *supra* note 4, at 185.
- 83 See William H. Wiersema, *Growth Through Computer Power: It Takes a Specialist*, 52 *Electrical Apparatus* 44 (1999) (describing the necessity for new, highly-trained information specialists in business).
- 84 See Lewicki et al., *supra* note 4, at 179 (arguing that “[w]ithin the context of negotiation, information is perhaps the most common source of power”); Craver, *supra* note 43, at 47 (arguing for careful preparation in negotiation “based upon the simple fact that knowledge constitutes power in the bargaining context”).
- 85 Information acquisition, however, can also be a time-consuming and expensive process, as any attorney who has spent months in pre-trial discovery can attest. The fact that the parties are willing to devote such effort and money in the quest for information confirms how critical it can be in addressing and resolving disputes.
- 86 Radar enabled the British-with far fewer pilots and aircraft than the Germans-to pinpoint where German air attacks would occur and to concentrate British planes in those locations. See Norman Franks, *Battle of Britain*, in *Greatest Battles of World War II* 57 (Norman Franks ed., 1981) (describing how, throughout the Battle of Britain, the Germans never “realized how accurately the [British] radar plots could identify the size, course, and height of their raids”).
- 87 General Omar Bradley's autobiography describes the “priceless insights into German information and strategy” provided by the Enigma decryption machines during World War II. See Omar N. Bradley & Clay Blair, *A General's Life* 118 (1983).
- 88 Car buyers look for the April issue of *Consumer Reports* magazine every year both for an analysis of the new car models and for tips on how to bargain for the purchase of new cars.
- 89 Lewicki et al., note that:
Power derived from expertise is a special form of information power. The power that comes from information can be used by anyone who has assembled facts and figures to support arguments, but expert power is accorded to those who are seen as having achieved some level of command and mastery of a body of information. Experts are accorded respect, deference and credibility based on their experience, study, or accomplishments. One or both parties in a negotiation will give experts' arguments more credibility than those of nonexperts.
Lewicki et al., *supra* note 4, at 181. See also Pienaar & Spoelstra, *supra* note 4, at 111 (noting that “[e]xperts have power even when their rank is low The more difficult it is to replace the expert, the greater is the degree of expert power that he or she possesses.”); Burkardt et al., *supra* note 31, at 263 (discussing the critical role of expertise in interagency negotiations between licensees and the Federal Energy Regulatory Commission).

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- 90 In 1993, responding to complaints that many “experts” in lawsuits were merely fringe scientists purveying “junk science,” the U.S. Supreme Court established a legal threshold for expert testimony in [Daubert v. Merrell Dow Pharm., Inc.](#), 509 U.S. 579, 589-90, (1993). Under Daubert, trial courts are directed to admit expert testimony only when the expert’s methodology conforms to the dictates of “good science.” See Michael H. Gottesman, [From Barefoot to Daubert to Joiner: Triple Play or Double Error?](#) 40 *Ariz. L. Rev.* 753 (1998) (describing Daubert’s impact on the admission of trial testimony).
- 91 Geoffrey Colvin argues that a major social paradigm shift of power is occurring, fueled in large part by the Internet. According to him:
Bliss for a buyer is tons of information and vendors on the verge of murdering one another. That situation is here or on the way in most markets. Through the Internet, consumers and business buyers compare product specs and prices in real time. They also reap other power-granting information: Shop for a car on the Web and you’ll find not only vehicle ratings and dealers invoices, but also the amount of the dealer holdback ... and a script to guide you through your negotiation with the salesman. It’s the same with thousands of other products-and the information is cheap (often free) and convenient.
Geoffrey Colvin, *Naked Power: The Scoreboard*, *Fortune*, Apr. 27, 1998, at 449.
- 92 Philosophers often identify empathy as a critical foundation of ethical thought and conduct. See, e.g., C. Daniel Batson, *Empathy, Altruism, and Justice: Another Perspective on Partiality*, in *Current Societal Concerns about Justice* 49-66 (Leo Montada & Melvin J. Lerner eds., 1996). See also Sidney Callahan, *The Role of Emotion in Ethical Decisionmaking*, *Hastings Center Rep.*, June/July 1988, at 6, 12 (arguing that emotions, particularly empathy, are critically “important in moral and ethical functioning,” and that “[m]any moral revolutions have been initiated by empathy felt for previously excluded groups: slaves, women, workers, children, the handicapped, experimental subjects, patients in institutions.”).
- 93 See supra notes 12-14 and accompanying text.
- 94 Rules that govern how parties reach agreement are generally found in the legal doctrine of procedural unconscionability; See infra notes 169-73 and accompanying text. Rules that govern the fairness of the terms of agreements are generally found in the legal doctrine of substantive unconscionability; See infra notes 166-68 and accompanying text.
- 95 We focus on the legal issues most directly relevant to power disparities in negotiation. A discussion of all possible approaches that the law takes with respect to overreaching in contracts would require a separate article, if not book, to cover the topic adequately. See James J. White & Robert S. Summers, *Uniform Commercial Code* § 4.1, at 132 (4th ed. 1995) (noting that a “radically diverse array of legal doctrine fits under the ‘policing’ umbrella [of contracts],” and concluding that addressing the topics could not be done in a book chapter- “[t]he task demands a book of its own.”).
- 96 In some cases, the offending party need not use overt threats. Mere hints of future unpleasantness, done in a sufficiently convincing manner, may suffice.
- 97 See infra notes 98-109 and accompanying text.
- 98 See infra notes 114-38 and accompanying text.
- 99 Duties to assist arise if someone has negligently placed another in danger, has negligently sought to rescue another, or has negligently exposed someone to an imminent risk in such a manner as to invite rescue by a bystander. These exceptions, however, traditionally have been limited. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56, at 378-82 (5th ed. 1984); See [Restatement \(Second\) of Torts § 314 \(1977\)](#) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”) See also [Fowler V. Harper & Posey M. Kime, The Duty to Control the Conduct of Another](#), 43 *Yale L.J.* 886, 887 (1934); Keeton et al., supra note 98, § 56, at 373-84 (writing that the law’s position derives from the classic distinction between “misfeasance” and “nonfeasance”).

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- 100 Under tort law principles, “special relationships” include those in which one party holds power over a dependent party or receives economic and other benefits from another party. See Keeton et al., *supra* note 98, § 56, at 374. The largest group upon whom such an affirmative duty has been imposed are the owners and occupiers of land. Other examples include a bank and depositor, a passenger and carrier, parent and child, psychotherapist and patient, and doctor and patient. See *id.*
- 101 See *id.*
- 102 Whether one party places great trust and confidence in the integrity and fidelity of another is critical to a cause of action for undue influence. See, e.g., [Goldman v. Bequai, 19 F.3d 666 \(D.C. Cir. 1994\)](#) (undue influence may be found when one party in whom another reposes confidence misuses that confidence while the other has been made to feel that the trusted party will not act against his welfare); [Estate of Welch, 534 N.W. 2d 109 \(Iowa Ct. App. 1995\)](#); [Estate of Keeney, 908 P.2d.751 \(N.M. 1995\)](#).
- 103 Special relationships cover a wide variety of circumstances. The key is whether the contracting parties bring unequal power to the agreement and whether one of the parties has abused the relationship. See, e.g., [Rebidas v. Murasko, 677 A.2d 331 \(Pa. Super. Ct. 1996\)](#) (noting that confidential relationships between contracting parties are not limited to any particular association of parties, but exist whenever one is in position of advisor or counselor, whereby the other party, with reasonable confidence, trusts that person to act in good faith for the other’s interests).
- 104 As Calamari & Perillo note, the line between these categories often is “blurred, as when the dominant party dominates by virtue of the trust and confidence, rather than the subservience he has engendered.” Calamari & Perillo, *supra* note 12, § 9.10, at 322.
- 105 See Peter J. Van Every, [Undue Influence-Judicial Implementation of Social Policy, 1968 Wis. L. Rev. 569](#) (discussion of elements of undue influence doctrine); Calamari & Perillo, *supra* note 12, § 9.10, at 322; Veen K. Murthy, [Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination? 4 Cardozo Women’s L.J. 105 \(1997\)](#) (discussing doctrine of undue influence in context of female testators).
- 106 For a discussion of “good faith,” see *infra* notes 191-202 and accompanying text.
- 107 For a discussion of disclosure requirements, see *infra* notes 118-223 and accompanying text.
- 108 See [Restatement \(Second\) of Contracts §177 \(1979\)](#). Calamari & Perillo advance four elements of a prima facie circumstantial case of undue influence: (1) susceptibility of the party influenced, (2) opportunity by the dominant party to take exercise undue influence, (3) disposition on the part of the dominant party to exercise undue influence, and (4) evidence of the unnatural form of the transaction. See Calamari & Perillo, *supra* note 12, § 9.10, at 322. Among the factors frequently considered indicators of undue influence by the courts: old age and physical and mental weakness of the person executing the instrument; that the person signing the paper is in the home of the beneficiary and subject to the beneficiary’s association and supervision; that others have little or no opportunity to see the victim; that the instrument is different and revokes prior instrument(s); that the agreement is made in favor of one with whom there are not ties of blood; that the agreement disinherits natural objects of the victim’s bounty; and that the beneficiary has procured its execution. See [Caudill v. Smith, 450 S.E.2d 8 \(N.C. Ct. App. 1994\)](#), review denied, [454 S.E.2d 247 \(1994\)](#).
- 109 See Calamari & Perillo, *supra* note 12, § 9.12, at 324-25; [Restatement \(Second\) of Contracts § 177\(2\) \(1979\)](#). See, e.g., [Biddle v. Johnsonbaugh, \(Pa. Super. Ct. 1995\)](#).
- 110 For a description of the bargain theory of contracts see E. Allan Farnsworth, [Contracts § 2.2 \(2d ed. 1990\)](#).

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- 111 See *supra* notes 12-14 and accompanying text. See also Dan B. Dobbs, *Handbook on the Law of Remedies* § 10.4, at 680 (1973);
- 112 See *Oppenheimer & Co. v. Oppenheimer, Appel, Dixon & Co.*, 660 N.E. 2d 415, 421 (N.Y. 1995) (stating that “[f]reedom of contract prevails in an arm’s length transaction between sophisticated parties ... and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain”).
- 113 Professor Duncan Kennedy describes the courts’ view of arm’s length contracts: Freedom of contract is freedom of the parties from the state as well as freedom from imposition by one another. The decision maker must not condition contract enforcement on the lighting of candles for the salvation of his soul (or the soul of the monarch). So long as [the parties] have legal capacity he is also prohibited from conditioning enforcement on the parties adopting his particular view of what their relationship should be like. He must let them deal only for the short term, though he believes they should bind each other for the long haul; he must let them buy and sell at whatever price they like, and on whatever terms, so long as the agreement meets the test of voluntariness. He must not use his power to make one party sacrifice or share with the other party beyond her willingness to do so of her own free choice.
Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563, 570 (1982).
- 114 As Professor Duncan Kennedy states, “Take the case of fraud. When two parties are bargaining over the distribution of a transaction surplus, information is a crucial element of power, particularly information about the real properties of the commodity in question or about market circumstances affecting its value to others than the two involved.” *Id.* at 582. See also Wetlaufer, *supra* note 44, at 1226-27 (noting that lies in bargaining “all have in common is that, if they are successful, the liar becomes richer in the degree to which the victim becomes poorer”).
- 115 For a discussion of the development of the law of deceit, see Percy H. Winfield, *The Foundation of Liability in Tort*, 27 *Colum. L. Rev.* 1, 6 (1927) (noting that “deceit ... developed through the law of sale in particular and the law of contract in general, but did not appear as an independent tort until 1789”).
- 116 See Keeton, et al., *supra* note 98, §§ 107-09; Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 *Campbell L.Rev.* 1, 4-5 (1997) (describing the elements of fraud); *Restatement (Second) of Torts* §§ 525,531 (1977). See also *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996); *Patten v. ALFA Mutual Ins. Co.*, 670 So. 2d 854, 856 (Ala. 1995); *Whitson v. Oklahoma Farmers Union Mutual Ins. Co.*, 889 P.2d 285, 287 (Okla. 1995). Calamari & Perillo state the five elements more tersely: (1) representation, (2) falsity, (3) scienter, (4) deception, and (5) injury. See Calamari & Perillo, *supra* note 12, § 9.13, at 326.
- 117 An action seeking restitution is generally less difficult to prove than one involving tort damages. See Calamari & Perillo, *supra* note 12, § 9.13, at 326 (noting that “[i]nasmuch as [restitution] is designed merely to restore the situation that existed prior to the transaction, it is not surprising that the requisites necessary to make out a case for restitution are far less demanding than those necessary to make out a tort action”).
- 118 See Keeton et al., *supra* note 98, § 106, at 737; Calamari & Perillo, *supra* note 12, § 9.20, at 337-40; *Restatement (Second) of Torts* § 529 (1981); *Restatement (Second) of Contracts* § 159 (1979). Professor Palmieri identifies seven circumstances in which the courts have recognized a duty to disclose: (1) all material facts that have been actively concealed must be disclosed; (2) prior statements that are later discovered to be or turn out to be false must be corrected; (3) once something is said on a topic, all material facts about it must be disclosed; (4) all material facts must be disclosed when there is a fiduciary or confidential relationship between the parties; (5) superior material information concerning a transaction must be disclosed when the other party cannot reasonably discover the information and is under a mistaken belief with regard to it; (6) all material facts must be disclosed in the formation of insurance and suretyship contracts; and (7) all material facts must be disclosed as required by statute. See Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 *Seton Hall L. Rev.* 70, 120 (1993).

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- 119 See Calamari & Perillo, *supra* note 12, § 9.20, at 337-40. See e.g., *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976 (5th Cir. 1996) (absent special relationship, no duty to disclose information about gas well); *Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2d Cir. 1993) (duty to speak cannot arise simply because two parties may have been on opposite sides of bargaining table because ancient rule of caveat emptor is still valid in New York); *Maksyn v. Loesch*, 937 F.2d 1237 (7th Cir. 1991) (failure of one party to explain terms of written contract to the other party before the other party signs is not fraud); *In re Windsor Plumbing Supply Co.*, 170 B.R. 503 (Bankr. E.D.N.Y. 1994) (mere silence is not active concealment that will support a misrepresentation charge).
- 120 This example is taken from an article by Professor Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 *UCLA L. Rev.* 337, 375-76 (1997). Professor Strudler argues that a principle that he describes as “deserved advantage” justifies nondisclosure in this case. The principle, simply stated, is that “other things being equal, the more value one brings to the bargaining table, the more one may fairly insist upon as return.” *Id.* In the supermarket example, the real estate broker brings the value of her undiscovered information and time spent searching for the land. According to Strudler, “a rule permitting nondisclosure puts the [broker] in a good position to haggle for a fair return on the value she brings to the negotiating table. She is in a strong bargaining position because she does not have to disclose, and, according to the deserved advantage principle, she deserves to be in a strong bargaining position because of the value she brings to the bargaining table.” *Id.* A number of commentators have worried about protecting the bargainer who devotes substantial resources to uncovering critical information to be used in negotiations. If the diligent bargainer must disclose this information, the incentive to develop it evaporates, thereby losing important social wealth. See, e.g., Richard Posner, *The Economics of Justice* 234-44 (1981) (arguing that if purchaser cannot withhold knowledge of minerals beneath land from seller, wealth will be lost to society); Anthony Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 *J. Legal Stud.* 1, 13-14 (1978) (arguing that socially valuable “deliberately acquired information” will disappear if those who acquired it through expensive research must disclose it to the other side).
- 121 The elements of common law fraud for omission or failure to disclose facts are: (1) an omission to state or disclose, (2) material facts, (3) when there is a duty to do so, (4) with intent to deceive or mislead, (5) causing justifiable reliance on the part of the plaintiff, and (6) which is the proximate cause of injury. See Palmieri, *supra* note 118, at 142. See also *Henry v. Office of Thrift Supervision*, 43 F.3d 507 (10th Cir. 1994); *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524 (11th Cir. 1993), *reh’g denied*, 996 F.2d 316; *Kovich v. Paseo Del Mar Homeowners Ass’n*, 48 Cal. Rptr. 2d 758 (Cal. 1996).
- 122 See, e.g., Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1988); Truth-in-Lending Act, 15 U.S.C. §§ 1601-65 (1982); Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-20 (1982). Several commentators argue that, under federal regulations, “the law of deception has now developed to the point of virtually eliminating any line between advertisements which are deceptive and advertisements which simply fail to inform.” Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 *J.L. & Econ.* 491, 495 (1981).
- 123 As Calamari & Perillo point out, “[These instances of mandatory disclosure] all govern transactions where one party is in possession of information which can be obtained by the other, if at all, only by extremely expensive means and where abuses of the information monopoly frequently took the form of false or misleading statements.” Calamari & Perillo, *supra* note 12, § 9.20, at 337.
- 124 Wetlaufer asserts that “[t]he problem of lying in negotiations is central to the profession of law.” Wetlaufer, *supra* note 44, at 1220. Professor James J. White argues that negotiators’ effectiveness often depends on their skill as liars: Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways [the negotiator] must facilitate his opponent’s inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled. Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will find them actively engaged in misleading their opponents about their true position To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 *Am. Bar. Found. Res. J.* 927-28 (1980).

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- 125 Not all lies deserve condemnation. In some cases, lies may be the only means of saving innocent lives and may require tremendous courage. See, e.g., Doug Struck, *Nuns Used Lies and Guile to Save Lives*, *Raleigh News and Observer*, Sept. 23, 1999, at A1 (describing how nuns in the Salesian Sisters' convent in East Timor repeatedly lied to save members of the East Timor independence movement from murderous militia members). If one believes Hannah Arendt, the nuns' lies may not be a particularly substantial sin. She writes:
It certainly is quite striking that not one of the major religions, with the exception of Zoroastrianism, has ever included lying as such among the mortal sins. Not only is there no commandment: Thou shalt not lie (for the commandment: Thou shalt not bear false witness against thy neighbor, is of course of a different nature), but it seems as though prior to puritan morality nobody ever considered lies to be serious offenses.
Hannah Arendt, *The Human Condition* 278, n.35 (1958).
- 126 On the other hand, should one's lies be found out, the power dynamic may well shift dramatically in the other direction. See Wetlaufer, *supra* note 44, at 1227 (noting that unsuccessful lies may "create a short-term shift in bargaining power away from the liar and in favor of the intended victim. [In addition,] they may have adverse effects on the liar's credibility and the effectiveness both in the remainder of the negotiation at hand and in future negotiations with this and other adversaries. They may also provoke defensive or retaliatory lying.").
- 127 The classic defense of "bluffing" in negotiations and other aspects of commercial life is found in Albert Carr, *Is Business Bluffing Ethical?* 46 *Harv. Bus. Rev.* 143 (1968) (arguing that, just as with poker, no moral culpability should attach to the use of deception and bluffing in the business world). Carr's thesis, however, has been strongly challenged. See, e.g., T.L. Carson et al., *Bluffing in Labor Negotiations: Legal and Ethical Issues*, 1 *J. Bus. Ethics* 13 (1982); Norman Bowie, *Should Collective Bargaining and Labor Relations Be Less Adversarial?* 4 *J. Bus. Ethics* 283 (1985); Jack N. Behrman, *Essays on Ethics in Business and the Professions* 84 (1988).
- 128 Both tort law and general commercial law purport to permit "puffs," which generally involve exaggerated language of praise or opinion containing no factual representations. For example, section 2-313 of the Uniform Commercial Code provides that an express warranty is created "by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the 'basis of the bargain.'" Section 2-313(2) provides, however, that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." See U.C.C. § 2-313 (1995). These latter affirmations are commonly known as "puffs." Whether a statement constitutes fraud or creates an express warranty rather than a "puff" is a question of fact. See *id.*
- 129 See *White & Summers*, *supra* note 95, § 9.4, at 335 (4th ed. 1995) (stating that "anyone who says he can consistently tell a 'puff' from a warranty is a fool or a liar").
- 130 See, e.g., *Cohen v. Koenig*, 25 F.3d 1168 (2d Cir. 1994) (statements will not form basis of fraud claim when they are mere "puffery" or are opinions as to future events); *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 955 F.2d 1043 (6th Cir. 1992), (mere "sales talk" and "puffing" do not rise to level of fraud), reh'g denied on remand, 817 F. Supp. 643; *PdP Parfums de Paris, S.A. v. Int'l Designer Fragrances, Inc.*, 901 F. Supp. (E.D. N.Y. 1995) (mere puffery or opinions as to future events do not create a claim for fraud).
- 131 Hornbooks generally characterize statements such as "This is a top-notch car" or "This is an A-1 automobile" as puffs. Professor Pierson insists that the courts are not so charitable. See Charles Pierson, *Does "Puff" Create an Express Warranty of Merchantability? Where the Hornbooks Go Wrong*, 36 *Duq. L. Rev.* 887 (1998) (stating that "[n]umerous decisions have found that statements that hornbooks would label 'puff' create express warranties").
- 132 We find that a disappointingly large number of courts still consider "sales talk" to be "puff" and not actionable. See, e.g., *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276 (D. Del. 1993) (holding that insurance company's statement to insurance agents that "the sky was the limit" with regard to what they could earn was merely opinion, and not actionable); *Hughes v. Hertz Corp.*, 670 So. 2d 882 (Ala. 1995) (finding that statement by sales person that used car was a "fine" car was "sales talk" and "puffery," not factual misstatement); *Ed Miller & Sons, Inc. v. Earl*, 502 N.W.2d 444 (Neb.1993) (noting that statement that real estate was "in first

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class condition” was expression of opinion and mere puffing, not factual misstatement); [DH Cattle Holdings Co. v. Smith](#), 607 N.Y.S.2d 227, (N.Y. 1994) (holding that statement by financial agents that investment was “safe investment” was not an actionable statement of fact, but mere opinion and puffery); [Prudential Ins. Co. of America v. Jefferson Associates, Ltd.](#), 896 S.W.2d 156 (Tex. 1995) (holding that statement by building manager that building for sale was “superb,” “super fine,” and “one of the finest little properties” in the city was not misrepresentation of fact, but merely “puffing” and opinion).

133 See, e.g., [King v. Co-disco, Inc.](#), 458 S.E.2d 881 (Ga. App. 1995) (holding that statement by distributor’s account representative that he would give customer the lowest price that the distributor gave to any of its customers in the area was definite and capable of exact proof, so it was not mere expression of opinion, and could be actionable); [Melotz v. Scheckla](#), 801 P.2d 593 (Mont. 1990) (express warranty created by use of words “good running condition”); [Pake v. Byrd](#), 286 S.E.2d 588 (N.C. App. 1982) (holding that express warranty created by phrase “good condition”); [Garrett v. Mazda Motors of Am.](#), 844 S.W.2d 178 (Tenn. App. 1992) (noting that sales person’s representation to buyer that a car had been used primarily by salesperson and had been “babied to death” when it actually had been stolen and driven 10,000 miles by a thief, crossed line between “puffing” and actual misrepresentation, and amounted to fraud); [Ellmer v. Delaware Mini-Computer Sys., Inc.](#), 665 S.W.2d 158 (Tex. App. 1983) (warranty created by the words “first class” in describing a computer); [Taylor v. Alfama](#), 481 A.2d 1059 (Vt. 1984) (finding that express warranty could be created by ad describing used car as in “mint condition” with a “rebuilt engine”).

134 As Pierson states:
A seller will defend on the grounds that a statement such as, “This is a first-class automobile,” is meaningless puff. Yet, if the seller thought the remark was meaningless, why did he make it? Anyone who has ever bought anything knows why these statements are madeThe reason is salesmanship, the intentional creation of expectations of quality in the buyer’s mind aimed at inducing the buyer to buy. The seller must be held to the expectations he intended to create.
Pierson, *supra* note 131, at 911.

135 See Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 *Ohio State L.J.* 1, 3 (1987) (arguing that “[i]t is against the rules for lawyers to lie, but their ability to deceive through other means is at least accepted and frequently applauded”); See also American Bar Association, *Model Rules of Professional Conduct* 4.1 Rule 4.1 cmt. (1995). The ABA rule, which prohibits false statements of fact, has generally been interpreted to permit misrepresentations with respect to estimates of price or value, and with respect to a party’s intentions as to the figure at which he or she would settle a claim. The official commentary states that:
Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.
Id. See also Peter R. Jarvis & Bradley F. Tellam, *A Negotiation Ethics Primer for Lawyers*, 31 *Gonz. L. Rev.* 549 (1996).

136 See Craver, *supra* note 43, at 318-19. Craver states that:
It is ... ethical for legal negotiators to misrepresent the value their client places on particular items. For example, attorneys representing one spouse involved in a marital dissolution may indicate that their client wants joint custody of the children, when he or she does not Lawyers may also misrepresent client settlement intentions. They may ethically suggest that an outstanding offer is not acceptable to their side, even though they know the proposed terms would be accepted if no additional concessions could be generated. Since the Comment to Rule 4.1 [of the ABA Model Rules] appropriately recognizes that this information is not something the other side has the right to know, statements regarding client settlement intentions are excluded from the general prohibition [against misrepresentations].
Id. at 43. We find ourselves unpersuaded by this. The fact that one’s adversary has no “right” to information justifies refusing to provide the information to him or her. It does not justify lying.

137 See *supra* note 123 and accompanying text. See also Sissela Bok, *Lying: Moral Choice in Public and Private Life* xvii (1978) (asserting that “[i]n law and in journalism, in government and in the social sciences, deception is taken for granted when it is felt to be excusable by those who tell the lies and who tend also to make the rules”); Allison Kornet, *The Truth About Lying*, 30 *Psychol. Today* 53 (1997) (suggesting that people “lie as often as we brush our teeth”); Margo Harakas, *Lies*, *Raleigh News & Observer*, Apr. 3, 1997, at E1 (quoting psychiatry professor, Charles Ford, who has studied lying for years and states that lying is “an absolutely pervasive and ubiquitous part of human life”); Eileen Garred et al., *Schools for Scandal*, *People*, May 13, 1991, at 103 (citing a Rutgers University study that found roughly 67 percent of all college students cheat at least once as undergraduates).

- 138 See, e.g., G. Richard Shell, *When Is It Legal to Lie in Negotiations?* 32 *Sloan Mgt. Rev.* 93 (1991) (arguing that “what moralists would often consider merely unethical behavior in negotiations turns out to be precisely what the courts consider illegal behavior”). See also Pierson, *supra* note 131, at 887-918 (arguing that many so-called “puffs,” in fact, constitute legally enforceable express warranties).
- 139 See, e.g., *Transamerica Consumer Receivable Funding, Inc. v. Warhawk Investments, Inc.*, 842 F. Supp. 536 (M.D. Ga. 1994) (holding that it is not duress to exercise legal right); *Lebeck v. Lebeck*, 881 P.2d 727 (N.M. 1994) (stating that a lawful demand or threat to exercise legal right does not constitute duress); *Maus v. Bank One Columbus, N.A.*, 614 N.E.2d 765 (Ohio App. 10 Dist. 1992) (a threat to do what one is legally entitled to do is not an improper threat).
- 140 See Calamari & Perillo, *supra* note 12, § 9.3, at 312. After describing various proper and improper acts, the authors conclude, “[i]n short, absent a wrongful threat, the driving of a hard bargain is not duress. This is true even if one party benefits from the financial distress of the other.” *Id.* See also *Resolution Trust Corp. v. Ruggiero*, 977 F.2d 309 (7th Cir. 1992) (stating that “economic duress” is present where a person is induced by a wrongful act to make a contract); *Vasapolit v. Rostoff*, 39 F.3d 27 (1st Cir. 1994) (same); *Johnson v. Int’l Bus. Mach., Corp.*, 891 F. Supp. 522 (N.D. Cal. 1995) (same).
- 141 Indeed, the traditional notion of duress is that a party to such a contract lacks true consent. See *Restatement (Second) of Contracts § 175(1)* (1979). See also Calamari & Perillo, *supra* note 12, § 9.2, at 309 (noting that “the traditional doctrine was frequently premised on the notion that agreement made under duress lacked ‘real’ consent and produced only apparent assent”). See, e.g., *Rosas v. U.S. Small Bus. Admin.*, 964 F.2d 351 (5th Cir. 1992) (holding that duress requires wrongful act so substantial as to destroy victim’s free agency without present means of protection); *Resolution Trust Co.*, 977 F.2d at 309 (holding that duress requires wrongful act of another to make contract under circumstances which prevent the victim from exercising free will); *Cumberland & Ohio Co. of Texas, Inc. v. First Am. Nat. Bank*, 936 F.2d 846 (6th Cir. 1991) (holding that coercive event necessary to support claim of economic duress must be of such severity, either threatened, impending, or actually inflicted, as to overcome mind and will of person of ordinary fitness), cert. denied, 112 S. Ct. 878, 502 U.S. 1034 (1991)).
- 142 John Dalzell, *Duress by Economic Pressure*, 20 *N.C.L. Rev.* 237, 238 (1942), cited in Calamari & Perillo, *supra* note 12, § 9.2, at 309-10.
- 143 See F.H. Buckley, *Three Theories of Substantive Fairness*, 19 *Hofstra L. Rev.* 33, 37 (1990) (noting that “[e]ven if the victim has no practical alternative but to submit, the contract will be enforced if the threat is permissible”).
- 144 See Calamari & Perillo, *supra* note 12, § 9.2, at 309-10 (stating that, in a case of duress, though one’s consent might be “real enough, the vice of it is that it was coerced in a manner that society brands as wrongful and is therefore not deemed the product of free will”). Simply because one has a “choice” does not preclude a finding of duress. As Justice Holmes stated, “[i]t always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.” *Union Pac. Ry. v. Pub. Serv. Comm’n*, 248 U.S. 67, 70 (1918).
- 145 See *Restatement (Second) of Contracts*, § 176(1)(a) (1979) (a threat constitutes duress if performance of the threatened act would be a crime or tort).
- 146 See Buckley, *supra* note 143, at 38 (noting that “a threat may be impermissible under the doctrine of economic duress even if the threatened action is permissible”). See, e.g., *Arians v. Larkin Bank*, 625 N.E.2d 1101 (Ill. App. 1993) (stating that an act wrongful in nature may constitute duress even if not illegal; *Osage Corp. v. Simon*, 613 N.E.2d 770 (Ill. App. 1993) (stating that a wrongful act for duress need not be illegal, but may include one that is wrongful in nature).
- 147 *Link v. Link*, 194, 179 S.E.2d 697, 705 (N.C. 1971) (involving a husband who improperly threatened his wife with suit

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demanding custody of their children on grounds of her adultery unless she assigned securities to him). See also Calamari & Perillo, *supra* note 12, § 9.3, at 311-12 (noting that threats to exercise otherwise proper legal rights constitute duress if used in oppressive or abusive ways).

- 148 See Buckley, *supra* note 143, at 39, n.18 (noting that “[w]here truth is a defense to an action for libel, the blackmailer could not be prosecuted if he released the information to the public without attempting to profit from it”). As Justice Holmes wrote, “it does not follow that, because you cannot be made to answer for the act, you may use the threat.” *Silsbee v. Webber*, 50 N.E. 555, 556 (Mass. 1898) (setting aside a contract induced by a threat to tell the victim’s husband that their son was an embezzler).
- 149 This, of course, says nothing about moral or pragmatic concerns. On those grounds, we do urge caution. See *infra* notes 427-31 and 438-48 and accompanying text.
- 150 Courts, however, may have a lower threshold for finding duress when weaker parties suffer from disabilities, old age, or illiteracy. See, e.g., *Grezaffi v. Smith*, 641 So. 2d 210 (La. App. 1994) (in determining whether duress occurred, court will look to see whether party caused a reasonable fear of considerable unjust injury to another person’s property, person, or reputation; in determining reasonableness of fear, the court must take into account the age, health, disposition and other personal circumstances of alleged victim).
- 151 See, e.g., *Hall v. Burger King Corp.*, 912 F. Supp. 1509 (S.D. Fla. 1995) (stating that fear of financial ruin or economic hardship is not sufficient basis for claiming coercion or economic duress); *Burch v. Fluor Corp.*, 867 F. Supp. 873 (E.D. Mo. 1994) (holding that financial distress which the party seeking to enforce contract did not create does not constitute duress); *U.S. West Fin. Serv., Inc. v. Tollman*, 786 F. Supp. 333 (S.D.N.Y. 1992) (noting that mere hard bargaining by defendant is not duress when the defendant did not cause the victim’s financial troubles); *Texas Commerce Bank, N.A. v. United Sav. Ass’n of Texas*, 789 F. Supp. 848 (S.D. Tex. 1992) (holding that tough, even nasty negotiating, is not duress; and that when circumstances present person with series of alternatives, all of which are bad, the choice of the least bad is not duress).
- 152 See *supra* notes 141-45 and accompanying text.
- 153 See *supra* notes 146-45 and accompanying text.
- 154 See, e.g., *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849 (Ala. 1992) (noting that duress may be created by unconscionable pressure).
- 155 Section 2-302 of the U.C.C. reads as follows:
Unconscionable Contract or Clause
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
U.C.C. § 2-302 (1995).
- 156 Although the provision, by its own terms, applies only to transactions falling under Article 2 of the U.C.C., unconscionability has expanded into the general law of contracts. See Calamari & Perillo, *supra* note 12, § 9.39, at 370 (noting that section 2-302 has “entered the general law of contracts” and citing numerous cases of its application outside the realm of the sale of goods). See also *Restatement (Second) of Contracts* § 208 (1981) (tracking the language of U.C.C. § 2-302).

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- 157 As Professor Harry G. Prince notes:
Assessments of [Section 2-302](#) usually begin with the observation that the Section does not contain a definition of unconscionability. The critics of the section have cited the lack of a definition as its major failing. On the other hand, supporters of [Section 2-302](#) assert that the lack of a precise definition reflects the wisdom that the unconscionability doctrine defies such a description. Thus, the lack of a specific definition arguably gives courts the necessary room to address problems the exact contours of which have yet to be defined.
Harry G. Prince, [Unconscionability in California: A Need for Restraint and Consistency](#), 46 *Hastings L.J.* 459, 470-71 (1995) (citations omitted).
- 158 Unconscionability traces its lineage to the old Roman concept of *laesio enormis*, which allowed for the rescission of contracts because of the inadequacy of the price. See [id.](#) at 466-67.
- 159 That unconscionability is an equity doctrine is made unmistakably clear in the language of [Section 2-302\(1\)](#) where it provides that “the court” deciding “as a matter of law” makes the finding of unconscionability. Juries, therefore, should play no role in the determination of unconscionability.
- 160 See Prince, *supra* note 157, at 467-68 (equity courts turn to unconscionability when faced with enforcing contracts that would cause the courts to be a tool for producing “an unjust or unfair result”). See also Emily L. Sherwin, [Law and Equity in Contract Enforcement](#), 50 *Md. L. Rev.* 253, 254-55 (1991) (arguing that equity does not assist parties in taking unfair advantage); Robert A. Hillman, [Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302](#), 67 *Cornell L. Rev.* 1, 26-27 (1981).
- 161 See Prince, *supra* note 157, at 469 (noting that in the past the courts policed unfair agreements by “adverse construction of language by manipulation of the rules of offer and acceptance” or by determination that clauses were contrary to public policy). The problem with this “covert” approach, as Professor Karl Llewellyn stated, is that “covert tools are never reliable tools.”; Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 365 (1960), cited in Prince, *supra* note 157, at 470 n.53.
- 162 [U.C.C. § 2-302](#) cmt. 1 (1995).
- 163 This famous quote is from a Supreme Court case, [Hume v. United States](#), 132 *U.S.* 406, 411 (1889), which, in turn, draws from the English common law, *Earl of Chesterfield v. Janssen*, 28 *Eng. Rep.* 82, 100 (Ch. 1750).
- 164 See [U.C.C., § 2-302](#) cmt. 1 (stating “the principle is one of the prevention of oppression and unfair surprise.”).
- 165 See Arthur Allen Leff, [Unconscionability and the Code--The Emperor’s New Clause](#), 115 *U. Pa. L. Rev.* 485, 487 (1967).
- 166 See [Wilson v. World Omni Leasing](#), 540 *So. 2d* 713, 716 (Ala. 1989) (unconscionability requires terms that unreasonably favorable to one party); [Martin Rispens & Son v. Hall Farms, Inc.](#), 621 *N.E.2d* 1078, 1086-87 (Ind. 1993) (substantive unconscionability requires oppressively one-sided or harsh terms); [Nelson v. McGoldrick](#), 871 *P.2d* 177 (Wash. App. 1994), *rev’d* on other grounds. 896 *P.2d* 1258 (Wash. 1995) (substantive unconscionability refers to one-sided or overly harsh terms); See also Prince, *supra* note 157, at 473 (noting that “substantive unconscionability looks to the oppressiveness or one-sided nature of the transaction and simply restates the basic requirement that the substantive terms must be unreasonably favorable to one party or unduly burdensome to the other”).
- 167 See [Schlottach v. Schlottach](#), 873 *S.W.2d* 928, 932 (Mo. Ct. App. 1994) (defining unconscionability as “inequality so strong, gross and manifest that it must be impossible to state it to one with common sense without producing exclamation at the inequality of it” (quoting [Pierick v. Peirick](#), 6415 *W.2d*. 195, 197 (Mo.Ct. App. 1982))).

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- 168 See Prince, *supra* note 157, at 473. See also Farnsworth, *supra* note 110, § 4.28, at 328-31; Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & Econ.* 293, 305-315 (1975). Of course, to say that these types of clauses are often challenged is not to suggest that they are automatically considered unconscionable. They are, however, suspect.
- 169 Leff, *supra* note 165, at 487.
- 170 See, e.g., *Allan v. Snow Summit, Inc.*, 59 *Cal. Rptr. 2d* 813, 825 (Cal. Ct. App. 1996) (noting, in dictum, that procedural unconscionability includes surprise where the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms); *John Deere Leasing Co. v. Blubaugh*, 636 *F. Supp.* 1569 (D. Kan 1986) (holding that liquidated damages clause in lease was procedurally unconscionable where it was in minute print on back of lease in such light-gray type as to be illegible); *Bank of Indiana v. Holyfield*, 476 *F. Supp.* 104 (S.D. Miss. 1979) (finding procedural unconscionability where contract used fine print and complex language).
- 171 See Leff, *supra* note 165, at 499-500. See, e.g., *Piantes*, 875 *F. Supp. at* 929 (noting that procedural unconscionability arises when high-pressure sales tactics used); *Northwest Acceptance Corp. v. Almont Gravel, Inc.*, 412 *N.W.2d* 719, 723 (Mich Ct. App. 1987) (noting that plaintiff had extraordinary bargaining power over defendant that led to unfair agreement).
- 172 See Prince, *supra* note 157, at 476 (noting that procedural unconscionability applies when, due to other party's bargaining power, party must accept terms, "although the circumstances do not prove actual duress"). Cases of oppression come quite close to invalidating contract clauses solely on the basis of inequality of bargaining power; See *infra* notes 179-81 and accompanying text.
- 173 Cases that invalidate contract provisions on the basis of one element only, although uncommon, do exist. See, e.g., *Gillman v. Chase Manhattan Bank, N.A.*, 534 *N.E.2d* 824, 829 (N.Y. 1988) (ruling that an "outrageous" substantive provision alone may be enough to establish unconscionability); *Sosa v. Paulo*, 924 *P.2d* 357, 363 (Utah 1997) (noting that procedural unconscionability, if extreme, can nullify contract term which is not substantively unconscionable); *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 *P.2d* 1028, 1043 (Utah 1985) (noting that unfair surprise alone may be enough to support finding of unconscionability in rare cases). Some courts have ruled that excessive price, standing alone, can create a substantively unconscionable agreement. See, e.g., *Toker v. Perl*, 247 *A.2d* 701 (N.J. Super. Ct. Law Div. 1968), (holding that contract for sale of freezer which priced freezer at more than two and one-half times its market value was unconscionable), *aff'd*, 260 *A.2d* 244 (affirming on fraud issue only); *Jones v. Star Credit Corp.*, 298 *N.Y.S.2d* 264, (N.Y. Sup. Ct. 1969) (holding that selling freezer for \$900-actually \$1,439.69 including credit charges and sales tax-was unconscionable as a matter of law). Some courts, on the other hand, have insisted that inflated price alone cannot render a contract unconscionable. See, e.g., *In re Colin Bkptcy*, 136 *B.R.* 856 (Bankr. D. Or. 1991) (noting that price alone may not render contract unconscionable under Oregon law).
- 174 See Calamari & Perillo, *supra* note 12, § 9.40, at 373 (noting that elements of both substantive and procedural unconscionability are usually present when courts invalidate contracts under *U.C.C. § 2-302*); Prince, *supra* note 157, at 472 (noting that "[m]ost successful claims involve a combination of procedural and substantive unconscionability").
- 175 See, e.g., *WXON-TV, Inc. v. A.C. Nielsen Co.*, 740 *F. Supp.* 1261, 1264 (E.D. Mich. 1990) (noting that Michigan law requires both substantive and procedural unconscionability); *Truta v. Avis Rent A Car system, Inc.*, 238 *Cal. Rptr.* 806, (Cal. Ct. App. 1987) (holding that procedural aspects of unconscionability must be found to coexist with substantive aspect if cause of action is to survive); *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 580 *N.Y.S.2d* 952 (N.Y. App. Div. 1992) (noting that New York law requires both substantive and procedural unconscionability).
- 176 See, e.g., *Fleming Co.*, 913 *F. Supp. at* 837 (ruling that even when there is unequal bargaining power between the parties, that alone is not the decisive consideration in determining whether a contract is unconscionable); *American Dredging Co. v. Plaza Petroleum, Inc.* 799 *F. Supp.* 1335, 1339 (E.D.N.Y. 1992) (holding that mere exercise of bargaining advantage is not enough for unconscionability); *Streams Sports Club, Ltd. v. Richmond*, 457 *N.E.2d* 1226, 1232 (Ill. 1983) (same); *Infosino v. Infosino*, 611 *N.Y.S.2d* 598 (1994) (ruling that court will not set aside an agreement simply because it was improvident); *Witmer v. Exxon Corp.*, 434 *A.2d* 1222, 1228 (Pa. 1981) (holding that simple disparity in bargaining power will not make contract

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unconscionable).

- 177 See supra notes 12-14 and accompanying text.
- 178 See Kenneth R. Davis, [The Arbitration Claws: Unconscionability in the Securities Industry](#), 78 B.U.L. Rev. 255, 259 (1998) (noting that the “doctrine of unconscionability instructs that if a party with a gross bargaining advantage exerts his power to exact unfair terms, the other party may avoid the contract”).
- 179 See [Ronwin v. Smith Barney, Harris Upham & Co.](#), 807 F. Supp. 87 (D. Neb. 1992) (holding that gross inequality of bargaining power and unreasonably one-sided terms supported finding of unconscionability); [Avildsen v. Prystay](#), 574 N.Y.S.2d 535, 535-36 (N.Y. App. Div. 1991) (noting that oppressive term arising from gross inequality in bargaining power supported finding of unconscionability), appeal dismissed, 588 N.E.2d 91 (N.Y. 1992).
- 180 Inequality of bargaining power would not always be necessary for an unconscionability determination. For example, it might not be required for procedural unconscionability cases involving “hidden” contract terms.
- 181 Perhaps the first use of the term occurred in an article by Edwin W. Patterson discussing life insurance contracts. See [Edwin W. Patterson, The Delivery of a Life-Insurance Policy](#), 33 Harv. L. Rev. 198, 222 (1919). In the article, Patterson referred to such contracts as standard contracts that are offered on a take-it-or-leave-it basis. For a discussion of adhesion contracts see J.W. Looney & Anita K. Poole, [Adhesion Contracts, Bad Faith, and Economically Faulty Contracts](#), 4 Drake J. Agric. 177 (1999); Nicholas R. Weiskopf, [Standard Forms and Standard Terms: Revising Article 2 of the U.C.C.](#), 29 UCC L.J. 257 (1997); Todd D. Rakoff, [Contracts of Adhesion: An Essay in Reconstruction](#), 96 Harv. L. Rev. 1173 (1983); W. David Slawson, [Standard Form Contracts and Democratic Control of Lawmaking Power](#), 84 Harv. L. Rev. 529 (1971).
- 182 See, e.g., Slawson, supra note 181, at 529 (estimating that form contracts account for 99 percent of all contracts); Rakoff, supra note 181, at 1176 (stating that “[t]he use of standard form contracts grows from the organization and practices of the large, hierarchical firms that set the tone of modern commerce”).
- 183 Professor Todd Rakoff has identified seven characteristics in a typical or “model” contract of adhesion:
1. The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
 2. The form has been drafted by, or on behalf of, one party to the transaction.
 3. The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
 4. The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
 5. After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
 6. The adhering party enters into few transactions of the type represented by the form-few, at least in comparison with the drafting party.
 7. The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.
- Rakoff, supra note 181, at 1177.
- 184 See Davis, supra note 178, at 286 (noting that “[n]ot all adhesion contracts oppress the party in the inferior bargaining position, and thus the courts enforce such agreements unless unfair”). See also [Goodwin v. Ford Motor Credit Co.](#), 970 F. Supp. 1007 (D. Ala. 1997) (holding that contract of adhesion in and of itself is no sure evidence of unconscionability).
- 185 See Davis, supra note 178, at 285 (noting that adhesion contracts are “drafted unilaterally by the dominant party and then presented on a ‘take-it-or-leave-it’ basis to the weaker party who has no real opportunity to bargain over the terms”); Friedrich Kessler, [Contracts of Adhesion: Some Thoughts About Freedom of Contract](#), 43 Colum. L. Rev. 629, 632 (1943) (noting that

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parties in strong bargaining positions often impose standardized contracts on weaker parties); Rakoff, *supra* note 181, at 1264-65 (noting that adhesion contracts tend to result from unequal bargaining power).

- 186 See, e.g., *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 108 (D. Miss. 1979) (holding adhesion contract used against dairy farmers unconscionable because of oppressive terms); Allan, 59 Cal. Rptr 2d at 824 (holding that adhesion contract unenforceable when (1) the contract does not fall within the reasonable expectations of the weaker or adhering party and (2) even if it does fall within those expectations, when the contract is unduly oppressive); *Henrioulle v. Marin Ventures, Inc.*, 573 P.2d 465, 468 (Cal. 1978) (holding adhesion contract containing exculpatory clause imposed through superior bargaining power on tenant unconscionable).
- 187 See Prince, *supra* note 157, at 463 (noting that “[g]enerally, the courts in most states have shown restraint in examining contracts or clauses for unconscionability”); A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States*, 14 Loy. L.A. Int’l & Comp. L.J. 455, 498-99 (1992) (noting that, despite the wide latitude given to courts by section 2-302, “an undercurrent of caution runs through the decisions”).
- 188 According to White & Summers:
Most who assert 2-302 and most who have used it successfully in reported cases have been consumers. Most of these successful consumer litigants have been poor or otherwise disadvantaged. Since much literature suggests that the low-income consumer is often the victim of sharp practices, it is not surprising that the targets of the unconscionability doctrine are usually plaintiff-creditors and credit sellers.
White & Summers, *supra* note 95, § 4.3, at 135.
- 189 See *id.*
- 190 See *id.* (noting that few businesspersons and middle-class cash purchasers are victims of “gross advantage-taking that usually calls forth 2-302”).
- 191 We do not address the issue of good faith and fair dealing in precontractual negotiations here. As we shall discuss, the precise nature of one’s obligations during contract formation remains a matter of considerable debate; see *infra* notes 212-23 and accompanying text.
- 192 See Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 *Hastings L.J.* 585 n.1(1996) (stating that the “overwhelming majority of jurisdictions apply [good faith] as a matter of common law”), and cases cited therein. See also Palmieri, *supra* note 118, at 87 (stating that “courts in the vast majority of American jurisdictions agree that a general obligation of good faith and fair dealing is implied in every contract”), and cases cited therein. In fact, good faith and fair dealing apply throughout Europe as well. See Peter Linzer, *Non-["Un-" ?] American Law and the Core Curriculum*, 72 *Tul. L. Rev.* 2031, 2037 (1998)(noting that good faith and fair dealing suffuse European law).
- 193 See Diamond & Foss, *supra* note 192, at 586 (stating that the duty of good faith “imposes limits upon one contracting party’s ability to negatively impact the contract’s value to the other contracting party. It determines when a party may no longer pursue his own self-interest but must instead engage in cooperative behavior by deferring to the other party’s contractual interests.”).
- 194 See e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Morris v. Coleman Co.*, 738 P.2d 841 (Kan. 1987); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).
- 195 Good faith can be traced back to Roman law, and a number of civil law countries require good faith in contracts. See E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 *U. Chi. L. Rev.*

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666, 669-70 (1963); Palmieri, *supra* note 118, at 77-78.

196 U.C.C. § 1-203 (1996).

197 Restatement (Second) of Contracts § 205 (1979).

198 The U.C.C. places the obligation of good faith in section one of the Code, which applies to all transactions arising under it. See U.C.C. § 1-203 (1996) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”). The Restatement (Second) states that “every” contract imposes the obligation of good faith and fair dealing on the parties. See Restatement (Second) of Contracts § 205 (1979).

199 See U.C.C. § 1-102 (1996) (stating that all provisions under the U.C.C. “may be varied by agreement, except ... that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed”). On the other hand, good faith cannot generally be used to override or contradict the express terms of a contract. See Diamond & Foss, *supra* note 192, at 587, and cases cited therein.

200 See Robert S. Summers, “Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 at 195 n.2 (1968).

201 U.C.C. § 1-201 (1996). This is a subjective standard. That is, the reasonableness of a person’s belief is irrelevant to good faith. If a person has a “pure heart and an empty head,” he or she acts in good faith. See Calamari & Perillo, *supra* note 12, § 11.38, at 458. See, e.g., *Watseka First Nat’l Bank v. Ruda*, 552 N.E.2d 775 (Ill. 1990) (regardless of negligence or imprudence of party, if action performed honestly, it was in good faith); *Lawton v. Walker*, 343 S.E.2d 335 (Va. 1986); *Frantz v. First Nat’l Bank*, 584 P.2d 1125 (Alaska 1978).

202 U.C.C. § 2-103 (1996). This is an objective standard. Even though the party engaging in the challenged behavior believes his or her action to be reasonable, the law will not excuse it if it violates commercial norms of fair dealing. Merchants are held to a higher standard of good faith because they “have expertise with respect to the customs and standards of their trade.” See Palmieri, *supra* note 118, at 94. Merchants are often held to higher standards throughout the U.C.C. See, e.g., U.C.C. § 2-103 (1) (1996) (merchants must observe reasonable commercial standards of fair dealing in the trade).

203 Restatement (Second) of Contracts § 205 (1979).

204 The likely purpose behind the ambiguity is to provide flexibility in safeguarding victims’ rights. See Palmieri, *supra* note 118, at 80 (noting that “a majority of commentators ... recognize ... it is probably better that the definition of good faith and fair dealing remains amorphous so that the doctrine can be applied on a case-by-case basis”). Nonetheless, the ambiguity inherent in ascertaining breaches has prompted numerous attempts to provide standards for making good faith determinations. See Diamond & Foss, *supra* note 192, at 590 (arguing that most attempts at developing standards “fail to provide workable guidelines for resolving good faith cases, compelling ad hoc decision making”).

205 See generally Summers, *supra* note 200. The Restatement (Second) essentially has adopted Summers’ analysis of excluding bad faith acts in its definition of good faith. Restatement (Second) of Contracts § 205 cmt. a (1979).

206 See *id.* at 196.

207 *Id.* at 232-43.

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- 208 See *id.* at 243-48.
- 209 See Looney & Poole, *supra* note 181, at 193 (noting that the U.C.C. section on good faith “does not create an independent cause of action for breach; it is more of an interpretive tool”).
- 210 This famous term, “let the buyer beware” indicates that one enters bargains at one’s own risk, unprotected by others. According to Professor LeViness, the term appeared in print as early as 1534 when Fitzherbert wrote in a book about horse trading, “If he be tame and have ben rydden upon, then caveat emptor.” Charles T. LeViness, *Caveat Emptor Versus Caveat Venditor*, 7 *Md. L. Rev.* 177, 182 (1943) quoted in Palmieri, *supra* note 118, at 110, n.135.
- 211 Palmieri, in particular, argues that the courts have applied the doctrine of good faith in an ever-expanding fashion in response to the “increasing application of ethics and morality in the law and the decline of caveat emptor doctrine.” Palmieri, *supra* note 118, at 76.
- 212 See U.C.C. § 1-203 (1996).
- 213 See *Restatement (Second) of Contracts* § 205 cmt. c (1979).
- 214 See, e.g., *Local 900, Union of Paperworkers Int’l v. Boise Cascade*, 713 F. Supp. 26 (D. Me. 1989); *Tolbert v. First Nat’l Bank*, 823 P.2d 965 (Or. 1991); *Four Nines Gold, Inc. v. 71 Const., Inc.*, 809 P.2d 236 (Wyo. 1991).
- 215 See Summers, *supra* note 200, at 220-32 and cases cited therein.
- 216 Indeed, even Summers has indicated that the “case law is scant” on the question of whether contract negotiations must be conducted in good faith. *Id.* at 216.
- 217 Many Civil Law systems apply good faith both to precontractual negotiation and to contractual performance. See Palmieri, *supra* note 118, at 74.
- 218 According to Palmieri:
Much of my background is in the law system of Italy. After graduating from the University of Bologna, I practiced law in Milan for many years. Although I subsequently studied the common law of England, the notions of my original training in the law still permeate my mind, profoundly and indelibly. In Italian law [and Civil law generally], the precontractual duty of good faith is embodied in the law itself Although I was told by my American colleagues that caveat emptor still applied to arm’s length transactions, and that an American judge would tell a plaintiff, who in the negotiation of a contract had been circumvented, that he should have been more circumspect and astute, I could not believe that this was really true.
Id. at 73.
- 219 According to Palmieri, his review extended through “a wide range of transactions, including transactions pertaining to the sale of commercial real estate, residences, businesses, stock or bonds, mortgages, personal property, and insurance.” *Id.* at 160-61. All indicated a generalized obligation of good faith and fair dealing.
- 220 See *id.* at 90-91 (arguing that “[a]lthough the U.C.C. and Restatement (Second) of Contracts imply a duty of good faith and fair dealing only in contract performance, one cannot infer from this that there is no precontractual duty of good faith and fair dealing.

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The Restatement (Second) of Contracts and, to a lesser extent, the U.C.C., contemplated the potential application of the duty of good faith and fair dealing to contract negotiations and did not intend, by negative inference, to foreclose such application.”).

221 According to Palmieri:

Any attempt to characterize the duty of good faith as merely contractual and thus to deny the existence of the duty when there is no contract is unsustainable because the duty of good faith exists before any contract is ever entered into. It is a duty imposed by law, and is outside the contractual freedom of the parties. The duty of good faith belongs to the prevailing practices of the community of people and their notions as to what constitutes the general welfare. It is a duty permanently present whenever human beings deal with each other. A breach of this duty is contrary to public policy and contra bonos mores as these concepts are understood by the community.

Palmieri, *supra* note 118, at 105.

222 As Professor Duncan Kennedy notes, “[t]he most common justification for compulsory terms-in tort law as well as in contract-is that there was inequality of bargaining power between the parties.” Kennedy, *supra* note 113, at 614.

223 One with a bargaining advantage remains free to negotiate what Paul Rosenberger calls “unconscionably unfair” contracts, i.e., agreements that are ethically unfair, but not illegally so. See Paul Rosenberger, *Laissez-“Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 Ohio St. J. Disp. Resol. 611, 632 (1998). On fairness and policy grounds, he strongly advises negotiators not to push agreements into the unconscionably unfair zone. We agree. See *infra* notes 438-48 and accompanying text.

224 One of our favorite illustrations of this point is a story told by Professor Gavin Kennedy: “Probably the most famous ... ploy is that of tough guy/ soft guy Somebody asked me, for example, only the other week, if I thought it was a good ‘tactic.’ Naturally, I replied that ‘it all depends.’” Kennedy, *supra* note 3, at 115. See also Schoonmaker, *supra* note 45, at 180 (asking “Which is the best style?” Schoonmaker responds, “It depends upon the situation.”); Shell, *supra* note 4, at xii (arguing that “all-purpose strategies are an illusion. Experienced negotiators know that there are too many situational and personal variables for a single strategy to work in all cases.”).

225 We refer to “achievable agreements” to note that the goals of the parties sometimes are so fixed and far apart that no agreement, however powerful the negotiating technique, is possible. Our focus is on those situations in which an agreement is at least theoretically possible.

226 Why so few studies? According to Neil Rackham, one of the few researchers who has done effective negotiation empirical studies:

Two reasons account for this lack of published research [on what goes on in face-to-face negotiations]. First, real negotiators are understandably reluctant to let a researcher watch them at work The second reason for the poverty of research in this area is lack of methodology. Until recently there were few techniques available which allowed an observer to collect data on the behavior of negotiators without the use of cumbersome and unacceptable methods such as questionnaires.

See Rackham, *supra* note 76, at 341.

227 As noted *supra* note 226., Rackham began his studies to deal with what was then a seemingly intractable labor-management war in England.

228 Rackham chose three criteria as identifying successful negotiators: (1) the negotiator should be rated as effective by both sides, (2) the negotiator should have a track record of significant success over time, and (3) the negotiator should have a low incidence of implementation failures. See *id.* at 342.

229 Skilled negotiators typically considered twice as many options as “average” negotiators. See *id.* at 343.

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- 230 On this dimension, skilled negotiators did not perform in dramatically better fashion than average negotiators. Both groups gave “little thought ... to the long term implications of what they negotiate.” Rackham, *supra* note 77, at 343.
- 231 “Irritators” come in two forms: insults and self-praise. Even average negotiators tend to know not to insult, i.e., to state or imply that the other party is unfair or unreasonable. However, average negotiators too often say annoyingly favorable things about themselves (“This is an exceptionally generous offer I’m making to you.” or “I’ve been in this business for 15 years. I certainly know how to structure a deal.”). Statements like these tend to antagonize the other side. See *id.* at 346-47.
- 232 Immediate counterproposals send the message that one either has not taken an offer seriously or wishes to block the proposal. See *id.*
- 233 Skilled negotiators tend to ask roughly twice as many questions as average negotiators. See *id.* at 350-51. We believe that the reluctance to ask questions constitutes one of the major areas that our negotiation students need to improve. Students fear that aggressive questioning will be intrusive and will create a hostile atmosphere (which it can). In response, we suggest that they practice asking questions in a low-key, pleasant-but persistent-fashion.
- 234 Why is sharing internal information so effective? Rackham suggests that “the negotiator appears to reveal what is going on in his/her mind. This revelation may or may not be genuine, but it gives the other party a feeling of security because such things as motives appear to be explicit and aboveboard.” Rackham, *supra* note 77, at 351.
- 235 In addition to studying effective negotiation techniques in these experiments, Karass also examined the effects of power imbalances in negotiations. See Kennedy, *supra* note 3, at 203-06 (discussing Karass’ research). For a discussion of specific advice on power imbalances, see *infra* notes 325-437 and accompanying text.
- 236 Karass’ conclusions are cited in Kennedy, *supra* note 3, at 204.
- 237 There is no doubt that aspirations dramatically affect outcomes. As Ury states:
Many of us tend to adopt rather modest goals, wishing to avoid “failing.” Unfortunately, low aspirations tend to be self-fulfilling. What you don’t ask for, the other side is unlikely to give you. Not surprisingly, those who begin with realistically high aspirations often end up with better agreements. How high is realistic? “Realistic” means within the bounds set by fairness and by the other side’s best alternative. Aim high.
Ury, *supra* note 5, at 25. We stress the insights from research on how aspiration levels affect negotiations. That is, other things being equal, those with higher aspiration levels will do better than those with lower aspirations. See, e.g., Pienaar & Spoelstra, *supra* note 4, at 28 (citing research that those “who started negotiating with the highest aspiration base got more, independent of power, skill, and experience”). One consequence of high aspirations that we have observed, however, is that, despite doing well in a negotiation, those with high aspiration levels often feel unsuccessful because they have not achieved their lofty goals. See Thompson, *supra* note 4, at 25 (citing research that “[n]egotiators with low minimum goals feel more successful than do those with higher minimum goals, even when the final settlement is identical”). Of course, if both sides enter a negotiation with extremely high aspirations, settlements may be more difficult to achieve. The key is whether the high aspirations are reasonable, the negotiators are flexible, and the interests are compatible.
- 238 The study included roughly 350-400 lawyers in Denver and a comparable number in Phoenix. See Gerald Williams, *Style and Effectiveness in Negotiation: Strategies for Mutual Gain* 152 (Lavinia Hall ed., 1993). The author chose attorneys because they “regularly negotiate in their daily work.”
- 239 Williams acknowledged that lawyers do not share a common understanding of what it means to be “effective.” To some, it means those who get the most money for their clients; to others, it means those who produce settlements where both sides are satisfied; and to still others, it means those who come closest to destroying the other side. See *id.* at 155.

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- 240 See id. at 159.
- 241 See id. A third group, the smallest, had no discernible negotiation pattern.
- 242 Williams, supra note 238, at 158.
- 243 See id. at 159.
- 244 This trait seems to define the line between the effective and ineffective aggressors. Ineffective aggressive negotiators, the so-called “insufferably obnoxious” group (about eight percent of attorneys) are simply “attacking, argumentative, quarrelsome, demanding, and aggressive.” Id. at 163.
- 245 See id. at 165 (concluding that “I have come to believe that a fully developed negotiator should be capable of appropriately adopting either [[cooperative or aggressive approach] in the proper circumstances.”)
- 246 See Williams, supra note 238, at 165.
- 247 See Thompson, supra note 4, at 4 (stating that “effective negotiators are self-aware”); Nierenberg, supra note 4, at 47 (arguing that “[effective negotiation preparation] requires, first of all, intimate knowledge of yourself”); Lewicki et al., supra note 5, at 21 (stating that “your personal qualities and attitudes will be called into play during negotiations, so it is important to assess these traits ahead of time”); Pienaar & Spoelstra, supra note 4, at 161 (noting that “Sun Tzu ... stated the following many years before the birth of Christ: ‘Know your enemy, know yourself, and you can fight a hundred battles without disaster ... ’. In negotiation these prophetic statements should be taken to heart. Negotiators should evaluate their own strengths and weaknesses ...”).
- 248 According to Goleman:
Self-awareness is not an attention that gets carried away by emotions, overreacting and amplifying what is perceived. Rather, it is a neutral mode that maintains self-reflectiveness even amidst turbulent emotions This awareness of emotions is the fundamental emotional competence on which others, such as emotional self-control, build.
Goleman, supra note 77, at 47.
- 249 See id. at 45 (comparing IQ and emotional intelligence and concluding that “of the two, emotional intelligence adds far more of the qualities that make us more fully human”).
- 250 We feel so strongly about the need for this kind of introspection that we circulate self-assessment forms at the start of each course and program that we teach. For examples of self-assessment questionnaires, see Schoonmaker, supra note 45, at 288-93 (offering a self assessment specifically of negotiation skills and weaknesses); Donaldson & Donaldson, supra note 5, at 15-24 (offering a broad assessment of values, goals, and personality traits that negotiators should know about themselves).
- 251 As Gavin Kennedy puts it, “[Negotiators] sometimes forget that the message they send is not necessarily the message that their partners receive ...”; Kennedy, supra note 3, at 133. For example, what we call candid and blunt, others might call obnoxious and insulting. What we call strongly principled, others might call stubborn and inflexible. What we call being hard on the problem, others might call being hard on the person.
In particular, in our experience, many people who have effective collaborative negotiation styles often view themselves as “weak” negotiators because they dislike confrontation. Conversely, many ineffective abrasive negotiators view themselves as “good” negotiators because they either get what they want or refuse to agree. The fact that they often end up without a favorable agreement they otherwise might have had rarely occurs to them.

- 252 This is not to say that negotiators should ignore tricks and techniques. We explore a number of them in this article. For a broad discussion of negotiating tactics, see, e.g., Robert Adler et al., *Thrust and Parry: The Art of Tough Negotiating*, 50 *Training & Dev.* 43 (1996) (discussion of various negotiation “tricks” and how to counter them); James A. Wall, Jr., *Negotiation: Theory and Practice* 48-67 (1985) (describing numerous negotiation tactics); Craver, *supra* note 43, at 167-205 (discussing “negotiation games/techniques”); Shell, *supra* note 4, at 228-33 (listing a “rogue’s gallery of tactics”); Lewicki et al., *supra* note 5, at 96-97, 228-31 (discussing “unethical tactics” and how to respond to them); Gary Dichtenberg, *Exposing Negotiation Tactics*, 39 *Successful Meetings* 98 (1990) (describing numerous negotiation tactics and ways to counter them); Ury, *supra* note 5, at 39-51 (offering advice for dealing with “obstructive, offensive or deceptive” tactics); Lax & Sebenius, *supra* note 4, generally (listing various tactics throughout the book); Kirk Kirkpatrick, *Fearless Negotiation* 53-101 (1990) (discussing a variety of negotiating tactics and how to respond to them).
- 253 See, e.g., Anderson, *supra* note 59, at 76 (“Although it is the least glamorous aspect of the negotiating process, [preparation] is the most important.”); Schoonmaker, *supra* note 45, at 27 (“Good preparation can mean the difference between success and failure”); Ury, *supra* note 5, at 16 (“Most negotiations are won or lost even before the talking begins, depending on the quality of the preparation”); Pienaar & Spoelstra, *supra* note 4, at 26 (“Once the potential for negotiation has been established, a negotiator should be able to anticipate the major events that will occur during negotiation and prepare in advance for them.”); Thompson, *supra* note 4, at 25 (“The most important aspect of negotiation occurs before negotiators ever sit down at the bargaining table. Preparation is the key to effective negotiation.”); Craver, *supra* note 43, at 47 (“People who carefully prepare for a negotiation generally achieve more beneficial results than those who do not.”); Kennedy, *supra* note 3, at 47 (“[P]reparation is the key to most of the important negotiations you undertake. It underlies everything you do as a negotiator. It is often the difference between a good deal and an average deal, and, as often, no deal at all.”); Lewicki et al., *supra* note 5, at 11 (“Planning and analysis are work. It takes time. But if you want to negotiate successfully, analysis and planning are the keys.”); David V. Lewis, *Power Negotiating Tactics and Techniques* 31 (1981) (“Good planning, in effective negotiation as in good management, is the key to success.”); Donaldson & Donaldson, *supra* note 5, at 26 (“Some people think that power comes from size, gruffness, or clout; but the easiest and most effective thing you can do to increase your power is to prepare.”); Nierenberg, *supra* note 4, at 47 (“There are any number of life situations for which preparation is necessary. Negotiation is one of these. For successful results it requires the most intensive type of long- and short-range preparation and training.”).
- 254 So important is careful preparation to Roger Fisher and Danny Ertel that they have written a 175-page book devoted solely to negotiation planning. See Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (1995). See also Kennedy, *supra* note 3, at 48-63, 79 (providing checklists for planning different stages of a negotiation); Shell, *supra* note 4, at 247-48 (offering an 8-point “Information-Based Bargaining Plan”); Craver, *supra* note 43, at 63-64 (providing an 11-point “Negotiation Preparation Form”); Pienaar & Spoelstra, *supra* note 4, at 26-44 (offering 8-step preparation plan); Schoonmaker, *supra* note 45, Appendix 1, at 264-74 (setting forth a 10-page “Preparation Questionnaire”); Lewicki et al., *supra* note 5, at 264 (providing an 8-point “Negotiation Planning Guide”); Donaldson & Donaldson, *supra* note 5, at 43-44 (offering an “Information Checklist”); Nierenberg, *supra* note 4, at 58-80 (offering a set of preparation points and noting that he markets software that helps prepare for negotiations). We, of course, have our own checklist. An abbreviated form of it can be found in Adler et al., *supra* note 252, at 46.
- 255 Indeed, as Pruitt and Lewis note, “people often have difficulty gaining insight into their own priorities [R]esearch suggests that this is true even of professional negotiators.”. See Dean G. Pruitt & Steven A. Lewis, *The Psychology of Integrative Bargaining*, in *Negotiations: Social-Psychological Perspectives* 161, 182 (Daniel A. Druckman ed., 1977). We find it particularly helpful at the outset to list all goals whether they seem compatible or not. For example, in planning for a review of one’s salary with one’s boss, we suggest listing all goals that might be relevant, such as working less or earning more money, even if the goals seem initially inconsistent. Once the goals have been listed, one can then establish priorities among them.
- 256 Fisher & Ury, *supra* note 4, at 42 (describing the difference between “positions” and “interests” as follows: “[D]esires and concerns are interests. Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.”). See also Ury, *supra* note 5, at 17 (“The distinction is critical: Your position is the concrete things you say you want—the dollars and cents, the terms and conditions. Your interests are the intangible motivations that lead you to take that position—your needs, desires, concerns, fears, and aspirations.”).

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- 257 According to the Fisher & Ury:
As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties. Agreement becomes less likely. Any agreement reached may reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties. The result is frequently an agreement less satisfactory to each side than it could have been.
Fisher & Ury, *supra* note 4, at 5.
- 258 See *id.* at 43 (arguing that “[w]hen you do look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well”).
- 259 See Ury, *supra* note 5, at 19. He argues that “[t]he single most important skill in negotiation is the ability to put yourself in the other side’s shoes. If you are trying to change their thinking, you need to begin by understanding what their thinking is.” *Id.* He continues: “How can you learn about the other side’s interests? Try the simple exercise of imagining from their point of view what they seem to care most about.” *Id.*
- 260 Management consultant John Rapp calls this “perspective taking,” i.e., looking at the world through an opponent’s eyes. He describes a conversation that illustrates its use:
I once asked sports “super-agent” Leigh Steinberg, “What skill makes a competent negotiator into a great one?” “That’s simple,” he said, “to find out how the world looks to the person across the table from me.” Steinberg employs one person whose only job is to write “opposition briefs,” detailing the opponents’ best positions, and then suggest “counters.”
John Rapp, *Perspective Taking*, 14 *Executive Excellence* 18 (1997).
- 261 See Craver, *supra* note 43, at 63 (advising, as part of the preparation process, that negotiators choose a “target point,” the “best result you hope to achieve” and urging negotiators to “[b]e certain that your target point is sufficiently high.”).
- 262 See Roger Dawson, *Secrets of Power Negotiating*, 42 *Success* 57, 58 (1995) (defining “maximum plausible position,” or “MPP,” as “the most you can ask for and still appear credible”).
- 263 See Pienaar & Spoelstra, *supra* note 4, at 26 (defining “aspiration base” as “the maximum [a negotiator] could possibly attain”); Ury, *supra* note 5, at 25 (noting that “low aspirations tend to be self-fulfilling. What you don’t ask for, the other side is unlikely to give you. Not surprisingly, those who begin with realistically high aspirations often end up with better agreements.”).
- 264 See *supra* note 237 and accompanying text. Of course, high aspirations can be carried to unreasonable lengths or can be too rigidly sought. As Pruitt and Lewis note:
High ... aspirations have received some bad press in the empirical literature on bargaining because they can slow down the bargaining process and increase the risk of no agreement This viewpoint results from the fact that most past experiments have employed unidimensional tasks that lack integrative potential [i.e., the ability to benefit both sides]. Hence, realism must temper the necessary idealism that goes into goal setting. It is necessary to be willing to alter goals if and when they prove unworkable.
Pruitt & Lewis, *supra* note 255, at 182.
- 265 See Ury, *supra* note 5, at 25. Ury describes this as the “what would you be content with” proposal. *Id.*
- 266 Management experts call this the “Fallacy of Sunk Costs,” i.e., the false assumption that one can justify future investments on the basis of previous large expenditures. Future investments, however, must be justified on the basis of future returns, not past expenditures. See Daphne Main & Carolyn L. Lousteau, *Don’t Get Trapped*, 81 *Strategic Fin.* 56 (1999) (pointing out how sunk costs can “trap” financial managers in projects); Hal R. Arkes & Peter Ayton, *The Sunk Cost and Concorde Effects: Are Humans Less Rational Than Lower Animals?* 125 *Psychol. Bull.* 591 (1999) (describing the “sunk cost” effect as maladaptive economic behavior that is manifested in a tendency to continue an endeavor once a substantial investment has been made in it).

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- 267 See Fisher & Ury, *supra* note 4, at 104 (explaining that determining a BATNA is important because “[t]he reason you negotiate is to produce something better than the results you obtain without negotiating.”). See also Ury, *supra* note 5, at 21-22 (stating that “[y]our BATNA is your walkaway alternative. It’s your best course of action for satisfying your interests without the other’s agreement.”); Thompson, *supra* note 4, at 24 (adopting the BATNA terminology).
- 268 See Schoonmaker, *supra* note 45, at 30-31 (stating that “[y]our MSP is the worst deal you will accept. Your goal should usually be the best deal you can get In other words, your MSP is your limit, while [your opponent’s] MSP is your goal.”).
- 269 See Craver, *supra* note 43, at 63 (defining “resistance point” as “minimum terms you would accept given your alternatives to a negotiated settlement”).
- 270 Ury argues that knowing the other side’s BATNA is critical. Knowing the other side’s BATNA can be just as important as knowing your own. It gives you an idea of the challenge you face: developing an agreement that is superior to their best alternative. It helps you avoid the dual mistakes of underestimating how good it is and overestimating how good it is. Your BATNA may be weak, but the other side’s BATNA may be weak too. Ury, *supra* note 5, at 24.
- 271 Fred Jandt offers what he calls a “mini-max” approach to planning with BATNAs. He urges negotiators to calculate four separate figures: (1) the minimum I can accept, (2) the maximum that I can ask for without getting laughed out of the room, (3) that maximum that I can give away, and (4) the least I can offer without getting laughed out of the room. See Fred Edmund Jandt, *Win-Win Negotiating: Turning Conflict Into Agreement* 199-228 (1985).
- 272 See *supra* notes 64-67 and accompanying text (discussing how power depends as much on one’s options as on the other side’s strength).
- 273 As Michael and Mimi Donaldson advise:
Don’t remain silent until the other party crosses the limit and knocks the negotiation out of the sky. You need to begin your complaints before that critical moment. Resist any proposal that too closely approaches the limits you set You can bet that the other party will be hurt and angry when you walk out if they haven’t had a clear warning from you in advance. Your counterpart needs to hear that the negotiation is approaching a resistance point before the discussion concludes.
Donaldson & Donaldson, *supra* note 5, at 73.
- 274 We use this term because the situation is so close to the classic “prisoner’s dilemma.” Others use the term “negotiator’s dilemma” to describe somewhat different scenarios. See, e.g., Pienaar & Spoelstra, *supra* note 4, at 89 (describing the dilemma as arising when negotiators fail to reach “agreement on a positive and constructive common ground”).
- 275 See Robert Axelrod, *The Evolution of Cooperation* 15-16 (1984) (noting that the “prisoners dilemma is simply an abstract formulation of some very common ... situations in which what is best for each person individually leads to mutual [lack of cooperation,] whereas everyone would have been better off with mutual cooperation.”). See also Pruitt, *supra* note 4, at 101-09 (extensive discussion of the “prisoner’s dilemma”).
- 276 This is a variation on the “Tit-for-Tat” strategy that proves most effective in the Prisoner’s Dilemma. That is, a party cooperates so long as the other party also cooperates. See Lax & Sebenius, *supra* note 4, at 158. A similar reciprocity strategy is known as GRIT, or Gradual Reduction in Tension. Under this approach, each party makes a concession and calls upon the other party to respond with a similar concession. See Thompson, *supra* note 4, at 33.
- 277 Reciprocity arises when we give someone something for what he or she has given us. See Schoonmaker, *supra* note 45, at 14 (arguing that “[g] iving away either information or substantive concessions almost inevitably creates some risks, and you should

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usually limit your vulnerability. Give them a little information or a small concession, but insist they reciprocate.”).

- 278 Lewicki et al. advise negotiators to research the following information about their opponents: (1) their objectives, (2) their interests and needs, (3) their alternatives, (4) their resources, (5) their reputation, negotiation style and behavior, (6) their authority to make an agreement, and (7) their likely strategy and tactics. See Lewicki et al., *supra* note 5, at 28.
- 279 The growth of the Internet provides both opportunity and hazard for negotiators. On the one hand, it potentially enables one to gain access to immense amounts of data about one’s opponent. On the other hand, it does the same for one’s opponent. See generally John J. McGonagle & Carolyn M. Vella, *The Internet Age of Competitive Intelligence* (1999) (describing how to gather intelligence about competitors and to deflect their intelligence-gathering attempts).
- 280 See Cohen, *supra* note 69, at 103 (stating that one should seek information “from anyone who works with or for the person you will meet with during the event or anyone who has dealt with them in the past. This includes secretaries, clerks, engineers, janitors, spouses, technicians, or past customers. They will willingly respond to you if you use a nonthreatening approach.”).
- 281 See Schoonmaker, *supra* note 45, at 115 (advising negotiators who seek information that “[t]he simplest way to get information is to ask for it. Do not be afraid to ask questions such as: ‘Who else is bidding?’ or ‘How soon do you need it?’ or ‘How much do you want to spend?’ Most people do not ask enough questions. They forget to ask some and are reluctant to ask others.”).
- 282 See Donaldson & Donaldson, *supra* note 5, at 142 (noting that “[u]nlike simple yes-or-no questions, open-ended questions enable the respondent to talk-and enable you to get much more information.”) (emphasis omitted).
- 283 See Craver, *supra* note 43, at 80 (advising that “[d]uring the preliminary stages of the information phase, many parties make the mistake of asking narrow, highly-focused questions that can be answered with brief responses. As a result, they tend to merely confirm what they already suspect. It is far more effective to ask broad, open-ended questions.”).
- 284 This question might be used to buttress a claim of fraudulent non-disclosure if one’s opponent has intentionally withheld extremely valuable information. See *supra* note 121 and accompanying text.
- 285 See Schoonmaker, *supra* note 45, at 116 (advising negotiators to overcome their fear of offending: “[f]ear of offending the other party is another inhibition that you must learn to ignore. You are not trying to start a love affair; you are trying to negotiate a good deal, and you need information to get it. Ask those questions, even if the other side resists answering.”).
- 286 See Cohen, *supra* note 69, at 103 (advising that the best way to seek information is by being direct and low-key: “some of us assume that the more intimidating or flawless we appear to others, the more they will tell us. Actually, the opposite is true. The more confused and defenseless you seem, the more readily they will help you with information and advice.”).
- 287 Craver laments that nonverbal communication, “[o]ne of the most important sources of information available to negotiators is frequently overlooked.” The reason, he suggests, is that many bargainers “naively believe that there is no need to look for these messages, because no competent negotiator would be so careless as to divulge important information in such an inadvertent manner.” But, such naivete is wrong. Anyone who harbors this opinion [that nonverbal signs can be revealing] should consider theatrical performances by well known actors who can rarely eliminate all involuntary gestures and mannerisms that are really their own instead of those attributable to the character being portrayed. If these professionals are unable to avoid unintended nonverbal disclosures, surely untrained negotiators will experience less success in this regard. Craver, *supra* note 43, at 30. See also Lewis, *supra* note 253, at 147-52 (noting the importance of body language and advising negotiators to assess it in the “overall context” of the other side’s personality).

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- 288 See Craver, *supra* note 44, at 81 (advising negotiators always to look out for “nonverbal cues”). See also Donaldson & Donaldson, *supra* note 5, at 169-80 (discussing the importance of “listening to body language” and arguing that “[r]eading the body language of another person is not a trick to gain advantage. It is a tool to improve communication.”).
- 289 As noted at *supra* note 234 and accompanying text, effective negotiators typically ask many questions when bargaining. One should always be prepared for this.
- 290 We note this from long experience. Time and time again, our students-as honest and decent a group of individuals as we have met-resort to misrepresentation when caught flat-footed in mock negotiations. This occurs despite the certainty that their lies will be exposed once the two sides exchange secret instructions. Almost without exception, the defense offered is “I didn’t know what else to say once they asked me that question.”
- 291 As Professor Shell notes, “there is no commandment in negotiation that says ‘Thou shalt answer every question that is asked.’ And as an aspiring idealist, I have found it useful to follow this rule: Whenever you are tempted to lie about something, stop, think for a moment, and then find something-anything-to tell the truth about.” Shell *supra* note 4, at 228. We endorse this approach, but would add that if one is well prepared, one need not resort to such measures.
- 292 Because timing plays such a large role in negotiations, one may be willing to provide information, but not immediately. For example, a question that asks why one has set a deadline for agreement might be answered, “Once I’m convinced that you really want to make an offer to buy the house, I’ll be glad to tell you why I insist that the deal be struck by the end of next month.”
- 293 Sometimes the other side asks a question that is too intrusive, but he or she would be satisfied with a partial answer. In such a case, a partial answer works well. For example, “I’ll be glad to tell you who helped me prepare the presentation, but I don’t think it’s appropriate to reveal how much I paid for their work.”
- 294 For example, “I’m sure that we can supply all the widgets you want. I’d appreciate if you’d wait until we find out the designs you want before we discuss the price.”
- 295 For example, “That’s a fair question, but rather than lie, let me tell you why I won’t answer it.”
- 296 In some cases, one might be willing to answer a question, but only if one’s opponent reciprocates. In such a case, one might agree to provide information in return for receiving equally useful information. For example, “I’ll be glad to tell you how much I’ll pay if you tell me whether you can ship an order within six weeks.”
- 297 See Pienaar & Spoelstra, *supra* note 4, at 96 (noting that “[i]n some cases, silence could be the most suitable response to difficult questions”). Silence can be a very effective negotiating technique generally.
- 298 See Craver, *supra* note 43, at 95-98. For more suggested responses, see Nierenberg, *supra* note 4, at 138-42 (offering additional responses to help avoid probing questions); Pienaar & Spoelstra, *supra* note 4, at 96-97 (offering what they term “constructive” and “negative” responses to questions).
- 299 This is one of our favored responses to overly detailed, convoluted questions. For example, assume a politician in the midst of a campaign is asked, “Isn’t it true that you have conducted a negative campaign against your opponent by conducting opposition research, by interviewing former campaign workers, by calling up old girlfriends, and by preparing a bunch of nasty ads attacking him?” One engaged in all of those activities, save for researching opposing campaign workers, might respond by saying, “I’m not going to dignify that question with a response other than to say that suggesting I do things like interview my opponent’s former campaign workers is flat-out wrong.”

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- 300 This suggestion makes us somewhat nervous. We see no need to “misconstrue” a question, which strikes us as mildly deceptive. We prefer simply to rephrase the question.
- 301 When asked why he always answered student questions with a question, one of our professors in law school responded, “Why not?”
- 302 Responses along these lines might be: “That feels unfair. I won’t answer that.”; “You have no right to ask me that question.”; or “Look, you wouldn’t answer that question if I asked it of you. I’m not going to answer it when you ask me.”
- 303 See, e.g., Shell, *supra* 4, at 157 (noting that, while he disagrees, many experts “say you should never open”); Dawson, *supra* note 262, at 60 (advising that negotiators should “[g]et the other side to state a position first”); Craver, *supra* note 43, at 57 (noting that “most negotiators prefer to have [their adversaries] articulate their opening positions first”); Schoonmaker, *supra* note 45, at 74 (advising negotiators to “[t]ry to get [the other side] to make the first offer”).
- 304 Shell cites the case of novelist Raymond Chandler negotiating with a Hollywood director and producer, and demanding \$150 per week with a warning that he might require two to three weeks to produce a script. The Hollywood folks reacted with amusement knowing that they were prepared to pay five times as much and that most movie scripts took months, not weeks, to write. See Shell, *supra* note 4, at 158.
- 305 During the investigation of the Whitewater matter, President Clinton invited attorney Lloyd Cutler to the White House to discuss whether Cutler would agree to join the White House staff as an advisor. Extremely reluctant at the age of 76 years, Cutler volunteered that he would do so but only for a period of six months, an offer he was sure the President would not accept. To his astonishment and dismay, the President instantly agreed. See Bob Woodward, *Shadow: Five Presidents and the Legacy of Watergate* 248-49 (1999). Professor Thompson refers to situations in which one’s opening offer is immediately accepted as the “winner’s curse” because one realizes that he or she could have done better with a more aggressive offer. See Thompson, *supra* note 4, at 31.
- 306 Brian Epstein, manager of the Beatles, committed this error. When negotiating for the group’s financial share of their first movie, *A Hard Day’s Night*, he led with what he considered an aggressive demand of 7.5 percent of the movie’s profits. The producers, who had been prepared to pay up to 25 percent, readily agreed. See Shell, *supra*, note 4, at 158.
- 307 One who does this may go so far outside the other side’s range of acceptable offers that the opponent simply terminates the negotiation, assuming that agreement is impossible.
- 308 One of the most famous stories about how to get the other party to make a first offer revolves around J.P. Morgan’s desire to buy from John D. Rockefeller a large tract of land containing ore. After strong urging by Morgan, Rockefeller sent his son, John D. Rockefeller, Jr., to Morgan’s office. Morgan opened by growling at the young man, “Well, what’s your price?” Rockefeller softly replied, “Mr. Morgan I think there must be some mistake. I did not come here to sell. I understood that you wished to buy.” See Nierenberg, *supra* note 4, at 123.
- 309 See Peter Robinson, [Contending With Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy](#), 50 *Baylor L. Rev.* 963, 980 n.100 (1998) (stating that “[t]here is much folklore about who should make the opening offer. Some advisors suggest that it is always better to have the other side put the first number on the table. The complexity of the negotiation process defies such simplistic strategies. There are times when a negotiator seizes a strategic advantage by making the first offer.”); David B. Falk, *The Art of Contract Negotiation*, 3 *Marq. Sports L.J.* 1, 22-23 (1992) (stating that first offers set the market); Shell, *supra* note 4, at 159 (noting that the negotiator who makes the first offer has the chance “to set the zone of realistic expectations for the deal”).

- 310 For example, a person offering to sell a one-of-a-kind dress formerly owned by a celebrity might do well to lead with a very high figure, knowing that its value to a fan of the celebrity is likely to be emotionally rather than financially based.
- 311 See, e.g., Schoonmaker, *supra* note 45, at 46 (stating that research by him and others indicates that, “other things being equal, the first offer has more influence on the final deal than any other factor. People who make generous first offers get worse deals than people who make ungenerous ones.”); Ury, *supra* note 5, at 25 (noting that those with high aspirations do better in negotiations and suggesting, “Aim high.”);
- 312 By this, we mean that if the other side was willing to pay \$10,000 and our opening price is \$9,000, we will have ceded to them \$1,000 of the bargaining surplus, i.e., of the amount that fell within both parties’ acceptable range, without ever trying for it ourselves.
- 313 See Lax & Sebenius, *supra* note 4, at 134-35 (citing research indicating that when “people assess an uncertain quantity, they tend to jump to a point estimate of it and then adjust a bit around it to account for the uncertainty. By influencing a counterpart’s point estimate of the quantity, a negotiator can locate where the small range of uncertainty will lie. One can thus “anchor” another’s beliefs about the quantity in a way favorable to one’s bargaining position.”); Shell, *supra* note 4, at 159-60 (indicating that the “anchor and adjustment effect” refers to “human tendency to be affected by ‘first impression’ numbers thrown into our field of vision. We tend to make adjustments from these often arbitrary reference points.”). The seminal article on this and other decisionmaking biases is by Tversky and Kahneman. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124, 1128-30 (1974) (describing the “anchoring effect”).
- 314 As Shell points out, for example, if “you are a new college graduate applying for an entry-level position in cities such as San Francisco or Boston, which have a lot of colleges and universities, don’t ask for the moon when an employer inquires about your salary expectations.” Shell, *supra* note 4, at 163. See also Lax & Sebenius, *supra* note 4, at 135, n.18 (citing research indicating that the “anchoring” effect operates most strongly when negotiators have “little information about the bargaining range” while “bargainers well-informed about the bargaining range used the counterpart’s offer to assess the reasonableness of the counterpart’s aspirations”).
- 315 See Schoonmaker, *supra* note 45, at 46-47 (arguing for what he calls the “Iron Law of Concessions” [:] Don’t give anything away. In negotiations gifts are rarely appreciated, nor are most of them reciprocated. They often make people think, ‘If they can give it away so easily, it must not be worth much. We should have asked for more.’); Pruitt, *supra* note 4, at 20 (citing various studies demonstrating “that a bargainer who makes larger initial demands and smaller concessions will achieve a larger outcome”); Donaldson & Donaldson, *supra* note 5, at 93 (“Too often, a quick concession robs the other party of the good feelings that they rightfully deserve after making a good bargain. It leaves the other party feeling that they priced the article too low and that they could have gotten more if they’d been smarter. Although that may be true, what advantage is it to you that they feel that way?”); Shell, *supra* note 4, at 165 (stating that “[r]esearch confirms that people receiving concessions often feel better about the bargaining process than people who get a single firm, ‘fair,’ price. In fact, they feel better even when they end up paying more than they otherwise might.”); Thompson, *supra* note 4, at 33 (citing research indicating that negotiators who began bargaining with a “tough stance,” who made few concessions at the beginning of the deal, proved to be more effective than negotiators who began bargaining with the opposite approach).
- 316 See Schoonmaker, *supra* note 45, at 88-89 (stating that without offering a justification for making a concession, the other side “may believe that you just cut away meaningless padding or that you are weak and eager. Either belief reduces their motivation to reciprocate. A plausible justification suggests that your concession is meaningful.”).
- 317 To return to the example at the beginning of the article, see *supra* note 6 and accompanying text, if one faces a loaded gun, there are certain hard realities that the weapon places upon the parties’ bargaining options. One’s verbal wizardry and dazzling negotiating technique may have limited utility at such a time.

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- 318 See supra notes 247-53 and accompanying text.
- 319 See Shell, supra note 4, at xiii (arguing that “there is only one truth about a successful bargaining style: To be good, you must learn to be yourself at the bargaining table. Tricks and stratagems that don’t feel comfortable won’t work.”).
- 320 See Schoonmaker, supra note 45, at 48 (arguing, that although negotiators should not try for “huge” changes in their bargaining approach, “you should certainly analyze your natural image, decide whether it fits the situation and, if necessary, change it”).
- 321 This is where negotiation courses and seminars prove so valuable. In these settings, the parties can engage in negotiations in which “reality” is held constant except for each negotiator’s performance. By comparing how one seeks information, resists information requests, persuades the other side, applies and resists pressure, and so on, with other negotiators dealing with the same problem, one can gain a measure of understanding of how effective one is as a negotiator.
- 322 This is the “negotiator’s bias” that we have mentioned previously; see supra notes 42-46 and accompanying text.
- 323 Schoonmaker insists that reading and understanding the other side constitutes a sine qua non of good negotiating: Hardly anyone spends enough time on [reading and understanding the other side.] We naturally concentrate on our own situation and concerns, even though the really important information is in the other side’s head. Shifting your focus to the other side’s situation and perceptions is the central theme of [my] book, and it comes up for virtually every negotiating step. Schoonmaker, supra note 45, at 50.
- 324 The critical point is that one must be thorough in calculating each party’s relative power. As Gavin Kennedy notes, “[y]our perceptions of my power are subject to all kinds of influences, some of which are mere whims and fancies and others with some degree of substance. Observations suggests that people make assessments of relative power on the flimsiest of data.” Kennedy, supra note 3, at 104.
- 325 See Merle Miller, *Ike: The Soldier As They Knew Him* 681 (1988) (describing Choltitz’ decision to disobey Hitler).
- 326 See Rubin & Brown, supra note 29, at 262-63 (noting that during the “early moments” of a negotiation, the moves and gestures of the bargainers “convey information about each party’s initial preferences, intentions, and perceptions, and are instrumental in shaping the psychological climate that will prevail throughout the bargaining relationship”).
- 327 Psychology professor Solomon Asch, one of the first researchers of the “primacy effect,” demonstrated that those traits of a person that observers first learned about influenced their ratings of the person more than traits they later learned about. See Solomon Asch, *Forming Impressions on Personality*, 41 *J. Abnormal & Soc. Psychol.* 258 (1946). See also Pienaar & Spoelstra, supra note 4, at 52-53 (citing studies on how the primacy effect, i.e., the “effect of first impression,” critically affects later interactions).
- 328 Lax & Sebenius assert that “one can enhance one’s power by speaking with a low voice ... and using powerful body language.” Lax & Sebenius, supra note 4, at 143. How does one get his or her voice to this range? We suggest clearing one’s throat and then speaking “from the diaphragm” to get greater resonance. Of course, if carried too far, this appears pompous and stilted.
- 329 Sometimes looking another person in the eye, especially one who intimidates us, can be difficult. In these situations, we counsel our students to focus on the opponent’s nose or chin instead of the eyes. The negotiator then appears to be giving eye contact, but will be less intimidated.

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- 330 Lax & Sebenius describe this as “powerology,” i.e., using power clothes, meals, travel, trappings, and talk to convey an image of strength. See Lax & Sebenius, *supra* note 4, at 143.
- 331 See Rubin & Brown, *supra* note 29, at 263 (citing numerous studies demonstrating that “the early initiation of cooperative behavior tends to promote the development of trust and mutually beneficial, cooperative relationship; early competitive behavior, on the other hand, tends to induce mutual suspicion and competition.”).
- 332 Schoonmaker stresses this point, arguing that “[t]he atmosphere created during the Beginning Game will usually set the tone for the entire negotiation. For example, starting with a friendly atmosphere may interfere with a power-oriented strategy, while a brusque, unfriendly opening can inhibit or even destroy a problem-solving strategy.” Schoonmaker, *supra* note 45, at 52.
- 333 See *id.* at 137 (insisting that “[r]egardless of your strategy, you must appear strong. Apparent weakness just invites others to try to exploit you. Strength is not hostility or rudeness; many strong people are polite and charming. It is an inner confidence and mental toughness that show that you cannot be pushed around.”)
- 334 Experts advise creating trust because it is the essential glue that holds deals-and societies-together. We are fortunate to live in a high trust society. As Francis Fukuyama notes, “[w]e often take a minimal level of trust and honesty for granted and forget that they pervade everyday economic life and are crucial to its smooth functioning.” Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* 152 (1996).
- 335 For example, one may like one’s relatives, but nonetheless shy away from investing in their business ventures.
- 336 See Thompson, *supra* note 4, at 171 (noting that “[p]aradoxically, if there is no risk in an exchange situation, exploitation cannot occur, but high levels of trust will not develop. Thus, trust is a consequence or response to uncertainty.”) (citations omitted).
- 337 See Nirmalya Kumar, *The Power of Trust in Manufacturer-Retailer Relationships*, 74 *Harv. Bus. Rev.* 92, 95 (“What ... distinguishes trusting from distrusting relationships is the ability of the parties to make a ‘leap of faith’: they believe that each is interested in the other’s welfare and that neither will act without first considering the action’s impact on the other.”).
- 338 See Rubin & Brown, *supra* note 29, at 264 (citing studies on the development of trust in negotiation that suggest that “[b]argainers ... do not want to take the risks involved in making a unilaterally trusting, cooperative overture to the other Rather than offer one’s hand in friendship, only to incur the risk of having it slapped away, it may be safer-and it is certainly easier-to offer no hand at all.”).
- 339 See Pruitt, *supra* note 4, at 124-27 (advising a gradual set of reciprocal steps to develop trust between negotiators).
- 340 See Ury, *supra* note 5, at 62 (arguing that, “[i]n dealing with an attack ... put as reasonable an expression on your face as you can muster. Adopt a calm, confident posture and tone. Stand up straight, make eye contact, and use your attacker’s name. Fearlessness disarms.”).
- 341 Depending on the ploy adopted by one’s opponent, there are a host of possible responses; see *infra* notes 372-413 and accompanying text.
- 342 Even those who are weak can be powerful; see *infra* notes 432-38 and accompanying text.

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- 343 See Cohen, *supra* note 69, at 102 (stressing the need to acquire information prior to the date of negotiation by noting “the earlier you start, the easier it is to obtain information. You always get more information preceding an acknowledged, formal confrontation, because people willingly let their hair down before the red light glows on the TV camera”).
- 344 G.H. Smith, *The Study of Business Negotiation in Japan*, unpublished AEP Script, School of Business Leadership UNISA, cited in Pienaar & Spoelstra, *supra* note 4, at 112.
- 345 See Anatoly Dobrynin, *In Confidence* 79-80 (1997) (Russian Ambassador to the United States’ description of the Cuban missile crisis).
- 346 See *supra* notes 63-66 and accompanying text.
- 347 See Schoonmaker, *supra* note 45, at 135 (advising that “[u]nless you are one of those rare people who can act coolly and effectively in a very weak position, you need to ease the pressure on yourself by creating attractive alternatives before the negotiations begin”).
- 348 By making the bidding for broadcast rights so public, the Russians ensured that the losing networks would suffer substantial “face loss.” This approach proved hugely successful. In 1976, Olympic broadcast rights had gone for \$22 million. In 1980, NBC paid \$87 million for them. See Cohen, *supra* note 69, at 123-25.
- 349 See *id.* at 122. As reported by Cohen, the aftermath of the deal was as revealing of the pitfalls of power ploys as the story of the sale. So upset were the owners at these heavy-handed techniques that they then successfully opposed the Soviets’ petition to rezone the property to build a recreation center, compelling the Russians to sell the land and look elsewhere. We can imagine few better examples of why one should not exploit a power advantage.
- 350 This constituted an extraordinary unleashing of such judicial action given that, in its previous 140 years, the Court had declared unconstitutional only sixty laws. See William Manchester, *The Glory and the Dream* 137 (1975).
- 351 As Manchester describes it, in the face of Roosevelt’s “reform” campaign to expand the court, “the Tory justices discovered liberal sympathies hitherto concealed.” *Id.* at 152.
- 352 See generally Fisher & Ury, *supra* note 4.
- 353 For a listing of various consumer protection laws—federal and state—and the agencies that enforce them, see Consumer Information Center, *Consumer Resource Handbook* (visited Dec. 5, 1999) <[http:// www.pueblo.gsa.gov/crh/respref.htm](http://www.pueblo.gsa.gov/crh/respref.htm)>.
- 354 See *id.* For example, many states require merchants to offer 1-3 day “cooling off” periods that permit consumers to cancel contracts they have just signed.
- 355 See generally Fisher & Ury, *supra* note 4; Ury, *supra* note 5 (describing the “principled negotiation” approach as one in which negotiators are advised to: (1) separate the people from the problem, (2) focus on interests, not positions, (3) invent options for mutual gain, and (4) insist on using objective criteria).
- 356 Of course, as some critics have noted, principled negotiation may not always be done well or may be rejected by the other side. See James J. White, *Review Essay: The Pros and Cons of “Getting to Yes”* by Roger Fisher & William Ury, [31 J. Legal Educ.](#)

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- 115 (1981) (objecting that Fisher & Ury's book "seems to overlook the ultimate hard bargaining [T]hey seem to assume that a clever negotiator can make any negotiation into problem solving To my mind this is naive."). But see Roger Fisher, Comment on James White's Review of "Getting to Yes," 31 *J. Legal Educ.* 128 (1981) (responding to Professor White's objections, Fisher argues that "[w]hat we are suggesting is that in general a negotiator should seek to persuade by coming up with better arguments on the merits rather than by simply trying to convince the other side that he is the more stubborn").
- 357 As Ury states, "[i]n reacting, we lose sight of our interests. Moreover, even if reacting doesn't lead to a gross error on your part, it feeds the unproductive cycle of action and reaction." Ury, *supra* note 5, at 36-37.
- 358 See Adler et al., *supra* note 42, at 171-72.
- 359 For example, "Joe, every time I ask you to consider my offer, you pound the table and yell. I'd appreciate it if you'd simply explain what you dislike about the offer."
- 360 We try to avoid naivete here. We realize that some people act in a consistently obnoxious and offensive manner when negotiating. Despite the best, most carefully delivered feedback, they persist in overreacting to mild or nonexistent slights, attacking inappropriately, and viewing their opponents as evil incarnate. Unfortunately, these individuals typically see their own actions very differently than does the rest of the world. Despite substantial feedback to the contrary, they insist they have reacted defensively and only after provocation. This aggressiveness or "tin ear," we believe, usually signals a lack of emotional intelligence. Is there a perfect way to deal with such individuals? No. In our experience, patience, persistence, and a thick skin offer the best, albeit not the most pleasant, approach to negotiating with these difficult persons.
- 361 Ury, *supra* note 5, at 132-33.
- 362 See *id.*
- 363 Ury advises building the other side a "golden bridge," that is, reframe a retreat for the other side as an advance toward a better solution. See Ury, *supra* note 5, at 109. For example, one might seek to persuade an opponent that the demand he or she has just made will be less useful in meeting their needs than one's suggested approach.
- 364 See Pruitt, *supra* note 4, at 93-98 (identifying ways in which negotiators send "indirect communications" signaling a willingness to retreat and noting that people do so as a way of offering "a concession without having your actions interpreted as weakness").
- 365 A warning is a persuasive argument predicting adverse action if matters escalate; a threat is a commitment to take such action. The way one phrases a statement plays an enormous role in how the other side reacts. See *id.* at 83 (describing the different impact that warnings and threats have and noting that "the simple labeling of a statement by the user as 'a warning, not a threat' is often sufficient. The incantation tends to relieve the recipient of the need to counterthreaten in defense of his prestige").
- 366 See Ford & Blegen, *supra* note 54, at 352 (citing research that "parties who fail to retaliate against unprovoked attacks are likely to be viewed as weak, and actually invite more frequent hostility from an opponent" and that "failure to defend oneself by retaliating against unprovoked hostility can encourage further offensive use of punitive action.").
- 367 See *id.* at 361 (arguing that their study and other research demonstrate "fairly strong and consistent support for the claim that actors interpret and respond to the offensive use of [punitive] tactics differently than to the defensive use; further, the research documents that strategies high on the offensive dimension are the most effective at deterring hostile action in bargaining").

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- 368 See supra note 252 and accompanying text.
- 369 See, e.g., Lewis, supra note 253 (devoting a 236 page book to describing “power negotiating tactics and techniques”); Kennedy, supra note 3, at 110 (citing experts who offer hundreds of power ploys).
- 370 Even when a ploy “works” in a negotiation and students have used it to good advantage, we fear that they often over-generalize about its effectiveness. What they will usually overlook is how the same ploy failed miserably in someone else’s negotiation, or how easily it could have been countered, leaving the student vulnerable to a counterploy. We thus feel that students overvalue the importance of ploys, draining critical attention away from other, necessary planning steps.
- 371 Gavin Kennedy refers to these tactics as “dominance ploys.” See Kennedy, supra note 3, at 110 (noting that “[d]ominance ploys can begin before the negotiations get underway” and describing them as “all those symbols, signs and stage settings that create an image of power balance between you and them, and are aimed at softening you up to ensure that you make the most movement”).
- 372 See Jonathan Harr, *A Civil Action* 123-25 (1995) (describing how a plaintiff’s attorney used expensive furnishings and food in negotiations based on his assumption that “the appearance of success often begets success”).
- 373 See Adler et al., supra note 252, at 46-47 (describing these and other tactics).
- 374 See Lewis, supra note 253, at 162-63 (advising that “[w]hen you’re the underdog in a negotiation, don’t act or talk like it.... The solution ... is to act and talk like a power negotiator; to develop a sort of mental toughness. Being mentally tough obviously does not mean being rude or overbearing. It does mean having the poise to hold your own in a negotiation, despite the intimidating tactics of a more powerful opponent.”).
- 375 See Kennedy, supra, note 3, at 115 (noting with respect to the “tough guy/soft guy” ploy that “[a]lmost everybody sound in body and mind knows of it I know of no book on negotiation ‘tactics’ that does not mention it.”); Dichtenberg, supra note 252, at 101 (describing “good guy/bad guy” as “the oldest and most widely used tactic”).
- 376 See Shell, supra note 4, at 173,232 (advising that “[t]he best way to fight this is to recognize it, name it, and refuse to go along with it.”). In sharp contrast, Craver, referring to the ploy as “Mutt and Jeff,” opposes calling an opponent on the practice, arguing that “little is to be gained from overt exposure Such accusations may ... induce truly Maichiavellian adversaries to embrace some other devious approach.”). Craver, supra note 43, at 194-96. Although Craver’s point is well taken if one addresses an opponent in an accusatory manner, we disagree that it need provoke even more devious responses if it is done in a confident, no-nonsense tone. In this case, it is more likely to convince an opponent that negotiation ploys will not work.
- 377 See Fisher & Ury, supra note 4, at 30 (observing that “[i]n a negotiation ... feelings may be more important than talk”).
- 378 See Jeffrey Z. Rubin, *Conflict From a Psychological Perspective in Negotiation: Strategies for Mutual Gain* 127 (Lavinia Hall ed., 1993). Rubin states:
What is the dynamic, psychological machinery that is driving [emotional escalations in negotiation]? In an escalating conflict the parties get locked into a way of presenting themselves. They have persisted so long in presenting themselves to an adversary as tough and unrelenting that they refuse to back down. They feel that they have too much invested in the presentation to quit. Or they may be locked into perceptions of the other side. They have viewed the other side for so long as a blood-thirsty, merciless adversary that they are unable to abandon that view even if they have been given contradictory information that should disprove the hypothesis.
Id.

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- 379 Anger can also distract, intimidate or fluster negotiators, permitting opponents to take advantage of one's disorientation. See Lewicki et al., *supra* note 5, at 97 (noting that "[n]egotiators often try to manipulate the other party's emotions to distract them and to get them to behave in a less rational manner. Get them angry or upset, flattered, or amused-then try to get concessions while they are not paying attention.").
- 380 See Schoonmaker, *supra* note 45, at 138 (noting with respect to the "madman's advantage" that there "are millions of people who really do not care about the objective effects of their actions, and millions more who can fake it"). Professor Robert Frank notes that a community where the prevailing norm is to act like a madman when provoked, i.e., to seek vengeance whatever the cost, will most likely be a peaceful place. In those few instances in which it is not, however, the community will be one where blood feuds last generations; See Robert H. Frank, *A Theory of Moral Sentiments*, cited in *Beyond Self-Interest* 90 (Jane J. Mansbridge ed., 1990) (pointing to the fact that crime rates in Appalachian communities may be very low because of the feeling that vengeance will always be sought, but also noting the multi-generational nature of the Hatfield-McCoy feud that devastated both families).
- 381 See Adler et al., *supra* note 252, at 47 (describing various techniques for responding to anger).
- 382 See Neale & Bazerman, *supra* note 37, at 161 (citing research demonstrating that humor and good feelings in negotiations result in "less contentious tactics").
- 383 Perhaps the best way to apologize is to express regret "that the situation has come to this" rather than for any specific misdeed on one's part.
- 384 See Lewis, *supra* note 253, at 92-93 (describing how Boulwarism worked).
- 385 See Craver, *supra* note 43, at 173.
- 386 See *id.*
- 387 Studies in procedural justice consistently demonstrate that people accept outcomes more readily when they believe that they have been treated fairly and that they view procedures as fair that give them control in decisionmaking. See E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 207-08 (1988) (Noting that "procedural justice judgments lead to enhanced satisfaction; this effect is especially strong when outcomes are negative" and that "[p]rocedures are viewed as fairer when they vest process control or voice in those affected by a decision"). See also Pruitt, *supra* note 4, at 147 (noting that "the mere appearance that the other has participated in a decision can help the other save social face. Hence in 1946, when Iran brought pressure for Russian withdrawal of troops from its territory, the United Nations called for a joint Soviet-Iranian report on the issue so that Russia would not look as if it were acceding to pressure from a lesser state.").
- 388 Hamner and Yukl describe this as a "last clear chance offer." See W. Clay Hamner & Gary A. Yukl, *The Effectiveness of Different Offer Strategies in Bargaining in Negotiation: Social-Psychological Perspectives* 137, 139 (Daniel A. Druckman ed., 1977)
- 389 See, e.g., Chester L. Karass, *Power Plays*, 35 *Logistics Mgmt.* 81 (1996) (arguing that "[t]here is power ... in not having authority. Try entering a negotiation sometime in which the opponent must deal with you, but in which you have no authority to close the deal What happens is that the opponent, recognizing that you have the power to deal with the decisionmaker, tries to give you all the ammunition he can. You wind up with more concessions-and concessions of a better nature-than if you were in charge."); Lewis, *supra* note 253, at 65-66 (insisting that "there are many cases where it would be to your distinct advantage to have limited authority"); Kennedy, *supra* note 3, at 216-17 (noting that the ploy of "limited authority gives the ploy maker a power he is not entitled to, though he is entitled to claim it if you are willing to acquiesce in his deception").

- 390 See Lewis, *supra* note 253, at 94-97 (describing a typical “lowball” ploy attempted on him by an automobile salesman).
- 391 See Adler et al., *supra* note 252, at 47 (describing this ploy and offering suggestions for countering it).
- 392 That is, one stops the negotiation and states “Let’s meet with your supervisor since you seem to lack adequate authority.” We have heard this described as the “Don’t talk to the monkey if the organ grinder chooses the tune” counterploy.
- 393 In these cases, one might hold back on a final offer until seeing what the other side’s final terms are.
- 394 See Chester Karass, *Beware The Trap of Total Authority*, 30 *Traffic Mgmt.* 27 (1991) (arguing that “when negotiators have full authority [[imbalances in power] can result in absolute disasters” and that “[r]ather than serving as a straitjacket, constraints [on one’s negotiating authority] actually provide a safety net that prevents you from making serious errors in judgment”).
- 395 See Shell, *supra* note 4, at 182 (observing that “[d]eadlines are most effective when they are linked to events in the outside world that the parties do not control”).
- 396 See Rubin & Brown, *supra* note 29, at 123 (describing a number of research findings that confirm the strong impact of deadlines on the chances of agreements). See also Dawson, *supra* note 262, at 63 (noting the “incredible pressure that time can put on a negotiation,” he argues that “80 percent of the concessions in a negotiation will occur in the last 20 percent of the time available”).
- 397 See Rubin & Brown, *supra* note 29, at 123.
- 398 See Lewicki et al., *supra* note 5, at 95 (describing the “wait until the last minute” ploy).
- 399 See Dawson, *supra* note 262, at 63 (noting that five days before the election, while the parties still argued over the shape of the table in the negotiating room, Johnson bowed to election pressures and called a halt to bombing in Vietnam).
- 400 This refers to the practice of seeking one or more small concessions after a deal has been struck and the other party is emotionally committed to the deal. See Kirkpatrick, *supra* note 252, at 75-87; Shell, *supra* note 4, at 232; Lewicki et al., *supra* note 5, at 95; Craver, *supra* note 43, at 180-181.
- 401 This technique occurs when the negotiator makes concessions in tiny dollops of “one slice, then another, and another....” Schoonmaker, *supra* note 45, at 89.
- 402 This technique involves the negotiator saying repeatedly to an opponent, “You’ve got to do better than that.” Many experts insist that this open-ended demand is extremely effective against naive or unprepared opponents, who keep bidding against themselves with no reciprocity from the person applying the tactic. See Kirkpatrick, *supra* note 252, at 96-97. See also Dawson, *supra* note 262, at 61 (referring to the technique as “the vise”).
- 403 Just as in the Uncle Remus story by Joel Chandler Harris, the negotiator falsely states that he or she dreads a certain action that the negotiator secretly welcomes. Craver suggests that this works most effectively against an opponent who is playing a “win-lose” game and unleashes the “dreaded” act upon the negotiator. See Craver, *supra* note 43, at 192.

- 404 This refers to the practice of never agreeing to the most recent offer the other side has made. One either goes a little above or a little below, depending on which way one wants the negotiation to proceed. See Kirkpatrick, *supra* note 252, at 61-74 (describing the purchase of a car using the “bogey” technique).
- 405 This is a technique that Kirkpatrick describes as an aid to the “bogey.” Under this approach, one “flinches” upon hearing an offer, conveying a visceral reaction against agreeing to the other side’s proposal. See *id.* at 72-73.
- 406 Also called the “free trial offer,” this technique seeks to get the other side emotionally involved in the negotiation. As Dichtenberg describes it, “[l]et the customer touch the product, let them experience ownership.... The tactic is called the puppy dog because it is based on giving a puppy to a child for a weekend for free and offering to take the puppy back if the child doesn’t want it. Naturally, the child falls in love with the puppy.” Dichtenberg, *supra* note 252, at 101. The ability of pets to draw customers has not been lost on other retailers. See Alexia Vargas, *Mom and Pop’s Retail Secret: Doggie in the Window*, *Wall St. J.*, Dec. 22, 1999, at B1 (describing how a gift card shop increased its retail sales by having friendly cocker spaniels on the premises to greet customers).
- 407 This refers to the negotiator who acts helpless to lull an opponent into underestimating his or her skill. Senator Sam Ervin, a quick-witted Harvard Law school graduate, often referred to himself as a “simple country lawyer” and talked in Southern homilies. Anyone who mistook him for a simpleton paid the price. See Craver, *supra* note 43, at 197.
- 408 Lewicki et al. offer some of the same suggestions, but add one noticeably missing from our list: retaliate. They note the drawbacks of such an approach, but argue that retaliation “may be useful if you are being tested by the other party.” Lewicki et al., *supra* note 5, at 97. Although we do not reject this advice, we prefer halting the negotiation rather than retaliating, realizing that responding in kind may, on occasion, be appropriate.
- 409 See Ury, *supra* note 5, at 101 (describing how to negotiate about the negotiation when one’s opponent insists on using negotiating tricks).
- 410 See Robinson, *supra* note 309, at 964 (stating that “[i]n mediation, the parties retain the decision making authority and thus participate as negotiators in the mediation”).
- 411 See, e.g., *Alternative Dispute Resolution: Strategies For Law and Business* 275-510 (E. Wendy Trachte-Huber & Stephen K. Huber eds., 1996) (offering numerous excerpted articles on mediation approaches and theory).
- 412 Neumann, *supra* note 33, at 432.
- 413 See *id.*
- 414 See Rubin & Brown, *supra* note 29, at 60-61 (describing these and other benefits of third party mediation); Lax & Sebenius, *supra* note 4, at 172-76 (same).
- 415 See Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 282 (1986) (asserting that mediators may provide empowering moves in negotiations through “aiding the weaker party to obtain, organize, and analyze data and identify and mobilize his or her means of influence; assisting and educating the party to plan an effective negotiation strategy ... and encouraging the party to make realistic concessions”).

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- 416 See Eric Galton, *Representing Clients in Mediation* reprinted in Trachte-Huber & Huber, *supra* note 411, at 302, 309 (suggesting that an effective mediator asks “[o]pen-ended questions designed to permit the party to identify weaknesses on her own”).
- 417 See Robinson, *supra* note 309, at 973 (advising lawyer-negotiators to approach mediation where such an interpretation might occur cautiously. One way to justify such an approach might be to seek a highly regarded legal authority as a mediator, thus showing confidence in the legal strength of one’s case).
- 418 See, e.g., Pfeffer, *supra* note 9, at 101 (stating that “[o]ne of the most important resources that any member of an organization can have is allies and supporters”); Beriker & Druckman, *supra* note 49, at 163 (noting that weaker parties “can equalize the power balance by aligning with stronger partners in negotiation”); Thompson, *supra* note 4, at 149 (noting that “[c]oalition formation is one way that otherwise weak group members may marshal a greater share of resources”); Margo Vanover, *Get Things Done Through Coalitions* in Lewicki et al., *supra* note 4, at 320 (arguing that in “case after case [[coalitions] have been successful in their pursuits”).
- 419 As Brislin points out, one of the most effective ways of dealing with opponents is to join with them against a common enemy. To deal with the common enemy, people have to set aside their differences and merge their efforts. In the 1700s there were bitter sectional rivalries within the British colonies in North America. These were manifested in restrictive trade policies, in an inability to collect taxes for services of use to all, and in vastly different positions on the slavery issue. These rivalries would have kept the colonists bickering among themselves for years and years. However, the existence of a common enemy, Great Britain, compelled the colonists to set aside their squabbles and to concentrate their energies against an outside force. Brislin, *supra* note 69, at 164.
- 420 See Vanover, *supra* note 418, at 320.
- 421 See Jeffrey T. Polzer, *Intergroup Negotiations: The Effects of Negotiating Teams*, 40 *J. Conflict Resol.* 678 (1996) (citing research on the effectiveness of negotiating teams: in mixed negotiations, teams outperformed individual opponents and were perceived as having more power and more ideas for solutions); Schoonmaker, *supra* note 45, at 211 (arguing that a “team” approach improves negotiating because “[t]eams usually analyze situations better than individuals. In addition to having more information and ideas, they also have superior analytic processes.... A team’s analysis is more explicit and objective [than an individual’s]. People have to explain their positions, justify their assumptions, and consider each other’s perspectives.”).
- 422 See Anne G. Perkins, *Negotiations: Are Two Heads Better Than One?* 71 *Harv. Bus. Rev.* 13 (1993) (reporting on research indicating that two-on-one negotiations often produce more valuable agreements for both sides than one-on-one negotiations); John L. Graham & Roy A. Herberger, Jr., *Negotiators Abroad: Don’t Shoot From the Hip*, 61 *Harv. Bus. Rev.* 160, 162 (1983) (advising that in international negotiations, business people bargain in teams because “[b]eing outnumbered or, worse, being alone is a terrible disadvantage in most negotiating situations. Several activities go on at once—talking, listening, thinking up arguments and making explanations, and formulating questions, as well as seeking an agreement. Greater numbers help in obvious ways with these.”).
- 423 For example, when queried about the fairness of a hardware store raising its prices on snow shovels the morning after a heavy snowstorm, over 80 percent of respondents in a study by Kahneman, Knetsch, and Thaler judged the action unfair despite the economic rationality of doing so. See D. Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 *Am. Econ. Rev.* 728, cited in Neale & Bazerman, *supra* note 37, at 158-59. See also Shell, *supra* note 4, at 61-63 (describing the so-called “ultimatum game,” in which negotiators seek to divide a sum of money. One side proposes a division, which need not provide equal shares. If the other side accepts, each side gets whatever was proposed. If the other side rejects, neither receives any money. Even though one arguably would always be better off taking a pittance—as opposed to nothing (if there is no agreement)—research suggests that negotiators will often scuttle any gain for either side if they view the other side as taking unfair advantage of the split); Colin Camerer & Richard H. Thaler, *Ultimatums, Dictators and Manners*, 9 *J. of Econ. Persp.* 209 (1995) (noting that people will not accept demeaning offers in ultimatum games even though the offers will provide more financial benefits than no agreement).

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- 424 Moral standards can operate under the direst of circumstances and can avoid conflict that would otherwise appear inevitable. For example, Raven & Kruglanski cite the case of loading passengers on lifeboats when a ship begins to sink: “The legitimate right of women and children on a sinking ship to request men to surrender their place on the first lifeboats may fit into our general cultural values, but it also diminishes conflict and provides a basis for queuing when conflict would lead to jamming and mutual loss....” . Raven & Kruglanski, *supra* note 71, at 94.
- 425 See *supra* note 92 and accompanying text.
- 426 See Rubin & Brown, *supra* note 29, at 261 (citing research that “[t]o the extent that one bargainer can convince the other that he has a right to make a particular offer or demand (“legitimate power”) the likelihood of this offer being accepted is increased. By appealing to ‘oughts’ of various kinds (rules, precedents, norms of reciprocity, fair play, etc.), each party can attempt to goad or prod the other into agreement.”); Lax & Sebenius, *supra* note 4, at 141 (noting that “in many negotiations, positions are advanced and justified not by arguing that the negotiator desires them but rather that they are “right,” morally, socially, or scientifically”); Cohen, *supra* note 69, at 80 (asserting that “if you lay morality on people in an unqualified way, it may often work”).
- 427 See Vanessa Fuhrmans, *Germans, U.S. Reach Accord to Compensate Slave Laborers*, Wall St. J., Dec. 15, 1999, at A17. The United States government undertook a similar reparations program to reimburse Japanese-Americans who had been interned during World War II. See *Redress for War Internees Ended*, N.Y. Times, Feb. 15, 1999, at A15 (describing how the U.S. Justice Department has closed the books on the \$1.6 billion reparations program for tens of thousands of people of Japanese descent who were interned in relocation camps during World War II).
- 428 See Rubin & Brown, *supra* note 29, at 261 (describing studies that show the effectiveness of “shaming” one’s opponent into accepting an offer by pointing to signs of one’s own weakness); Pienaar & Spoelstra, *supra* note 4, at 203 (citing studies indicating that persons who react to verbal attacks by showing signs of suffering, pleading, or asking for help sharply reduce the number of attacks on them by the aggressive parties).
- 429 Doris Kearns Goodwin, *No Ordinary Time: Franklin & Eleanor Roosevelt: The Home Front in World War II 517-18* (1994).
- 430 See David Halberstam, *The Fifties 539-60* (1993) (describing the impact of national media in Montgomery during the boycott: “The more coverage there was, the more witnesses there were and the harder it was for the white leadership to inflict physical violence upon the blacks. In addition, the more coverage there was, the more it gave courage to the leadership and its followers.”).
- 431 Thomas Schelling offers a high-risk approach to acts of desperation. In some cases, making “a voluntary but irreversible sacrifice of freedom of choice” can operate to demonstrate one’s determination. See Schelling, *supra* note 10, at 22. For example, in a game of “chicken” between two drivers, if one of them visibly tosses his steering wheel out the window, leaving himself no choice but to drive straight at the other driver, the other driver, if at all rational, will swerve. See *id.* In a similar fashion, if a negotiator irrevocably commits himself to a certain course of action—say, resigning in one hour if his salary demands are not met—he may carry the day.
- 432 Halberstam, *supra* note 430, at 541.
- 433 See Nierenberg, *supra* note 4, at 38 (“[n]ever press for the ‘best’ deal and thereby corner your opponent. As Edna St. Vincent Millary observed, ‘Even the lowly rat in adversity has courage to turn and fight.’”). See also *supra* notes 48-57 and accompanying text for a discussion of the reasons why power disparities often make bargaining difficult and agreements less likely.
- 434 In advising attorney-negotiators not to press an advantage too strongly, Paul Rosenberger offers numerous reasons for restraint: While [an overreaching, but legal] contract will have net benefits in the short-run, the same may not be true in the long-run.

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Opposing parties subject to such contracts will tend to either (1) perform the minimal obligations to the contract when they might have performed more out of good faith, or (2) breach the contract because the losses that the contract imposes are too great. In either event, each will result in greater costs (i.e., litigation costs or lost benefits) incurred by the [overreaching party] in the long run. Furthermore, any chance of a long-term relationship that is beneficial to both sides beyond the term of the contract may be negated by such an initially lopsided agreement.
Rosenberger, *supra* note 223, at 632.

- 435 See Nierenberg, *supra* note 4, at 30 (advising that “[a]ll parties to a negotiation should come out with some need satisfied. This can’t happen when one of the parties is demolished.”).
- 436 See Ury, *supra* note 5, at 150 (advising “even when you can win, negotiate” because “an imposed outcome is an unstable one.... Earlier this century, the world learned this lesson at enormous cost; an imposed peace after World War I led to World War II.”).
- 437 This is a point repeatedly stressed in Stephen Covey, *The Seven Habits of Highly Effective People* 205-34 (1989) (stressing a “win-win” philosophy of life).
- 438 See Schoonmaker, *supra* note 45, at 166 (noting that “[u]nderlying many negotiation rituals is the need for everyone to appear to win.... If possible, let them feel they have won. Even if you have gotten an exceptionally good deal for yourself, you might complain, “You really beat me this time, but I’ll get you next time.”).
- 439 Lewicki et al. advise those more powerful to take steps to “disarm” themselves at the beginning of a negotiation to signal their willingness to bargain collaboratively. See Lewicki et al, *supra* note 5, at 168 (further advising that “in addition to signaling that you are willing to work with them on an ‘equal’ basis, you may have to offer a quick concession, or sketch out an outline of the type of agreement you hope to work toward.”).
- 440 See Dawson, *supra* note 262, at 57 (arguing that “power negotiating” does not teach bargainers to crush opponents. “It teaches you how to win at the negotiating table but leave the other person feeling that he won The ability to make others feel that they won is so important that I would almost give that as a definition of a Power Negotiator.”).
- 441 See Bert R. Brown, *Face-Saving and Face-Restoration in Negotiation*, in *Negotiation: Social-Psychological Perspectives* 275-99 (Daniel A. Druckman, ed., 1977) (noting that, “in some instances, protecting against loss of face becomes so central an issue that it ‘swamps’ the importance of the tangible issues at stake and generates intense conflicts that can impede progress toward agreement and increase substantially the costs of conflict resolution”).
- 442 Fisher and Ury write:
In the English language, “face-saving” carries a derogatory flavor. People say, “We are doing that just to let them save face,” implying that a little pretense has been created to allow someone to go along without feeling badly. The tone implies ridicule This is a grave misunderstanding of the role and importance of face-saving. Face-saving reflects a person’s need to reconcile the stand he takes in a negotiation or an agreement with his principles and with his past words and deeds.
Fisher & Ury, *supra* note 4, at 29. See also McJohn, *supra* note 52, at 47 (noting that “parties may become unable to agree to a transaction that gives them what they actually want, simply because such agreement would cause loss of status” and urging steps to avoid such situations); Schoonmaker, *supra* note 45, at 166 (urging particular care about saving face in the final moments of a negotiation because people “can vividly recall those final minutes. If they believe that they were beaten or tricked, you may have problems implementing this agreement or negotiating the next one.”).
- 443 See Fisher & Ury, *supra* note 4, at 29.
- 444 Evan Esar, *20,000 Quips and Quotes: A Treasury of Witty Remarks, Comic Proverbs, Wisecracks, and Epigrams* 622 (1995).

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**ADDRESSING POWER IMBALANCE IN EMPLOYMENT MEDIATIONS:
USING DISPUTE SYSTEMS DESIGN TO IDENTIFY AND ADDRESS
RECURRING BARRIERS TO SETTLEMENT¹**

Jane Juliano²

¹ This is a draft of a paper for the Symposium *Not All Controversies End in Court: Checking the Balance in Alternative Dispute Resolution*, University of District of Columbia Law Review, Washington, D.C., 2015.

² Chief, Alternative Dispute Resolution Unit, U.S. Office of Special Counsel, Washington, DC. All opinions and views reflected in this paper are those of the author and do not represent the United States Government or the U.S. Office of Special Counsel. The author would like to acknowledge the significant contributions of OSC staff to this article particularly Mark Cohen, Anne Wagner, Page Kennedy, Whitney Sisco, Richard Kelley and Erica Calys.

INTRODUCTION

Alternative means of resolving legal disputes have become an integral part of the American legal system.³ As these Alternative Dispute Resolution (ADR) processes have become widely available in the United States, scholars and critics have begun to parse their strengths and weaknesses compared to the traditional legal system. In its timely Symposium *Not All Controversies End in Court: Checking the Balance in Alternative Dispute Resolution*, the University of the District of Columbia Law Review challenged contributors to explore whether ADR provides “a just resolution that might not be available to parties through traditional litigation” and whether safeguards are necessary to avoid a “second-class justice that denies the parties their day in court.”⁴

This article will explore the Symposium questions by discussing 1) the dynamics of power in employment disputes and 2) the use of dispute systems design principles to identify recurring power imbalances and to develop strategies to overcome them at the ADR program at the U.S. Office of Special Counsel.

I. POWER DISPARITY IN EMPLOYMENT MEDIATIONS

Over one hundred years ago, the Supreme Court wrote of the employer-employee relationship, “the proprietors lay down the rules, and the laborers are practically constrained to obey them.”⁵ The great philosopher Adam Smith explained the inherent advantage of employers over employees: “Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.”⁶

In mediations, the ability of a negotiator or party⁷ to “get one’s needs met and to further one’s goals” is generally considered a result of negotiation *power*.⁸ This simple conception of

³ Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L. REV. 281 (2013).

⁴ Symposium, *Not All Controversies End in Court: Checking the Balance in Alternative Dispute Resolution*, U.D.C. L. REV. (2016) (Call for Papers).

⁵ *Holden v. Hardy*, 169 U.S. 366, 397, 18 S. Ct. 383, 390, 42 L. Ed. 780 (1898). See also National Labor Relations Act 1935, § 1 (29 U.S.C. § 151) (“the inequality of bargaining power between employees ... burdens and affects the flow of commerce.”)

⁶ ADAM SMITH, *Of the Wages of Labour*, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, I.8.12 (Edwin Cannan, ed., London: Methuen & Co., Ltd. 1904) (1776), <http://www.econlib.org/library/Smith/smWN3.html#B.I> (Last visited Nov. 10, 2015).

⁷ In this paper, the words “negotiator” and “party” will be used to mean an individual and/or attorney in a legal dispute as those words are commonly used in litigation.

⁸ Bernard Mayer, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE*, 50 (1st Ed. 2000); see also Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27.2 AMERICAN BEHAVIORAL SCIENTIST 149, 150

“power” implies that the negotiator who possesses superior power will be able to get what he or she wants. However, superior resources or status does not always result in superior bargaining results.⁹ First, it is the *perception* of power that affects negotiation dynamics. In their survey of negotiation literature Kim, Pinkley and Fragale distinguish *potential* power (available or actual sources of power that a negotiator could draw upon to obtain the benefits he seeks) from perceived (the assessment each negotiator makes about his or her own and the other’s potential power). It is the *perception* of one’s own and the other’s power upon which each party bases his or her tactical negotiation decisions.¹⁰

Second, in their exhaustive article reviewing research on power imbalances in bargaining, Adler and Silverstein found that a symmetrical balance of perceived power between negotiators is often “the most favorable condition for reaching agreement.”¹¹ They argue that the party with more power often cannot leverage a superior position to get an agreement because the weaker party will simply resist an agreement when he or she feels the terms are demeaning, unfair or coerced.¹²

This paper focuses on the example of mediation at the U.S. Office of Special Counsel and discusses the development of process features that its mediators employ to empower parties, particularly those without legal representation. Before delving into that program, it will be useful to distinguish some of the sources or components of negotiation power.

“*Substantive*” power and power of a favorable alternative to settlement. Which “facts” of the disputed situations favor which party given the law and influence factors?¹³ Who has an appealing “best alternative to a negotiated agreement” (BATNA) so that they are not desperate for a deal?¹⁴ In the mediation of legal disputes, the alternative to a negotiated agreement is usually litigation in court. Parties' demands and offers are influenced by their perception of how

(1983)(defining power in negotiation as the “ability to influence the decisions of others assuming they know the truth.”)

⁹ See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 4 (2000)(“[G]reater power, by itself, does not necessarily produce more favorable agreements for the powerful.”); Mayer, *supra* note 25; see also Fisher, *supra* note 25.

¹⁰ See Peter H. Kim, Robin L. Pinkley, & Alison R. Fragale, *Power Dynamics in Negotiation*, 30 ACADEMY OF MANAGEMENT REV. 799, 807-810 (2005); Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 13 (2000).

¹¹ See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 16 (2000).

¹² Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 16-17 (2000).

¹³ Mayer *supra* note 7; see also (1st Ed. 2000), Jossey-Bass *supra* note 12 at 55 (discussing legal prerogative); see also Roger Fisher, *Negotiating Power Getting and Using Influence*, 27 AMERICAN BEHAVIORAL SCIENTIST 149, 158 (1983).

¹⁴ David A. Lox & James K. Sebenius, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 91 (Harvard Business School Press, 2006) (“Your apparent willingness to walk – a quiet confidence about doing so rather than a bald threat – can confer real advantage. The other side’s observation of your calm readiness to walk away – the psychological opposite of visibly craving a deal – normally serves as a major advantage.”)

strong each other's legal claims are.¹⁵ Attorneys might say, "I have a good case" or "the facts are on our side." This aspect of power is undoubtedly the first aspect—and sometimes the only one—that many think of as influencing negotiation results.

Assessing the potential outcome of a court proceeding can be difficult. In employment disputes such as discrimination or Prohibited Personnel Practice cases,¹⁶ liability often turns on intent. Typically, intent must be extrapolated from conflicting testimony or documentary references. The more ambiguous the evidence, the more cognitive biases have room to roam: individuals engaged in an adversarial process will tend to view evidence in a way that is more favorable towards their position than an uninvolved observer would.¹⁷ One's assessment of one's own and the other negotiator's case in court is often a powerful anchor in negotiations.

Power of resources. Who has the most useful resources at their disposal? Who can obtain or possesses critical information, legal representation and advice? Who can fund and wait out a lengthy investigation or litigation?¹⁸ Money, personnel, connections—these are all resources that help one reach a negotiation goal. Access to relevant business information, having the funds to hire experts and obtain specialized research or analyses, and the ability to engage legislative interest, community sentiment, or the media in one's position are a few examples of how resources lead to increased negotiation power.

Legal representation is perhaps the biggest advantage superior resources can provide.¹⁹ An attorney who is able to establish and pursue a strong legal claim has created a stronger alternative to settlement and thus bargaining position. In employment cases, many employers are corporations or other organizations that are represented by attorneys, creating an imbalance of power when the employee is unrepresented.

Positional power. Who has the more advantageous status or position and decision-making influence within the relevant hierarchy?²⁰ An employee's negotiation counterpart is typically a higher level management representative. When one negotiator holds a higher position than another, the higher level individual likely has greater decision-making authority, access to greater information about the organization and possible situations, greater influence with high-level decision-makers, and more authority to give instructions and obtain cooperation from

¹⁵ Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-66, 968 (1979) (in legal settlement discussions parties bargain in the "shadow of the law").

¹⁶ See 42 U.S.C. §2000e; 5 U.S.C. §2302 et seq.

¹⁷ See Richard Birke and Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 3 Harv. Neg. L. Rev. 1, 16 (1999).

¹⁸ MAYER, *supra* note 7; see also JOSSEY-BASS, *supra* note 7 at 56 (discussing resources).

¹⁹ Legal representation is so vital to a meaningful participation in the formal legal system that it is guaranteed for criminal defendants by our Constitution. In criminal cases where life and liberty is at risk, the Sixth Amendment to the United States Constitution provides a right "to have the assistance of counsel for his defense;" U.S. Const. amend. VI.

²⁰ MAYER, *supra* note 7; see also JOSSEY-BASS, *supra* note 7 at 56-7 (discussing association and procedural power).

others. In fact, in a typical employment mediation the management official at the table has the organizational authority to provide (or not provide) what the employee sitting across the table is demanding.

Personal and strategic power. *Personal power* - who has personal style, confidence or charisma that causes others to want what the person wants, and to tend to give extra weight to his/her judgment?²¹ *Strategic power* – who has better communication, interpersonal and negotiation skills? That person can often obtain better results than a less skilled negotiator with better “facts” on their side.²²

Skills in interpersonal communication, diplomacy, charm and negotiation savvy can be an enormous advantage for negotiators. Although those who have achieved management positions may have earned those promotions partly because of their facility in interpersonal collaboration and emotional intelligence,²³ such characteristics are well distributed among the rank and file. Careful listening, the ability to share one’s interests and perceive those of others, creativity and integrity are some of the qualities that lay the ground for successful negotiation results.²⁴

Negotiation *skill* is thus an important factor in each negotiator’s ability to influence the outcome, and thus their power. In the vast majority of negotiations, parties reach more efficient and more valuable agreements when negotiators employ a collaborative, interest-based negotiation strategy rather than win/lose, competitive one (often called “distributive” negotiation in research literature).²⁵ As in a poker game, negotiators with superior negotiation skills can often obtain better results than those with less skills but a stronger “hand”-- more positional power, better “facts” on their side, or greater resources.

The combination of all of these sources of power components determines one’s ability to obtain a desired negotiated result. For example, inferior resources and organizational position need not yield a poor outcome if the negotiator has strong personal and strategic power and has been able to marshal other leverage, such as a strong BATNA or community support.

In court, the judge and jury retain the ultimate power to decide legal rights and responsibilities under the law. In mediation, power is *shared* among the parties and the mediator(s), and *shifts*

²¹ MAYER, *supra* note 7; *see also* JOSSEY-BASS, *supra* note 12 at 57 (discussing moral power and personal characteristics).

²² Fisher, *supra* note 18.

²³ *See generally* Daniel Goleman, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (10th Anniv. ed. 2005).

²⁴ *See, e.g.,* Andrea Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, Harvard Negotiation Law Review, Vol. 7, p. 143, 2002

²⁵ *See, e.g., also* Manager as Negotiator, David A. Lox and James K. Sebenius, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 249 (The Free Press, 1986) (discussing power in negotiation); Leigh L. Thompson, Jiunwen Wang & Brian C. Gunia, *Negotiation Annual Review*, ANNU. REV. PSYCH. 491, 493-494 (2010); Max Bazerman & Deepak Malhotra, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND (2008).

throughout the process.²⁶ But *should* a neutral mediator attempt to “balance power” among parties? Alternatively, is this rightfully the province of the judicial system, where parties understand they will be subject to the decision of a judge or jury? Long time civil rights Community Relations Service mediator Silke Hansen says: “Unless I can help balance that [power disparity], and empower each party to effectively participate at the mediation table, we’re not going to have an effective, successful mediation.”²⁷ Professor Stulberg does not believe mediators have “a duty to redistribute the power or, at a minimum, has a duty not to permit the mediation process to reinforce this power disparity in the settlement...”²⁸ The mediator should not become a “mini-legislator charged with promoting the social welfare,” nor can a mediator assume that he can accurately “identify the various sources of power and assess the power dynamics in a given situation.” There exists “no common standard [that] enables us to determine if the power is ‘balanced.’”²⁹

The Model Standards of Conduct for Mediators do not address this dilemma directly, but several provisions bear upon the issue, such as the parties’ self-determination, mediator impartiality, and the overall quality of the process.³⁰ Impartiality prohibits the mediator from acting “with

²⁶ See Peter H. Kim, Robin L. Pinkley, & Alison R. Fragale, *Power Dynamics in Negotiation*, 30 ACADEMY OF MANAGEMENT REV. 799, 819 (2005)(power relations are dynamic in negotiation). For a detailed discussion of influence and power in mediation decisionmaking, see Leonard L. Riskin, *Retiring and Replacing the Grid of Mediator Orientations*, 21 ALTERNATIVES TO THE HIGH COST OF LITIGATION 69 (2003); Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. R. 1 (2003).

²⁷ Silke Hansen, Civil Rights Mediation Oral History Project interview, available online at http://www.colorado.edu/conflict/civil_rights/interviews/Silke_Hansen.html (Last visited December 11, 2015).

²⁸ in a manner that promotes ... party participation, procedural fairness, party competency and mutual respect among all participants, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RES. 85, 86 (1986).

²⁹ Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RES. 85 (1986).

³⁰ American Arbitration Association, American Bar Association, & Association for Conflict Resolution, *Model Standards of Conduct for Mediators*, https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased, (Sept. 2005) (hereinafter *Model Standard of Conduct for Mediators*); see *A Guide for Federal Employee Mediators: A Supplement to and Annotation of the Model Standards of Conduct for Mediators*, http://www.adr.gov/pdf/final_manual.pdf (2009) (hereinafter *A Guide for Federal Employee Mediators*):

“STANDARD I. SELF-DETERMINATION A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome...

STANDARD II. IMPARTIALITY A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice. B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. 1. A mediator should not act with partiality or prejudice based on a participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

partiality or prejudice based on a participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.”³¹ Self-determination, on the other hand, requires that the mediator strive to ensure that each side is making a “voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” “Quality process” requires that the mediator conduct the process “in a manner that promotes ... party participation, procedural fairness, party competency and mutual respect among all participants....”³² Each mediator must decide in each individual situation when intervention is proper and ethical.

I now turn to an example of how a dispute systems design process conducted at a small Federal agency, the U.S. Office of Special Counsel, identified and addressed stakeholder concerns over power imbalances in an ADR program.

II. THE OFFICE OF SPECIAL COUNSEL ADR PROGRAM

A. Office of Special Counsel

In 1978, in the wake of the Watergate scandal, Congress passed the Civil Service Reform Act to improve management and integrity in the Federal workforce.³³ The Act specified merit principles to guide management and defined “prohibited personnel practices” or “PPPs.”³⁴ The Merit Systems Protection Board (MSPB) was established for Federal employees to file appeals pertaining to Federal personnel and workplace matters.³⁵ First as an arm of the MSPB and later as an independent federal agency, the U.S. Office of Special Counsel investigates and

STANDARD VI. QUALITY OF THE PROCESS A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes ... party participation, procedural fairness, party competency and mutual respect among all participants.

4. A mediator should promote honesty and candor between and among all participants...

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

³¹ *Id.*

³² See Agusti-Panareda, *Power Imbalances in Mediation: Questioning Some Common Assumptions*, DISPUTE RESOLUTION J., Sect. B at notes 20-21 (May-July 2004).

³³ Pub. Law 95-454 (October 13, 1978), 5 U.S.C. Chapter 11; see, *The Merit System Principles, Keys to Managing the Federal Workforce 3* (U.S. Merit Systems Protection Board, January 2017).

³⁴ See 5 U.S.C. §2302.

³⁵ U.S. Merit Systems Protection Board, *About MSPB*, accessed at: <https://www.mspb.gov/About/about.htm>

prosecutes prohibited personnel practices with a primary mission of protecting whistleblowers.³⁶ OSC also prosecutes violations of the Uniform Services Employment and Reemployment Rights Act (USERRA) and the Hatch Act.³⁷

Newly filed Prohibited Personnel Practice (PPP) complaints are investigated to determine whether there are reasonable grounds to believe that a violation has occurred or will occur. If reasonable grounds exist and the complaint meets other factors warranting potential prosecution, then the case is referred to OSC's Investigation and Prosecution Division (IPD) for full investigation and possible corrective and/or disciplinary action. For USERRA cases, the Department of Labor receives the initial complaints and refers cases requiring litigation to OSC.³⁸ If OSC is reasonably satisfied that a claimant is entitled to relief, OSC may act as attorney for the claimant.

The IPD staff conducts a complete investigation at no cost to either party. The employer/agency must respond to formal requests for information and documents and its key personnel must submit to interviews under oath. If the Special Counsel finds a violation, she can prosecute the case at the Merit Systems Protection Board.³⁹ If she finds no violation and closes the case, in whistleblower retaliation and some other PPPs, the employee may file a petition with the MSPB and argue their case in front of an administrative judge *de novo*.⁴⁰

³⁶ Carolyn N. Lerner and Jason M. Zuckerman, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, 2-3 (2014), last accessed March 29, 2016 (available at [https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20\(5-19-14\).pdf](https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20(5-19-14).pdf)). OSC became an independent federal agency with the enactment of the Whistleblower Protection Act (WPA) of 1989. 5 U.S.C. § 1211, et seq.

³⁷ Office of Special Counsel, *About*, available at <https://osc.gov/Pages/about.aspx> (last visited on 10/18/15). OSC derives its authority from four statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA).

³⁸ See Office of Special Counsel, *USERRA: OSC's Role*, <https://osc.gov/pages/userra.aspx> ("OSC receives cases from the Department of Labor that may be appropriate for litigation. These are cases in which a federal employer is believed to have violated USERRA, but the issue could not be resolved by the Department of Labor. These cases are referred to OSC at the claimant's request once the claimant has exhausted the Department of Labor's process.") (accessed March 30, 2016)

³⁹ 5 U.S.C. § 1214(a)(1)(A).

⁴⁰ "Individual Right of Actions (IRA) with the Merit Systems Protection Board. Employees or applicants who allege that they experienced retaliation because of whistleblowing under 5 U.S.C. § 2302(b)(8) may seek corrective action in appeals to the MSPB. Such an appeal is known as an 'individual right of action' (or IRA). By law, the employee or applicant must first seek corrective action from OSC before filing an IRA. ... The Whistleblower Protection Enhancement Act of 2012 expands the IRA right to include most reprisal claims under 5 U.S.C. § 2302(b)(9), including: retaliation for filing a whistleblower appeal, complaint or grievance; retaliation for assisting an individual in the exercise of an appeal, complaint or grievance right; retaliation for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel; or retaliation for refusing to obey an order that would require the individual to violate a law." Office of Special Counsel, *Our Process*, <https://osc.gov/Pages/ppp-ourprocess.aspx> (last visited Dec. 7, 2015).

“Alternative dispute resolution” or “ADR” at OSC, then, is an alternative to investigation and prosecution in front of the MSPB.⁴¹ OSC’s ADR program offers is mediation and conciliation. Mediation is an informal process in which a neutral third party mediator helps disputing parties to reach a voluntary, negotiated resolution. Parties⁴² participate voluntarily and retain decisionmaking power; the mediator has no authority to make a decision. In a conciliation, the mediator works through a series of telephone conversations with each side to resolve the dispute; there is no face-to-face meeting.

B. Building an ADR program

When Special Counsel Carolyn Lerner was appointed by the President to head the agency in 2011, she expanded the role of ADR at OSC.⁴³ Drawing on her own background in mediation, she recognized the benefits to complainants and agencies of making voluntary mediation more widely available.⁴⁴ She established an independent ADR Unit and appointed an experienced full-time ADR Specialist to head the new office. The ADR Unit staff initiated a Dispute Systems Design (DSD) process⁴⁵ while simultaneously evaluating ongoing mediations. As part of the DSD process, OSC staff:

- Identified and met with stakeholders to explore their interests and concerns regarding an ADR program at OSC (e.g., nonprofit “good governance” and veterans organizations, plaintiff employment attorneys and agency employment lawyers);
- Met with mediation program administrators at other Federal agencies, including the MSPB and EEOC;
- Convened a working group with OSC staff from the prosecution and examination divisions to obtain their views on criteria for suitability for mediation and barriers to settlement;

⁴¹ See U.S. Office of Special Counsel, *Fact Sheet: How Complaints are Investigated and Prosecuted*, <https://osc.gov/Resources/2014%20Form%20IPD%20Process.pdf> (hereinafter *OSC Investigation and Prosecution Fact Sheet*). Once a case is investigated, if a violation of PPP or USERRA law has been found, IPD will attempt to obtain corrective action from the Federal agency involved. If that is not successful, OSC may file a case with Merit Systems Protection Board against the agency. In some types of PPPs, such as retaliation for whistleblowing, an employee can file a case with the MSPB directly. See Merit Systems Protection Board, *Questions and Answers About Whistleblower Appeals*, <http://www.mspb.gov/appeals/whistleblower.htm> (last visited Dec. 7, 2015).

⁴² In this article we use the terms “complainant” or “employee” to designate the individual who files a PPP or USERRA case against their Federal agency employer. We use the term “agency” to refer to employer agency in such a complaint. We will also use the more general terms “party,” “participant,” or “negotiator” to refer to either side to a legal dispute in their capacity as a party to an ADR or a court judicial process.

⁴³ See U.S. Office of Special Counsel, *OSC Annual Report to Congress FY 2014*, at 14 (<https://osc.gov/Resources/OSC%20Annual%20Report%20to%20Congress%20FY%202014.pdf>).

⁴⁴ OSC initiated ADR in PPP cases in 2000. Office of Special Counsel, Annual Performance Report of the U.S. Office of Special Counsel for Fiscal Year 2002, <https://osc.gov/Resources/rpt-02.pdf>, at 3. In addition to her civil rights law practice, Special Counsel Lerner practiced as a mediator and taught mediation at George Washington Law School prior to her appointment.

⁴⁵ See Cathy A. Constantino & Christina Sickles Merchant, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1st ed. 1995).

- Developed and presented an overview of OSC’s expanded ADR program to agency attorneys, plaintiffs’ attorneys and non-profit groups that represent parties in OSC cases;
- Expanded the eligibility criteria for PPP case eligibility so that many more cases qualified for the mediation program;
- Made USERRA cases eligible for mediation for the first time;
- Conducted full week mediation training for OSC collateral duty mediators; and
- Partnered with the Harvard Negotiation and Mediation Clinical Program⁴⁶ to obtain an independent review and recommendations for the newly expanded ADR program⁴⁷.

Because the community of those who have cases or work with OSC contributed their thoughts and interests to the program design, it has been well-received. The result is an active, valued program that parties like to use and OSC staff enjoys participating in.

In general, OSC’s mediation process follows a civil legal dispute mediation model,⁴⁸ beginning with in-depth pre-mediation preparation followed by either an in-person all day mediation session or asynchronous telephone negotiations. Most of the cases referred to IPD for investigation are sent first to the ADR Unit for review.⁴⁹ If the ADR staff determines the case may be suitable for mediation, a convener⁵⁰ contacts the parties, starting with the employee who filed the complaint. The convener explains the OSC mediation program and provides information about the investigation and prosecution process. If the employee agrees to mediate, the agency is offered mediation. If both parties agree, one or two OSC co-mediators are assigned to work with the parties to prepare for and arrange the mediation at a location convenient to the parties. If the mediation results in resolution, the agreement is put into writing and becomes binding on both parties.⁵¹

⁴⁶ See generally Harvard Negotiation & Mediation Clinical Program, *About Us*, <https://blogs.law.harvard.edu/hnmcp/about-us/> (last visited Dec. 7, 2015). HNMCP worked on projects for OSC in spring 2012 (<https://blogs.law.harvard.edu/hnmcp/projects/u-s-office-of-special-counsel/>) and spring 2013 (<https://blogs.law.harvard.edu/hnmcp/projects/u-s-office-of-special-counsel-2/>). We are indebted to their excellent, high quality work.

⁴⁷ The students conducted a variety of stakeholder interviews with: complainants and attorneys from OSC mediations, OSC mediators, OSC IPD staff and peer Federal agency ADR program directors. The students analyzed collected data and made recommendations regarding mediation suitability criteria, the optimal staffing of mediations and process choices that would increase the effectiveness of the program. See generally, *U.S. Office of Special Counsel Spring 2012 Dispute Systems Evaluation, Mediation*, <https://blogs.harvard.edu/hnmcp/projects/u-s-office-of-special-counsel/> (last accessed March 30, 2016).

⁴⁸ See, e.g., Golann and Folberg, *MEDIATION THE ROLES OF ADVOCATE AND NEUTRAL* (2d ed. Aspen Publishers)(p 90-92)

⁴⁹ See Office of Special Counsel, *Fact Sheet How OSC’s Mediation Program Works*, <https://osc.gov/Resources/2014%20Form%20Mediation%20Process.pdf> (hereinafter *OSC Mediation Fact Sheet*).

⁵⁰ “Convener” is an ADR Unit staff member who performs some or all mediation convening tasks: evaluates whether the case is suitable for mediation, contacts the parties to discuss OSC’s mediation program, explains confidentiality obligations in ADR, helps parties choose whether mediation is right for them, and begins to arrange for a mediation location and mediator assignment.

⁵¹ The law on a signatory’s ability to sue and obtain remedies for breach of a settlement agreement between an employee and a Federal Agency is complex and unsettled. *E.g.*, in *Cunningham v. United States*, 748 F.3d 1172 (Fed. Cir. 2014), the Federal Circuit held that a Federal government employee can sue his or her employer for

C. ADR program features that affect power imbalance

The level of resources a negotiator has at his disposal, particularly legal representation, is a primary source of negotiation power. Prior to the mediation, an attorney who establishes a strong legal claim has created a stronger BATNA, which in turn enhances his client's bargaining position. Attorneys are usually experienced negotiators and can speak in depth about litigation contingencies that may affect case outcomes. Being removed from direct involvement, they can often more effectively represent a party than a party can usually represent himself.

Most employees who participate in OSC mediation have not hired an attorney,⁵² whereas agency management officials are usually accompanied by an agency attorney. Feedback from employment attorneys, employees and advocacy groups during the DSD process highlighted the power imbalance this trend creates. Over time, the ADR Unit developed several process features to assist the unrepresented party to obtain the information they need to meaningfully participate in mediation: negotiation coaching, legal Subject Matter Experts and the option of bringing a "support person" to the mediation.

Interest-based bargaining, negotiation coaching and value creation. Superior negotiation skills enhance negotiation power. Modern negotiation theory has taught us that we can maximize results if we have identified, brainstormed and brought into the bargaining mix as many tradeable issues as possible. Even mediocre negotiators can do well if they learn how to *create value*. Finding items of value to offer and trade and reaching the best agreements possible are more likely when negotiators employ a collaborative, *interest-based* negotiation strategy rather

breach of a settlement agreement in the Court of Claims if the agreement can be fairly interpreted to contemplate monetary damages from a breach. *Id* at 1178. Many parties to OSC mediations include a clause in their settlement agreement that requires them to return to OSC mediation if there is a dispute regarding the settlement agreement.⁵² One reason is likely the economics of hiring an attorney. A mid-level Federal government position (GS-11) pays \$56,428 annually. The highest GS level (15) pays \$132,122, plus locality pay of up to 29%. *See generally*, Office of Personnel Management, *2015 General Schedule Locality Pay Tables*, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2015/general-schedule/> (last visited Dec. 7, 2015). The average cost to evaluate and file an employment lawsuit is \$4,500, and the average attorneys' fees in an employment matter through trial is \$88,000. Paula Hannaford-Agor, *Caseload Highlights: Estimating the Cost of Civil Litigation*, 7 http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csp_online2.ashx. Employees may get part or all of their attorneys' fees reimbursed by the agency in a PPP case if they "substantially prevail" in court. *See* 5 U.S.C. § 1221(g). However, MSPB data for whistleblower retaliation cases shows that in FY 2014, employee-complainants prevailed in only 5% of cases that went to hearing. U.S. Merit Systems Protection Board, *Annual Performance Report for FY 2014*, at Appendix A (May 29, 2015) (<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>). For most employees, OSC is their best chance to obtain tangible recompense for alleged violations of PPP laws. (<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>). For most employees, OSC is their best chance to obtain tangible recompense for alleged violations of PPP laws. OSC's FY 2014 data shows that approximately 50% of cases investigated by IPD result in corrective action for the employee; in ADR over 62% of cases that go through mediation result in a settlement. *See* U.S. Office of Special Counsel, *OSC Annual Report to Congress FY 2014*, at 24, 31 (<https://osc.gov/Resources/OSC%20Annual%20Report%20to%20Congress%20FY%202014.pdf>).

than only a “distributive,” competitive one.⁵³ In interest-based negotiation, the negotiators seek to identify and reconcile their *interests* rather than positions. It is a simple concept, but stunningly effective. Once the creativity has run its course, the more traditional “haggling” part of negotiation is usually used to divide up the remaining spoils. Researchers sometimes refer to this process as *claiming* value. Traditional competitive bargaining tactics are useful for claiming, but not for *creating* value. Since the greatest way to increase negotiation gains is usually through expanding the pie (and thus each person’s portion) rather than claiming a large piece of a small pie, negotiators who engage in interest-based bargaining, all other things being equal, will get the best results.⁵⁴ For example, an employee and her supervisor may start bargaining over a performance review and bonus, but leave the discussion with 1) agreed upon modifications to her performance review, 2) an agreement that the employee will be appointed to a special project that will enhance her skills and professional visibility, and 3) an agreed upon process for more frequent discussion of performance on an informal basis.

OSC mediators thus emphasize negotiation coaching, particularly value creation, knowing that these techniques tend to even the playing field by enabling both parties to obtain more of what they want in a mediated settlement. As Department of Justice Community Relations Service mediator Silke Hansen explains:

... I offer pre-mediation training to both sides. I also use that as a way to help each of the parties identify what their interests and concerns are, and what they hope to get out of this process. ... I want to make sure that both sides are heard and that we can talk about how each side's needs can be met. I also let the institution know that it's in their best interests to have a well-trained, capable party on the other side because it will be easier to deal with and negotiate with them if they are capable.⁵⁵

OSC uses a highly skilled group of full-time as well as collateral duty mediators who are trained in both dispute resolution skills and Federal employment law. The mediators take *both* parties through detailed conversations to ascertain their interests and goals. Once interests are identified mediators help the parties begin to brainstorm new and different options that could meet those interests. *Pro se* parties receive as much individualized help as they need.

⁵³ See, e.g., Lax and Sebenius *supra* note 26; Leigh L. Thompson, Jiunwen Wang & Brian C. Gunia, *Negotiation Annual Review*, ANNU. REV. PSYCH. 491, 493-494 (2010); Max Bazerman & Deepak Malhotra, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* (2008).

⁵⁴ E.g., Lax and Sebenius, *supra* note 26.

⁵⁵ Silke Hansen interview from the Civil Rights Mediation Oral History Project. Available online at http://www.colorado.edu/conflict/civil_rights/interviews/Silke_Hansen.html (Last visited December 11, 2015). See also Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 19 (2000) (“We do contend, however, that greater power is not an unmixed blessing nor is it guaranteed to produce expected results. In short, exercising greater power calls for subtle and nimble skills that are almost as demanding as those required for negotiating with less power.”).

In the pre-mediation exchange of information, desired settlement options may be shared in order to give the other party time to research. For example, an employee may wish to work in a different office or location. The mediators and the employee may decide to share this interest with the agency prior to the mediation so that the agency can develop reassignment options to bring to the table. As this mediation preparation continues, parties have the opportunity to ask questions, revise positions, and seek further information from subject matter experts. The attention given to preparation ensures that both parties are fully prepared for a thorough, creative and productive mediation. This level of preparation tends to put the parties onto a more level playing field with respect to information and negotiation strategy.

Subject matter experts, co-mediators and support persons. Subject Matter Experts emerged from the DSD process to meet the needs of parties in USERRA mediations. Veterans' organizations and military departments found that in USERRA cases, employers generally intended to follow the law but were confused as to what it required of them. When educated, agency management was usually willing to comply. OSC incorporated this understanding into its USERRA mediations by borrowing a concept from the U.S. Navy's mediation program—the use of the “Subject Matter Expert,” or “SME.”

At OSC, these experts are senior IPD attorneys who have broad knowledge of PPP and/or USERRA, OSC investigation and prosecution practices as well as MSPB case law and outcomes. They can answer questions about case law, OSC investigation procedures, appeal rights and related matters. The SME is disqualified from investigating the case should it not settle and move on to IPD. The SME is available to any mediation participant at any time during the process. Today, both unrepresented and represented parties take advantage of this resource. OSC mediators discuss this resource with parties throughout the case. For the unrepresented employee, it helps diminish the potential strategic advantage of agency representatives, who usually have counsel and may be “repeat players” in employment mediations.⁵⁶

The presence of a professional mediator or co-mediators addresses another concern expressed by employees during feedback sessions: they felt outnumbered when they arrive at mediation by themselves and the agency has two or three individuals on their side of the table. Particularly when there are two co-mediators managing the communications, employees have told us they feel the room is more balanced.

During mediation, employees or agency managers who may need support to communicate effectively can discuss their approach in confidential sessions (caucuses) with the mediators. Mediation techniques such as summarizing and reframing can enhance the parties' communication. When mediators paraphrase and reframe important points, both parties can

⁵⁶ Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer A Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 339 (2005).

potentially hear the message in a different way.⁵⁷ Simply listening to a communication from a neutral can diminish cognitive biases such as reactive devaluation.⁵⁸

The ADR program also established a policy that allows employees to bring a support person to the mediation. That person can be anyone the employee feels would help them make a decision. Negotiation preparation discussions with mediators, access to a SME, and the availability of a support person can counteract, to some extent, disadvantages of position and resources.

Flexibility. The last major feature of OSC's mediations that affects the balance of negotiation power is the *flexibility* of the process. The mediators work with the parties to set a fruitful environment for the mediation session. OSC works with agencies to bring to the mediation table a management representative who has strong interpersonal skills. The mediator continually asks him or herself: *what does each party need to make a good decision?* Sometimes the parties do not want an in-person meeting; if so the mediators will work through phone or video calls. Unrepresented employees may bring a support person not only to the mediation but also to the SME conversation or any other pre-mediation phone call. In some cases, remote agency offices must be coordinated and the OSC mediators are best positioned to convene the decisionmakers in order to facilitate their mediation preparation and decisionmaking. Agency attorneys often take advantage of the subject matter expert call as a way to educate the management officials who must make a decision on behalf of their agency. OSC mediators support the parties in obtaining whatever information they need to make a decision.

Professionalism. OSC co-mediators are able to talk with each other throughout the process to choose the most effective process strategies tailored to each case. A sole mediator who encounters a challenge during the mediation process is encouraged to speak with the ADR Unit Chief, who serves as an "ad hoc" co-mediator and coach. Active cases are reviewed in a weekly ADR Unit case status meeting. Full-time and collateral duty mediators meet bi-monthly to keep abreast of the latest research and best practices in the field. The ADR Unit holds trainings for mediators (and other OSC staff) in the principles of conflict resolution, negotiation and communication.

Mediators are encouraged to seek feedback from parties during the process; parties may also take any questions or concerns to the ADR Unit Chief. OSC conducts evaluation phone calls to parties after the mediation has concluded; this feedback is important information that the Chief uses to continually improve and adapt the ADR program to meet the needs of the parties. The

⁵⁷ E.g., Kahneman and Twersky demonstrated that when making choices under uncertainty the framing of each option influences our tendency to prefer one over the other. D. Kahneman, & A. Tversky, *Prospect theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); A. Tversky & D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124 (1974); see also Chia-Jung Tsay & Max H. Bazerman, *A Decision-making Perspective to Negotiation: A Review of the Past and a Look into the Future*, HARV. BUSINESS SCHOOL WORKING PAPER 10-002, at 4(2009) (available at <http://www.hbs.edu/faculty/Publication%20Files/10-002.pdf>).

⁵⁸ See Richard Birke and Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 3 *Harv. Neg. L. Rev.* 1, 47-49 (1999).

opportunity to give direct feedback about the process allows the parties a voice in shaping the process for future parties and helps OSC maintain a quality and fair process.

III. SUGGESTIONS AND CONCLUSION

A. Potential Role for Law Schools

Clinical opportunities through legal education are increasing rapidly. The American Bar Association recently added a requirement that law schools include a minimum number of hours of simulation coursework in order to be accredited.⁵⁹ One fruitful ground for clinic cases is Federal agency legal disputes. Through the Administrative Dispute Resolution Act of 1996, Congress encouraged Federal agencies to use ADR. In addition to OSC, other agencies with similar enforcement responsibilities offer mediation.⁶⁰ For example, the Merit System Protection Board⁶¹ and the Equal Employment Opportunities Commission⁶² offer mediation for cases filed with them. Both programs utilize trained mediators and provide the service throughout the United States free of cost to the parties. As with OSC, if a case does not settle the parties simply proceed to traditional investigation or litigation.⁶³ The programs are effective. MSPB reports that three in five cases mediated settle during the process and that over ninety-five percent of participants in MSBP's mediation process report that they would engage in the process again.⁶⁴

Although process features can help an unrepresented employee participate meaningfully in mediation, supervised volunteer student attorneys could bring the case to a completely new level. The University of San Francisco School of Law runs a successful Employment Law Clinic that trains students to represent clients in EEOC and MSPB mediations.⁶⁵ Administrative proceedings are a less formal litigation environment, well suited for educating law students. Focusing students on effective legal dispute resolution advocacy provides an opportunity for them to learn one of the most frequently used skills practicing attorneys need. It also makes employment mediations a more even playing field for those unrepresented employees whose livelihood is at stake.

⁵⁹ American Bar Association, Section on Legal Education and Admissions to the Bar, Managing Director's Guidance Memo, Standards 303(a)(3), 303(b), and 304 (March 2015); http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governance/cedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf

⁶⁰ 5 U.S.C. §572. Also, EEOC Federal Sector regulations require all Federal agencies to offer mediation for EEO claims of their employees. U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/federal/adr/index.cfm> <http://www.eeoc.gov/federal/adr/fsmispilotprog.cfm> (LAST VISITED NOV. 20,2015). Rule 18.2.2(b)(ii).

⁶¹ U.S. MERIT SYST. PROTECTION BOARD, <http://www.mspb.gov/appeals/mediationappeals.htm> (Last Visited Nov. 20,2015). Rule 18.2.2(b)(ii)

⁶² U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/mediation.cfm> (Last Visited Nov. 20,2015). Rule 18.2.2(b)(ii)

⁶³ *Id.*

⁶⁴ U.S. MERIT SYST. PROTECTION BOARD, <http://www.mspb.gov/appeals/mediationappeals.htm> (Last Visited Nov. 20,2015). Rule 18.2.2(b)(ii)

⁶⁵ Law Clinics, Employment Law Clinic, <https://www.usfca.edu/law/professional-skills/law-clinics> (accessed March 28, 2017).

B. Recommendations

Based on OSC's experience, the following mediation process features in ongoing ADR programs can help ensure that all parties are able to meaningfully negotiate and settle their legal disputes:

- Start with a dispute systems design process in order to tailor the dispute resolution program to the parties and types of disputes it seeks to serve.
- Emphasize exchange of information and thorough negotiation preparation prior to the mediation; encourage parties to prepare with the help of the mediator.
- Encourage a *pro se* party to bring a support person to the mediation.
- Provide information about the applicable law and litigation processes through written materials and/or a neutral subject matter expert available to speak privately with either side in advance of the mediation.
- Use co-mediation both to "even the playing field" when the employee attends alone, and as a quality measure for the mediators and the mediation process.
- Find and make use of a mediator "coach"/expert to whom mediators can turn, during and after the mediation if strategic or ethical questions arise.

The University of the District of Columbia's Symposium challenged experts in the field to explore whether safeguards should be included in ADR processes to prevent a "second-class justice". At OSC, the ADR program is faced with recurring power disparities due to both the inherent power imbalance in employment relationships and unequal legal representation. OSC has found that process features such as negotiation coaching, the use of support persons and subject matter experts, flexibility and co-mediation give unrepresented and represented parties alike the information and support they need to make decisions that are right for them. The DSD process was invaluable in uncovering recurring power disparities and developing processes to address them.