The Rhetorics of Negotiations

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This article offers a framework for understanding negotiations in terms of several distinct and coherent “rhetorics” (or sets of speech acts). These are (1) the rhetoric of distributive bargaining (haggling); (2) the rhetoric of integrative or “win-win” bargaining; (3) the rhetoric of argument, including formal legal argument; (4) the rhetorics of selling and threatening; (5) the rhetorics by which one party might seek to manage the other’s understandings of the parties and their situation; (6) the rhetoric of narrative; and (7) the rhetoric of reciprocity. In this way, the author seeks to identify and explain the full range of speech acts that may simultaneously bear upon the conduct and the outcome of negotiations. The author departs from existing literatures that divide the universe of possible negotiations according to their particular characteristics (e.g., zero-sum v. non-zero-sum games); identify alternative styles or approaches among which negotiators must choose (e.g., competitive v. cooperative, win-lose v. win-win); or argue that one such style or approach is ethically or instrumentally superior to another. The author’s argument draws on the literatures of rhetoric, communications and argumentation; economics and game theory; sociology, social psychology, anthropology and literary theory; political and diplomatic history; labor management relations; the manuals for criminal interrogation; and six centuries of self-help manuals. It also draws on Virgil’s AENEID and Shakespeare’s HENRY V and OTHELLO; on the propaganda films of Leni Riefenstahl and Frank Capra; and on TO KILL A MOCKINGBIRD, LAWRENCE OF ARABIA, THE GODFATHER, THE UNTOUCHABLES, THE TEN MEN and A PRETTY WOMAN.

Lawyers are generally counted as successful in the degree to which they are effective at producing instrumental results through their strategic speaking. Much of that speaking, perhaps even most, involves the conduct of negotiations. It is through negotiations that lawyers reach almost all of their agreements and settle almost all of their differences. Most lawsuits end in negotiated settlements, and even those that do not may entail a wide range of negotiations over both the possibility of settlement and the conduct of the litigation. Outside the realm of litigation, many lawyers spend great portions of their time negotiating agreements of one kind or another. And finally, of course, they are constantly involved in diverse negotiations with their clients, their colleagues, their staff, their families, and all of those with whom they interact in the course of the day. Under these circumstances, a reasonably comprehensive understanding of negotiations may be of immeasurable importance to a practicing lawyer.

My purpose in this paper is to offer a framework for such an understanding, a framework that will be set out in terms of seven distinct “rhetorics.” I begin, then, with two definitions. By “negotiation,” I mean any situation or process in which two or more parties to some possible consensual agreement seek to reach that agreement.
without the aid or intervention of an authoritative third party such as a judge. And by “rhetoric” I mean a set of speech acts or discursive conventions through which such parties might seek to reach such an agreement. My use of the plural term “rhetorics” is meant to suggest that the process of negotiations is best understood not as a single undifferentiated universe of speech acts or rhetorical “moves” but as a number of distinct sets of speech acts.

This constitutes a significant departure from the existing literature. To date, most attempts to establish a framework for understanding negotiations have sought either to divide the universe of possible negotiations according to their particular characteristics (e.g., zero-sum v. non-zero sum games); to identify alternative styles or approaches among which negotiators must choose (e.g., competitive v. cooperative, win-lose v. win-win); or to argue that one such style or approach is ethically or

1 The game theorists’ distinction between zero-sum and non-zero-sum games has become the distinction between those circumstances that present opportunities for “distributive” (or win-lose) bargaining and those other circumstances that present, or also present, opportunities for “integrative” (or win-win) bargaining. See, e.g., RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (1965); DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); Gerald B. Wetlaufer, The Limits of Integrative Bargaining, 85 GEO. L.J. 369 (1996) (arguing that the range of circumstances presenting opportunities for integrative bargaining has sometimes been overstated). Analytically, this distinction between the circumstances that present opportunities for distributive and integrative bargaining is different from the distinction that these authors often make between tactics (speech acts) that are likely to prove useful in dealing with the two kinds of circumstances. See infra note 2.

2 There are three main literatures dealing with alternative styles or approaches negotiators might choose to conduct their business. One deals with various forms of the distinction between “cooperative” and “competitive” styles. See, e.g., Morton Deutsch, A Theory of Competition and Cooperation, 2 HUM. REL. 129-151 (1949); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); Dean Tjosvold, The Goal Interdependence Approach to Communication in Conflict: An Organizational Study, in Theory and Research, in CONFLICT MANAGEMENT (M.A. Rahim ed., 1990); Gerald R. Williams, Style and Effectiveness in Negotiation, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN (L. Hall ed., 1993).

A second such literature has developed a set of five styles based upon differing positions on a two-dimensional grid in which one axis measures concern for self and the other measures concern for other. The resulting styles usually include competition, avoidance, accommodation, collaboration and compromise. See, e.g., Ralph H. Kilmann & Kenneth W. Thomas, Developing a Forced-Choice Measure of Conflict-Handling Behavior: The MODE Instrument, 37 EDUC. & PSYCH. MEASUREMENT 309-25 (1977); Kenneth W. Thomas, Conflict and Conflict Management, in HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (M.D. Dunnette ed., 1976); Dean G. Pruitt, Strategic Choice in Negotiation, 27 AM. BEHAV. SCIENTIST 167-194 (1983); William W. Wilmot & Joyce L. Hocker, INTERPERSONAL CONFLICT (6th ed., 2001) (Chapter 5: Styles and Tactics).

A third body of work, already described in note 1 supra, arises out of game theory’s distinction between zero-sum and non-zero sum games. Here the distinctions between “competitive” and “cooperative” and between “collaboration” and “compromise” give way to the distinction between “distributive” and “integrative” bargaining. See, e.g., RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (1965); DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981); HOWARD RAIFFA, THE ART AND SCIENCE OF
instrumentally superior to another. Those that deal not just with styles or approaches but also with tactics generally confine themselves to the tactics of distributive and integrative bargaining – tactics that correspond to two of my seven rhetorics – and many are content to describe the process in terms of only one. I will count this essay successful if I persuade my readers that the process of negotiations may usefully be described by reference to several of these seven rhetorics. Beyond that minimal purpose, I will suggest that all seven of these rhetorics are relevant to the conduct of negotiations, that each of the seven is distinguishable from the others, and that each of the seven can be studied, taught and learned.

I propose that the rhetorics of negotiations include the following:

1. The rhetoric of distributive bargaining (a.k.a., haggling);
2. The rhetoric of integrative or “win-win” bargaining;
3. The rhetoric of argument, including formal legal argument;
4. The allied rhetorics of selling and threatening;
5. The rhetorics by which we manage others’ understandings of who we are, of who they are, of our relationship, or of their situation;

Negotiation (1982); David A. Lax & James K. Sebenius, The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain (1986). This distinction between distributive and integrative bargaining is useful both in distinguishing between classes of circumstances (those that offer opportunities for one or the other or both sorts of bargaining), see supra note 1, and also in distinguishing between classes of tactics (those that are appropriate to one or the other of these sorts of bargaining). When this distinction is applied not to circumstances but to tactics, it can be said to describe two alternative styles or approaches to negotiations. It then also approximates the distinction I will draw between the “rhetoric of distributive bargaining” and the “rhetoric of integrative bargaining.” But while game theorists might fairly believe that zero-sum and non-zero-sum games (the provinces, respectively, of distributive and integrative bargaining) are, if taken together, in some sense complete, comprehensive and exhaustive of all possibilities, I will argue that the rhetorics of distributive and integrative bargaining, taken together, are only two of the seven rhetorics that are relevant to the conduct of negotiations.

3 Closely associated with this material dealing with the distinction between distributive and integrative bargaining is an important series of works that recommend – prescriptively – one or another version of the integrative approach to negotiation. Mary Parker Follett, Constructive Conflict, in Dynamic Administration: The Collected Papers of Mary Parker Follett (H. Metcalf & L. Urwick eds. 1942) (paper delivered in 1925; arguing that “integration” is a means of dealing with differences that is superior to “domination” and “compromise”); Roger Fisher & William Ury, Getting to Yes (1981) (arguing that the “principled,” “win-win” (integrative) approach to negotiations is superior to the conventional win-lose (confrontational, integrative, power-based) approach); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984) (arguing that the problem-solving (integrative) approach to negotiations is superior to the conventional adversarial (distributive) approach; treats the two as alternative “approaches,” “models,” “orientations” and “conceptions” of negotiations).

4 See, e.g., the material described supra in notes 2 and 3. See also, e.g., James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations, 1980 AM B. Found. Res. J. 926 (assuming, at least in retrospect, that distributive bargaining (haggling) is the single rhetoric relevant to the conduct of negotiations).
(6) the rhetoric of narrative or story-telling; and
(7) the rhetoric of reciprocity.

Each of these rhetorics is distinct from the others, internally coherent, and susceptible of description. Each works in a different way and serves a different purpose. Each can be recognized, analyzed, taught, learned and practiced. If we have the necessary knowledge, skill and self-control – and subject only to occasional problems of incompatibility – any of us can use or not use these rhetorics in accordance with their utility. Further, none of these rhetorics is somehow “natural” to the process of negotiations in ways that the others are not. And none is the “master rhetoric” of negotiations in the sense that one can, within any one of them, perform anything like the full range of rhetorical acts that may be useful and effective in negotiations. Each of the rhetorics has its strengths and its weaknesses, and each is appropriate or inappropriate to certain circumstances and to certain tasks. This is no less true of the rhetoric of formal, legal argument than it is, say, of the rhetoric of haggling. Having said all that, I believe that these seven rhetorics – taken together – represent a reasonably complete catalogue of the speech acts relevant to the conduct of negotiations.

The nature of these rhetorics – and of their relationship to one another – may be illustrated by reference to three of these rhetorics: legal argument, distributive bargaining, and selling. First, within the rhetoric of legal argument, one might hear it said that “it is the law that your client is liable to mine if x and y; x and y are the case; therefore your client is liable to mine.” Quite differently, in the rhetoric of distributive bargaining one might hear “the asking price is $240,000.” And finally, within the rhetoric of selling, a seller might say “you may not realize this, but last year 90% of the students graduating from West High were admitted to Ivy League colleges.” In the rhetoric of legal argument, we seek to establish a principle or an entitlement with which the other person may be obligated to conform. In the rhetoric of distributive bargaining, we name a price that we hope will be accepted while also initiating a process that, through the give and take of haggling, may lead to agreement at a lower but still acceptable price. And in the rhetoric of selling, we seek to strengthen the other party’s desire to reach agreement or, perhaps more precisely, to increase their valuation of the thing to be acquired and in that way to increase the amount they would be willing to pay for the thing in question. My hypothesis is that these three statements are different in kind, that they have different intended effects, and that they produce those effects in different ways. It is also my hypothesis that it is much easier to think about, and to learn, the conventions of these three rhetorics as distinct sets of rhetorical conventions than it is somehow to think about and to learn, in some generalized way, a larger and unitary “art” or “rhetoric” (in the singular) of negotiations.

The rules and conventions of legal argument are different from the rules and conventions of haggling and both of those are different in kind from the rules of selling. That is not to say these different rhetorics may not complement each other and
work together, as will be the case when someone seeking to sell a car will seek simultaneously to haggle and to sell. At the same time, however, it is no less true that various of the rhetorics of negotiations may be not just different from one another but may sometimes be incompatible. The most obvious of these incompatibilities is between the rhetoric of distributive bargaining, which puts a premium on deception, and the rhetoric of integrative bargaining, which puts a corresponding premium on openness and truth-telling. Further, as I have already suggested, none of these rhetorics is equally suited to all tasks. Someone who went into a court of law armed not with the rhetoric of legal argument but only with the rhetoric of distributive bargaining (haggling) would sacrifice a great deal of effectiveness in her dealings with the judge. And perhaps it is only a lawyer, and an ineffective one at that, who would use the rhetoric of formal argument in an effort to sell a used car or a vacuum cleaner, or to persuade a child to help clean the basement, or to resolve a difference one might have with one’s date about what movie to see or what to do after. In those settings, the rhetoric of formal argument will be not just ineffective but it may also be dysfunctional and counterproductive.

1. The Rhetoric of Distributive Bargaining (a.k.a. Haggling)

In introducing the rhetoric of distributive bargaining, we shall assume that there are two parties to the negotiation, that each party knows its reservation price and that those reservation prices are stable and not known to the party’s adversary. We will also assume, at least at first, that there exists a zone of agreement. With all this in place, and viewed in isolation from other rhetorics that are sometimes incompatible, the rhetoric of distributive bargaining – we might also call it the rhetoric of haggling or of dickering – may be described in fairly simple terms. Indeed, James J. White plausibly argues that it comes down to only two things: being successful, first, in misrepresenting one’s own reservation price and, second, in seeing through your adversary’s attempt to misrepresent theirs.

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his [the first negotiator’s] hand. Like the poker player, in a variety of ways he 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

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5“Reservation price” is a term that is familiar to economists and to those who participate in certain kinds of auctions. It refers to the price at or below which a prospective seller will not sell some particular thing – and to the price at or above which a prospective buyer will not buy. The term appears to derive from the practice, at auctions, by which prospective sellers offer goods for sale subject to the “reservation” that no sale shall be made except at a price higher than the sellers’ “reserve” or “reservation” price. A party’s reservation price is sometimes referred to as their “indifference point,” that term referring to the price at which the party becomes indifferent to the transaction under negotiation and beyond which the party would prefer not to do the deal.
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 show 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 [reservation price], is the essence of negotiation. 6

If we confine White’s statement to the domain of distributive bargaining, and don’t attempt to make of it a complete theory of negotiations, it provides us with a good and workable starting point for our understanding of distributive bargaining.

A fuller description of the rhetoric of distributive bargaining is only a little more complex. According to this fuller description, it remains the object of the parties to discover the other person’s true reservation price while creating a favorable apprehension (or misapprehension) as to their own. This process is then supplemented by various details of a linguistic dance by which a party makes and implements his decisions as to

1. whether, at what point, and in what way to make an opening offer, and how one is to read and respond to the other’s first and subsequent offers;
2. how one is to manage the pattern of one’s own concessions, and how one is to read and respond to the other party’s pattern of concessions;
3. how one is to manage the levels of one’s own commitment, and to read and respond to the levels of commitment expressed by the other party;
4. how one is to manage the range of possible threats that one might make, and to read and respond to the various threats that might be made by the other party;
5. how one is to manage the reasons, arguments, appeals, and explanations with which one accompanies one’s own offers, commitments, and threats, and how one is to read and respond to those with which the other party accompanies her offers, commitments, and threats; and
6. how one is to manage one’s own communications with respect to need, urgency, aversion to risk, alternatives to this negotiated agreement, and readiness to accept those alternatives, and how one is to read and respond to the other party’s communications on these subjects.

The rhetoric of distributive bargaining has the potential, more than any of our other rhetorics, to become the domain of hard bargaining. It is, in any event, the domain of zero-sum bargaining in which the parties are dividing a pie of fixed size and every

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slice that goes to one party is a slice that will not go to the other. Finally, as Professor White suggests, it is a realm in which winners and losers are largely determined by the success of each of the parties (A) in figuring out her adversary’s (B’s) reservation price while causing that adversary (B) to make a favorable but mistaken assessment of her (A’s) own.

Even this superficial description is enough to make it clear that the rhetoric of distributive bargaining raises a number of exceedingly serious ethical problems. Without attempting to explore these questions in any depth, I would simply say that under a range of circumstances lying works in distributive bargaining, especially competent lying, and that because of the harm it does to our adversaries it may nonetheless be wrong. Perhaps such lies are ethically permissible because they are permitted by “the rules of the game.” Perhaps lies about our reservation price are not really lies at all, or perhaps we as lawyers may even owe some affirmative obligation to lie when it serves the interests of our clients. But it is also quite possible that such lies are effective in promoting our interests and those of our clients but are nonetheless ethically impermissible. That said, the purpose of this essay is to describe the rhetorics of negotiations, and it shall be enough for now to acknowledge the presence of difficult ethical issues.

2. The Rhetoric of Integrative Bargaining

The domain of integrative or “win-win” or “non-zero-sum game” negotiations is that within which the parties to a negotiation may reach a number of different outcomes and in which “the size of the pie” may vary in a very particular way. Not in the sense that the pie will be bigger if the parties reach an agreement than if they don’t, for that is true of virtually all bargaining and, more to the point, of all distributive bargaining. And not in the sense that one party cares more about the subject of the negotiation than does the other and in which a “win” by that party might be worth more than a “win” by the other. Rather in the sense that some agreements may be better than other agreements for both parties.

A canonical example of integrative bargaining is found in the parable of the orange. Two brothers are quarreling over the household’s last orange. Conceivably, either brother could end up with the entire orange or he could compromise and cut it in half. But if they understood that one brother wanted only to eat the fruit of the orange and the other wanted only to use the rind of the orange to zest a cake, they would understand that one could have the entire fruit while the other could have the entire

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8 Id. at 1236-72.
9 Example of sale of an old car by the academic, insensible to wealth, to the young family man who is having trouble putting money on the table.
rind. Thus, there is a possible agreement that would leave both parties significantly better off than they would have been had they simply cut the orange in half. Indeed, they could move from a 50-50 agreement to a 100-100 agreement in which they both obtained all of what they wanted.\footnote{Id. at 376-80}

Another such example is set out in \textit{the parable of the opera singer}. Here we assume that Ms. Singer will not perform for less than $14,000 and that Mr. Owner-of-the-Local-Auditorium, having taken account of his expenses and the number of seats he believes he can sell, cannot offer anything more than $10,000. As long as the parties seek to negotiate for a fixed dollar amount, there is no zone of possible agreement. Thus there is no dollar amount that is, as it must be for Ms. Singer, above $14,000 and is also, as it must be for Mr. Owner, below $10,000. As fate would have it, though, the parties hold different expectations about the number of seats that will be sold. For her part, Ms. Singer is utterly confident that 10,000 tickets will be sold while Mr. Owner – burned once too often in his efforts to sell high culture to the burghers of his small city – is equally confident that sales will not exceed 4000 tickets. Now the parties may exploit this difference and “expand the pie” by negotiating a contingent agreement in which Ms. Singer is paid $1.50 for every seat sold and both parties count themselves as better off than they otherwise would have been in the absence of this agreement.\footnote{Id. at 383. From Ms. Singer’s perspective, such a contract is worth $15,000 ($1.50 per seat times 10,000 seats), which is $1000 better than – higher than – her $14,000 reservation price. From the perspective of Mr. Owner, the perceived cost is $6000 ($1.50 per seat times 4000 seats), which is $4000 better than – lower than – his $10,000 reservation price.}

The circumstances in which there are opportunities for integrative bargaining are quite specific. They are:

(1) differing interests, including multiple issues differently valued;

(2) differing assessments as to future events, including differing probabilistic assessments of
   (a) the likelihood of some future event or
   (b) the likely future value of some variable;

(3) differing preferences regarding risks;

(4) differing time preferences regarding payment or performance\footnote{Id. Space on this list might also be made for circumstances in which it proves possible to reach an agreement while minimizing transaction costs. The often-heard suggestion that there are other circumstances that offered opportunities for integrative bargaining has, I think, generally been put to rest. Id.}

But even within the categories that have been named, there are some circumstances in which opportunities for integrative bargaining exist and others in which they do not.
And, of course, where there are opportunities for integrative bargaining, there may also be opportunities for distributive bargaining.\textsuperscript{14}

Having said that, insofar as we are seeking simply to identify and exploit opportunities for integrative bargaining, the rhetorical task is to secure such information as may permit the fashioning of integrative solutions. In the degree to which such information is being sought within the confines of the negotiations themselves, what is required is a process of inquiry and exploration. Some will say that what is called for is a rhetoric of disclosure, but that is a statement that, at best, requires great qualification.\textsuperscript{15} What is actually required is the discovery of information concerning the other side’s interests and the identification of usable means of expanding the pie. Openness and disclosure are warranted if but only if they are necessary either to that discovery or to the identification of those means.\textsuperscript{16}

3. \textit{The Rhetoric of Formal Argument, including Legal Argument}

Argument is the providing of reasons, grounds, justifications or explanations either in support of, or in opposition to, some claim or position. The reasons invoked may be factual (“all men are mortal”), logical (“that doesn’t follow”) or normative (“that’s not fair”). Arguments may be deductive, inductive or – as is most frequently the case – merely a statement of reasons. They may be formal or informal; linear or non-linear; fully stated or resting on grounds that are merely implied. They include the arguments we might “make” as well as those others we might “have,”\textsuperscript{17} excluding only those quarrels\textsuperscript{18} and other forms of verbal aggressiveness\textsuperscript{19} that do not involve the giving of reasons. They may be dispassionate, objective and civil – or loud, emotional and highly personal. Narrowly rational or purely emotional, pleasant or unpleasant, constructive or destructive, cooperative or competitive, collegial or combative. They may be motivated by good reasons or by bad – by the desire to find the truth or to reach agreement or by the desire to secure advantage, to dominate, or even to humiliate one’s adversary. They may be logically, factually and ethically sound – but

\textsuperscript{14}Id.
\textsuperscript{15}Id. at 390-94.
\textsuperscript{16}Id.
\textsuperscript{18}DOUGLAS N. WALTON & ERICK C. W. KRAEBBE, COMMITMENT IN DIALOGUE: BASIC CONCEPTS OF INTERPERSONAL REASONING (1995) (distinguishing “quarrels” from other types of dialogue including “persuasion dialogue” or “critical discussion”).
for present purposes they don’t cease being speech acts or cease being arguments if they are not.

In most academic literatures, argument is discussed in terms that are expressly normative.\textsuperscript{20} Here, however, I define it in a way that is widely inclusive and purely descriptive. To confine our observations to those arguments that are good or sound or made for some purposes but not for others would blind us to the many ways in which arguments actually function in the conduct of negotiations. And ironically, it would also blind us to a range of difficult and important questions concerning the nature, the consequences and the ethics of argument.

In the conduct of negotiations, argument may be brought to bear on a variety of different subjects. First, the parties may offer arguments, reasons or explanations related to the value of whatever is the subject of the negotiation and of possible exchange. Thus a seller may offer reasons supporting the value of this car to this buyer, while the buyer may cite its deficiencies and explain how it really doesn’t meet his needs. Or a plaintiff’s lawyer might argue for the strength and value of his case while the defendant argues that – as matters of fact and law – that case is doomed to failure. Or either party may offer reasons in support of the representations he has made about his situation, including such matters as his desire or need to reach an agreement, the nature of his underlying interests, or the quality of his alternatives to this negotiated transaction. Second, a party might offer arguments relevant to the consequences of a failure to reach agreement, including arguments that might bear upon the seriousness of some warning or the credibility of some threat. Third, the parties may offer arguments, reasons or explanations related to the conduct or behavior of one or another of the parties within the course of the negotiation, as for instance in connection with the offers and concessions that are being made. This often involves defending or justifying one’s own conduct or criticizing, attacking or making demands related to the conduct of one’s adversary – and it usually invokes some norm of fairness, reasonableness, reciprocity, good faith or civility. Finally, the parties may offer arguments concerning the appropriateness of various points at which agreement could ultimately be reached, including such positions as mid-points and difference-splitting, round numbers, “objective criteria” and “neutral principles.”\textsuperscript{21}

If arguments may be offered on a variety of subjects related to a negotiation, they may also be offered for a variety of purposes. They may be offered for the


\textsuperscript{21}Arguments of these four kinds are strongly – though not exclusively – associated with what are here described as the rhetorics of distributive bargaining and of selling and threatening. Argument may also be serve a probing or exploratory function associated with integrative bargaining.
purpose of securing the other party’s voluntary assent as to the merits of the argument; of demonstrating the strength of the argument in terms of the likelihood that it will persuade some important third party (e.g., judge, jury, prosecutor, public opinion); or of demonstrating the strength of the speaker’s convictions as to merits of the argument (and thus, e.g., the speaker’s willingness to settle a lawsuit or to agree to some particular settlement). They may be offered for the purpose of securing some relational or interactional objective (e.g., domination, resistance of domination) or as a an aspect of probing and exploring and testing and sparring or even playing with one’s adversary.22

My primary objective, of course, is to suggest that argument may be one of the several rhetorics through which negotiations are conducted. It is a coherent set of speech acts and conventions concerning their use. And it is distinctive, at least in degree, from the other “rhetorics” that might be brought to bear in the course of a negotiation. If this be so, then a distinction can be drawn between, for instance, the rhetoric of argument and the discourse through which the tourist and the rug merchant – or the car salesman and his prospect – might dicker and haggle their way toward a mutually acceptable price.23 Between the speech acts comprising formal legal argument and the speech acts of advertising and selling, whether what is being advertised and sold is beer, clothes, cars, houses, or aluminum siding.24 Between the rhetoric of formal argument and the rhetoric by which Martin Luther King and Ronald Reagan moved their respective audiences.25 Between the rhetoric of argument and the system of speech acts through which Leni Riefenstahl, Frank Capra and others constructed the propaganda films of World War II.26 And between the syllogisms and other speech acts of formal argument and the often crudely demonstrative speech acts by which the Godfather persuaded his adversaries that his was an offer they couldn’t refuse.27 This said, it is of course true that the rhetoric of argument may be deployed in support of – or even embedded within – others of the rhetorics of negotiation (e.g., distributive bargaining, selling, threatening), just as other rhetorics (e.g., narrative) may sometimes be deployed in support of or embedded within the rhetoric of argument.

Additionally, I would like to raise a series of questions concerning the particular nature of argument – especially formal legal argument – and its place and effects within the larger process of negotiation. Within our academic literature, the

22See, e.g., Beatrice v. Benedict in WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING (1598); lunches with lawyers, law school faculty, law students passim 1967-2005.
23See infra Part I (distributive bargaining).
24See infra Part IV.A. (selling).
25See infra, e.g., Parts V.B. (managing others’ understanding of who they are), V.C. (managing others’ understanding of the situation they are in), VI. (narrative).
26See infra, e.g., Parts V.B. (managing others’ understanding of who they are), V.C. (managing others’ understanding of the situation they are in), VI. (narrative).
27THE GODFATHER (1972). See infra, e.g., Parts IV.B. (threatening), V.A. (managing others’ understanding of who the speaker is); VI. (narrative).
conventional wisdom on this subject is fairly represented by three related positions, each of which has been ably elaborated in texts that have contributed greatly to the development of our field. First, Melvin Eisenberg has argued that legal argument actually, in fact, dominates the process of negotiations involving the resolution of disputes and that it may generally be counted on to produce the right result. Next, Roger Fisher, William Ury and Bruce Patton assert that formal legal argument – they call it “principled” bargaining – is the most effective means by which a particular party to a negotiation can advance her own particular interests and that such discourse can also be relied upon, simultaneously, to produce the best outcome for all parties.

28Melvin A. Eisenberg, Private Ordering through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. REV. 637 (1976). Eisenberg understands the actual conduct of negotiation to be fundamentally norm-centered. Id. at 638. Thus he asserts that real-world negotiations are dominated by “elements characteristically associated with distinctively legal processes – principles, rules, precedent, and reasoned elaboration,” id. at 637-39; that the conduct of negotiations consists largely of the “invocation, elaboration, and distinction of principles, rules, and precedents” id. at 639; and that “in most cases of dispute-negotiation the outcome is heavily determined by the principles, rules, and precedents that the parties invoke,” id. at 639. He further asserts that lawyers contribute to the norm-centeredness of these negotiations because they are predisposed to “negotiate on the basis of legal principles, rules, and precedents,” id. at 664-65, because they have been trained to a professional norm of “objectivity,” id. at 663, and because they function in a manner “strikingly similar to a formal adjudicative unit,” namely a judge, id. at 665. In his understanding of negotiations, the “non-normative elements” of negotiation – including those associated with bargaining power – “do not begin to operate until norms and facts have been focused near their limits of precision.” Id. at 680. In these ways he “rejects the perception of negotiation as “the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff.” Id. at 638. All this being the case, he is happily able to conclude that the process of “private ordering” through negotiations is both lawful and legitimate.

29ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES (2d ed. 1991). If Eisenberg argued that certain forms of negotiations are, in actual fact, “norm-centered,” Fisher, Ury and Patton urge negotiators to engage in “principled negotiation” in order to maximize their own individual interests (or the interests of those they represent in negotiations). In their view, negotiators must choose between “positioned bargaining” and “principled” negotiations. Positional bargaining, as they see it, is a contest of “naked will,” id. at 12, and a constant battle for dominance, id. at 83. It is a process in which people get their way by being stubborn and intransigent, id. at 12, and in which each side “locks themselves into their positions,” refuses to budge, and tries to convince the other side of the impossibility of their ever changing their original position, id. at 4-5. And it is a process by which people are browbeaten, pressured, manipulated, subjected to threats and ultimatums – and in which through such pressures people are forced to yield, to horse-trade, to make arbitrary concessions, and to reach “arbitrary” agreements. Id. at 91, 91, 152, 91, 82, 91, 12.

Principled negotiation, in their view, is all about the reasoned elaboration of such objective standards and criteria as principles and precedent. Based on principle not pressure, it is a process in which negotiators “never yield to pressure, only principle” and “refuse to budge except on that basis.” It is a process that is “on the merits” and in which each participant is open to reasoned persuasion and ultimately behave – in language almost identical to Eisenberg’s – “like a judge.” Id.

For Fisher, Ury and Patton, the choice between principled and positional negotiation is easy. Positional bargaining is difficult, costly, and inefficient; it produces anger, resentment, and hostility and is destructive of relationships; it causes negotiations to fail and, even when agreements are reached, it produces bad agreements. In stark contrast, principled negotiation is effective and efficient; it is amicable and thus preserves relationships; it offers the “power” of “legitimacy”; and “[i]n virtually
Finally, Robert Condlin asserts that formal argument has a positive role to play in negotiations, but unlike Fisher and Ury, Condlin’s is an expressly ethical argument. More specifically, he argues that negotiators ought to operate primarily through the rhetoric of formal legal argument and that they ought to embrace his ideal of “cooperative argument,” not because it will allow them to maximize their individual interests — he seems to assume it may not — but because it is ethically the right thing to do.30

While this is not the place to do so in any but the most summary way, I will elsewhere take issue with these views. In doing so, I will accept Condlin’s distinction between cooperative and competitive argument31 but then suggest that it is competitive every case, the outcome will be better for both sides with principled” rather than positional “negotiation.” Id. This argument, like Eisenberg’s before it, rests on the belief that a lawyer selects and conducts his arguments not in the spirit of advocates but rather in the spirit of a neutral and disinterested judge. And on the further claim that it is principled negotiation — negotiation in the spirit of the judge — that will best promote the interests of an individual negotiator.

30Robert J. Condlin, “Cases on Both Sides”: Patterns of Argument in Legal Dispute-Negotiation, 44 Md. L. Rev. 65 (1985). It is Professor Robert Condlin who explicitly embraces the normative or ethical case in favor of a positive role for legal argument in the process of negotiation. He asserts, among other things, that negotiated agreements ought to be assessed in terms of whether they have produced “just results,” id. at 67, 82; that parties to legal disputes are entitled to have their disputes resolved in accordance with law, id. at 82; and that “scrupulously legal and moral negotiators” are those who pursue “justifiable outcomes” and “strive honestly to reach settlements that are legal and moral,” id. at 78. He then propounds an ideal of “cooperative argument” in negotiations. In his view, cooperative argument consists of non-coercive, rational analysis, in which the objective is to teach another about the truth of one’s substantive claims.... Cooperative argument raises all relevant issues, takes favorable and unfavorable evidence into account, and is expressed at a pace and manner that make digesting and rebutting easy. It does not rely for its force on factors such as power, stamina, tolerance for conflict, delay, ignorance, status, and the like. In cooperative argument, the image of the adversary is that of an autonomous, rational actor, willing to learn. Id. at 72-74.

Condlin’s ideal of cooperative argument bears a striking resemblance to Fisher, Ury and Patton’s ideal of principled bargaining. But there is a difference, and I think it is crucial, in the argument these authors offer in support of their ideal. Condlin’s argument is expressly ethical. His claim is that negotiators ought to engage in cooperative argument not because it will get them what they want but because it is the right thing to do. Even, one must assume, when doing the right thing will cause them to get not more but less of what they seek. Fisher, Ury and Patton strenuously reject any suggestion that they might be making an ethical argument or that people should follow their suggestions because it is the right thing to do. Instead, they claim to offer an argument about how negotiators would proceed if he were seeking nothing more than the promotion of his own self-interest.

31This distinction bears a close relationship to a number of similar distinctions that have been have asserted and refined since the days of Plato and Aristotle. These include the distinctions between dialectic and rhetoric, heuristic and eristic, conviction and persuasion, critical discussion and persuasion dialogue, cooperative and competitive argumentation, and coalescent and non-coalescent argumentation. PLATO, GORGIAS (Donald J. Zeyl trans., 1987); ARISTOTLE, RHETORIC (W. Rhys Roberts trans., 1954); ARISTOTLE, SOPHISTICAL REFUTATIONS, at 165b13-165b22 p. 279 (W. A. Pickard-Cambridge trans., 1958) (dialectical v. contentious (eristic) arguments); ARISTOTLE, TOPICS, at Bk. 1 101a5-101a17 p. 167 (W. A. Pickard-Cambridge trans., Revised Oxford Translation, 1984)
and not cooperative argument that is by far the more common in the world of actual negotiations and that comports more closely with lawyers’ conventional understandings of their ethical obligations. I will then propose that argument, when it is competitive and partisan, may be less useful and more problematic than is assumed either by Eisenberg or by Fisher, Ury and Patton. Partisan argument tends toward self-righteous simplification, the over-claiming of certainty, and various forms of coerciveness. Accordingly, it may drive the parties further apart rather than bringing them together; call forth resistance and opposition; contribute to the hardening of positions; and undermine the possibilities of compromise and accommodation.

That said, my primary purpose in this section has been to establish the possibility that the rhetoric of formal argument, including formal legal argument, may comprise a coherent set of speech acts and conventions concerning their use and that it might be seen not as some kind of “master rhetoric” but as one among several possible rhetorics that might sometimes be relevant to the conduct of negotiations. I have also attempted to pose a series of questions concerning the nature of legal argument and its place within the larger process of negotiations. This is not the place to resolve the questions of whether lawyers and other real-world negotiators function as partisans seeking to advance their client’s interests or as objective judges; whether argument operates to bring the parties together or to drive them apart; whether the rhetoric of argument may corrode respect for our adversaries; whether it contributes to the hardening of parties’ positions; and whether it undermines the possibility of compromise and accommodation. But, as we go forward in the study of negotiations and of two-party disputing, these questions surely warrant our continued consideration.

4. The Allied Rhetorics of Selling and Threatening

As we have seen, the rhetorics of distributive and integrative bargaining permit two or more parties to discover and settle upon mutually advantageous agreements on the assumption that their preferences and their reservation prices are fixed and stable. In this section, we take up two rhetorics – one that can generally be described as selling and the other, as threatening – through which one party seeks advantage by altering, by changing, another’s preferences, indifference curves, and reservation prices. In the first of these rhetorics, speech acts are designed to shift the potential buyer’s reservation price by causing him to increase the value he assigns to whatever it is that he might secure through the negotiated agreement. In the second, speech acts are designed to shift the potential buyer’s reservation price by causing him to diminish their assessment of, or their valuation of, the situation they would be in if they fail to reach agreement.

When either of these rhetorics is successfully employed by a prospective seller, they increase the potential buyer’s reservation price – the dollar amount more than which the buyer genuinely cannot be induced to pay. In this way they eliminate from the zone of possible agreement precisely those possible agreements which would have been least beneficial to the seller – or they create a zone of agreement when none previously existed. Selling does so by acting upon the buyer’s valuation of what he might buy while threatening does so by acting upon his assessment of his situation should he decide not to buy. In either case, the buyer’s preferences shift in such a way that he is now willing to pay more than he previously would have been willing to pay. And if, by either of these two rhetorics, a seller can induce an increase in the buyer’s reservation price, she will produce a corresponding upward shift in the entire range of favorable outcomes. This shift occurs, at least in part, because the change in the buyer’s reservation price increases the seller’s willingness and ability to resist possible agreements that fall within the now-shortened zone of possible agreement but are at the end of that zone which is least favorable to the prospective seller.

These two sub-rhetorics are closely related and the distinction between them is sometimes imperfect. Further, both sub-rhetorics contain speech acts that are honest

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32One of the most basic ways to improve one’s bargaining position through the alteration of a party’s indifference point occurs when the party to a negotiation sets out to alter and improve her own indifference point, usually by searching or in some other way discovering or developing alternatives to the negotiated agreement. This is easiest to understand if we take a party’s indifference point to be her “best alternative to negotiated agreement” and imagine the party successfully investing time in improving her best alternative to this particular negotiation. In dealing with a car dealer from whom one wants to buy a car, nothing so unambiguously improves one’s position than to search out a better alternative than the one already at hand to a negotiated agreement with that particular dealer. It favorably shifts her indifference point and, with it, the entire range of probable outcomes. Work of this kind is not within the allied rhetorics of selling and threatening. Indeed, it is entirely external to the negotiation at hand – and on which this search work may be brought to bear. It is, however, a case in which one party may seek to improve her position in negotiation through the alteration of a party’s indifference point – in this case through the alteration of her own indifference point.
and useful as well as others that may be destructive and reprehensible.

A. Altering another’s reservation price through the rhetoric of selling, creating needs and desires, creating dissatisfaction

Here I am interested in those rhetorical strategies by which A seeks to improve his own position by shifting, in a direction favorable to A, B’s valuation of whatever it is that A is offering to B. This is most easily illustrated with reference to the efforts at “selling” that are routinely made by those who are offering goods or services in exchange for money, whether that selling is done door-to-door or through enormously expensive television commercials. These sellers are not dickering over the price or seeking to capture the lion’s share of the available surplus. Rather, they are seeking to alter the mind of the target, to create or call forth needs or desires, or to create or call forth dissatisfaction with the target’s existing situation, and thus to alter the target’s reservation price in a manner that improves the seller’s position. In this way the seller may seek to raise the buyer’s desire for and valuation of whatever the buyer is offering to sell and thus to alter – to raise – the buyer’s reservation price. The seller may want to raise the buyer’s desire, valuation and reservation price so she is motivated to buy a product she would not otherwise have bought. Or she may want to raise the buyer’s desire, valuation and reservation price for some particular product (e.g., a particular brand of car or beer) so that, when the time comes to buy, she will prefer that product over the competitors she might otherwise have bought. In either event, the seller seeks to serve his own purposes by creating or increasing the buyer’s desire and thus by raising the buyer’s reservation price for whatever the seller is offering. In negotiations, such a change in the buyer’s desire and valuation will both raise the maximum the buyer is willing to pay and increase the buyer’s willingness to pay the full range of prices below that maximum.

But if this sub-rhetoric is most easily illustrated in the efforts of those who are seeking to sell goods and services, it is essential to understand that this rhetoric potentially flows both ways. If two parties are considering the exchange of one’s apples for the other’s oranges, they may each seek advantage through distributive bargaining, each attempting to discover the other’s (stable) reservation price while creating a favorable misapprehension of their own. Or they may each seek to improve their position by increasing the other’s desire for and valuation of whatever they are offering in the exchange. Mr. Apple seeks to increase Ms. Orange’s desire for apples. Or Ms. Orange seeks to increase Mr. Apple’s desire for oranges. If distributive bargaining is a set of communicative activities that goes on within the assumption that reservation prices are stable, then the activity of selling or otherwise altering the other’s valuation of whatever we are offering – of altering the other’s reservation price – is a different set of activities. While these two sets of activities are almost certainly compatible, they are still different. And the parties efforts to raise the other’s valuation of what they are offering may flow both ways in the course of a single negotiation.
Take as a further example negotiations over the settlement of a simple lawsuit. The plaintiff is offering to exchange her claim for a cash settlement and in that sense she has something, not entirely unlike a car, that she is seeking to sell in exchange for cash. Perhaps among other communicative activities, she will be seeking to alter—specifically to increase—the defendant’s valuation of the plaintiff’s claim, the defendant’s desire to settle, and thus the defendant’s reservation price. And she will do so in the warranted expectation that such an alteration in the defendant’s reservation price will redound to the plaintiff’s benefit. But at the same time that the plaintiff is seeking to alter the defendant’s reservation price to the plaintiff’s own advantage, so may the defendant be engaged in his own version of selling, seeking to increase the plaintiff’s desire for and valuation of the cash the defendant is offering and thus altering the plaintiff’s reservation price to the defendant’s own advantage. This might involve the defendant’s efforts to foreground (1) the difference that cash could make in the plaintiff’s life (thus seeking to increase the plaintiff’s valuation of cash as opposed, for instance, to vindication); (2) the strength of the defendant’s case (thus seeking to increase the plaintiff’s valuation of any cash offer by decreasing his valuation of his own prospects at trial); (3) the benefits to the plaintiff of having cash now rather than at the conclusion of what could be a lengthy lawsuit; and (4) the virtue of having an actual and certain amount of cash over the mere possibility of winning more (thus seeking to increase the plaintiff’s valuation of a certain amount by heightening his sensitivity and aversion to risk).

The rhetorical strategies by which a seller could raise the prospective buyer’s reservation price are several. She could, for instance, demonstrate that purchase would bring with it benefits of a kind that the prospective buyer had not anticipated. She might also take benefits of a kind that the prospective buyer had already identified and make them more prominent in the mind of the buyer. In *The Tin Men* (1987), our salesmen are heard to say:

“You and your lovely wife might have been asking yourself exactly what are the benefits of aluminum siding.”

“It won’t chip, peal, blister, crack, flake, or rust in any way!”

“Only maintenance you’ll ever have you’ll have to wash it down twice a year with a hose!”

“It affords much greater insulation which means it cuts down on your heating bills.”

“I’ll tell you what, only on this sale, I’ll throw in a garden hose on the sale!”

“Let’s do some business.”

“This house will be a monument to your good taste!”

Other such statements might include “The school district is better than you might have thought”; “You’d be surprised how well these cars hold their resale value”; “They are
especially crashworthy and thus will cost less to insure than you might have thought”; “The girls/guys can’t keep their hands off guys/girls who own these cars”; “It’s in much better mechanical condition than you might have had reason to expect”; or “It’s a status symbol.”

The seller might also increase the prospective buyer’s commitment to some particular property by encouraging him to imagine himself having acquired – and enjoying the benefits of – the property.

“Imagine yourself sitting on that deck watching the sun set over that golf course.”

“Why don’t you take it out for a test drive.”

Or she might create a need or desire or dissatisfaction that wasn’t already there.

“Here, kid, try one of these fine reefers – the first one’s free.”

“Does it bother you that people think you’re overweight?”

“Ever consider the possibility you’ve got bad breath?”

Or “that your deodorant isn’t doing its job?”

“You know, don’t you, that other people with families like yours are buying their kids encyclopedias?” Or “are buying land in the southwest?”

Or she might seek to modify the prospective buyer’s beliefs as to the market value of the product that is offered, e.g., “This encyclopedia set has been advertised nationally at $2800.”

The rhetorical strategies by which a speaker seeks to increase his audience’s desire for or valuation of whatever the speaker is offering is, of course, the very essence of commercial selling. 33 That said, I doubt that this category of speech act is

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33 The literature of selling is also filled with advice about, among other things, the tactics of closing. Subject to minor variations, the catalogue of closing techniques includes (1) direct (you simply ask them to decide); (2) summative (“the salesman recapitulates the points of agreement and thereby induces the buying decision”); (3) assumptive (“the salesman assumes the agreement has been reached,” e.g. by saying “I will help your secretary to write up the order” – said to be appropriate when “the salesman notes that commitment and decision making are a painful experience to the other person”); (4) demonstration (showing the product in use; said to be “strictly low pressure because it places the prospect or customer in seeming control” and to offer the further advantage of “providing the prospect or customer a sample of post-transactional satisfaction that will attend the purchase”); (5) positive choice (“[t]he salesman presents the prospect or customer with two or three positive alternatives and in effect says, ‘Do you want A or B?’”); (6) minor decision (in which “the salesman seeks affirmation on the smallest possible decision that encompasses the full order” as when the car salesman, dealing with a married couple, “might get a decision from the wife on the color of the paint or upholstery for the new car”); (7) challenge (“With the dominant, self-confident, innovative person the salesman may choose to close by offering him the opportunity to score a first. . . . ‘Mr. Purchasing Agent, once you are convinced of the soundness of my proposition, I know you can arrange for me to make a presentation to some of the line management of your company.’ Even if he normally does not have such authority, the
anywhere better exemplified than in young Henry’s speech to his troops at Agincourt in Shakespeare’s *Henry V*. The speech comes in response to his cousin Westmoreland’s fearful wish “O! that we now had here/ But ten thousand of those men in England/ That do no work today” – and to the general air of desperation that had gripped the vastly-outnumbered British troops. It is “honor,” Henry argues, that matters most, and they should “wish not a man from England” because “the fewer the men, the greater share of honor.” Those who want, may leave, he said; but those who stay and fight shall earn eternal honor as well as the rights to brag about and embellish upon their achievements, and they shall become as a brother to the King. Life and safety are nothing compared to such eternal honors as these. Thus the hopeless battle is not something to be feared and avoided, but is a great opportunity to be seized and joyously embraced. And of course embrace it they did – as have centuries of Englishmen for whom this play has been staged whenever the circumstances have seemed most desperate.

**B. Altering another’s reservation price by diminishing their assessment of, or their valuation of, the situation they would be in if they do not reach an agreement with us, including threats and the destruction of value.**

We deal here with a series of acts by which one party to a negotiation secures an advantage by altering the other party’s valuation of its alternative to a negotiated agreement and thus altering the other party’s reservation price. These acts range from the benign to the horrific, from a situation in which the acting party simply demonstrates that the other party has misjudged his circumstances, to one in which the acting party may create dissatisfaction that was not previously present, to one in which the acting party either destroys or credibly threatens to destroy value that would otherwise be available to the non-acting party, to one in which one party simply chooses the time or terrain that is most favorable to it and most unfavorable to its adversary. Examples will include the presentation of a strong legal argument during the course of settlement negotiations; the *Life Magazine* gig from *The Tin Men* (1987); certain of the threats made by the Godfather and by one of Eliot Ness’ co-workers, the purchasing agent may rise to this kind of a challenge.”); and (8) “scare” (the “negative close” in which the salesman describes what the prospect will be missing if he doesn’t buy now). The catalogue and quotes are from W.J.E. CRISSY & ROBERT M. KAPLAN, *SALESMANSHIP: THE PERSONAL FORCE IN MARKETING* 290-98 (1969), though comparable catalogues can be found in countless other books on the subject of selling. Examples of these “closing techniques” will be readily found in *THE TIN MEN* (1987) and *THE SALESMAN* (1969).

Stated in this way, these “techniques” sound like hopelessly naive manipulations, though the problem of “closing” is common to all negotiations. In any event, techniques of this kind hold a central place in the well-established literature of “selling.” So do the techniques for “handling objections.” I am not entirely satisfied that these matters are properly classified in a section that deals primarily with methods for altering other people’s indifference points.

34SHAKESPEARE, *HENRY V* (1597).
tactics by which they increased the credibility of those threats, together with the resulting changes in an adversary’s assessment of his “best alternative to negotiated agreement”; and one of the predatory corporate tactics displayed in *A Pretty Woman* (1990).

We begin, then, with the presentation of a strong legal or factual argument during the course of negotiations concerning the possible settlement of a lawsuit. For these purposes, a factual argument may be as simple as a single but important piece of evidence. Strong arguments may function in various different ways (see Part III above), but in this particular setting one of the ways they may function is to alter the opposing parties’ reservation price. In settlement negotiations, a party’s reservation price reflects that party’s assessed valuation of the lawsuit if, without settlement, it were to run its full course – which in turn reflects the party’s assessment of the probabilities of various possible outcomes. Of interest here is the fact that a strong legal or factual argument can, in such a setting, alter the other side’s assessed valuation of the lawsuit in the absence of a settlement. Once having been shown that argument (or that piece of evidence), a party who might, moments before, have thought that in the absence of an agreement he could go to trial and have a 50% chance of winning $1,000,000 might now believe that his chance of winning that amount is 30%. Thus the party offering the argument has significantly improved his own bargaining position by altering his adversaries’ assessed valuation of the lawsuit in the absence of a settlement and having thus shifted the adversary’s reservation price. That done, a lawsuit that might once have required an offer of just over $500,000 might now be settled by an offer of just over $300,000. While such an argument could reasonably be described as “selling,” it may also be understood as a set of speech acts through which one party alters another’s party’s reservation price by diminishing their assessment of the situation they would face in the absence of an agreement.

If one party can use credible information to alter another’s assessment of its alternative to a negotiated agreement, such effects may also be produced through the use of threats. In *The Tin Men* (1987), B.B. Babowsky (Richard Dreyfus) and his partner Moe (John Mahoney) are selling aluminum siding door to door. They drive into a new neighborhood, settle on the *Life Magazine* gig, and set up their camera in the mark’s front yard. When she comes out (“What’s up, hons?”) they explain that they are from *Life magazine* and that they’re taking a picture of her house for their annual home improvement issue. Hers, it turns out, is to be the “before” picture in a set of “before and after” pictures illustrating the benefits of aluminum siding. She responds in horror at the prospect of such humiliation and asks – begs – to know if there isn’t some way their house could be the “after” picture. The men from *Life Magazine* “don’t know if that could be done” or even whether someone might be available” who could sell her the aluminum siding. The salesmen’s speech acts has two aspects. First, they threaten the housewife with public humiliation of a kind that would, absent the purchase of aluminum siding, leaving her far worse off than she had previously thought herself to be. Second, they take whatever benefits might normally be associated with the purchase of aluminum siding and add to it the additional benefit
of moving from the “before” page (with all its attendant humiliation) to the “after” page (with all the attendant social and psychic benefits). It is the first of these two aspects – the threat of public humiliation – that brings this episode into the present category. It does so by altering the homeowner’s assessment of the situation she would be in if she were not to buy new siding (i.e., by decreasing her “best alternative to a negotiated agreement” and, in this case, her reservation price), and by altering that assessment in a direction that is highly beneficial to the salesmen.

Threats of outright violence may be shown to operate in similar ways, as will “speech acts” designed to enhance the credibility of threats already made. Recall, for instance, the scene with the horse’s head in *The Godfather* (1972) and the effect it had on the recipient’s assessment of his alternative to reaching a negotiated agreement. Or the scene from *The Untouchables* (1987) in which Eliot Ness’s mentor Jim Malone (Sean Connery) viciously fills a gangster full of lead, spewing his innards all over the interior of northwoods cabin, for the purpose – and with the effect – of persuading a mob accountant to tell what he knew. That the gangster was already dead, a fact known to Malone and the audience but not to the accountant, did not prevent the accountant from reassessing the significance of Malone’s threat to do the same to him. The accountant’s assessment of his alternative to reaching an agreement with Malone thus shifted through the accountant’s enhanced belief in the credibility of Malone’s threat, and an agreement that had previously been unacceptable is now anxiously embraced.35

Another example of such a favorable alteration in the other sides’ assessment of its reservation price appears in *A Pretty Woman* (1990), this one being gratuitously destructive in a different way than our examples from *The Godfather* (1972) and *The Untouchables* (1987). In this case Edward Lewis (Richard Gere), as the not-yet-repentant corporate shark, is negotiating to buy a family-owned shipyard from old man Morse (Ralph Bellamy). Because Morse is in the final stages of negotiating a major contract to build new ships for the Navy, Lewis’ initial low-ball offer is well below what Morse takes to be his reservation price. Lewis’ next move is to announce (falsely) that he has, through his contacts in the Senate, taken the steps necessary to assure that Morse’s contract with the Navy will never be approved. By that claim to have destroyed Morse’s best alternative, Lewis has radically altered Morse’s understanding of the situation he would be in if he did not reach a negotiated agreement with Lewis. Through Lewis’s (feigned) destruction of this contractual possibility, he has radically reduced Morse’s understanding of the value of his best alternative to the negotiated agreement with Lewis. Because Morse’s reservation price has been reduced and because Lewis knows that it has been reduced, Lewis knows that

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35See also Saddam Hussein on “the mother of all wars” and on the willingness of Iraqis to lose a trillion men in one day’s battle with Iran and to come back the next day with a trillion more; and the U.S. build up of forces and U.S. press releases about the capacities of our new weapons to seek out enemy warlords hidden far underground, etc. And see, in *SHAKESPEARE, HENRY V*, Hal’s speech to the little walled city he is threatening to vaporize.
Morse has no choice but to accept the low-ball offer that Morse had, only moments earlier, found laughably unacceptable.

However harsh, Lewis’ tactic is closely related to the more customary maneuvers by which the parties to a labor negotiation might seek to change the underlying circumstances so as to maximize their adversary’s strike costs or to minimize their own (e.g., GM building up inventory in anticipation of a strike, UPS workers timing the possibility of a strike to coincide with the Christmas shipping season, or the baseball players or umpires timing their potential work-stoppage to coincide with the World Series).36

In the second of these two subsections on selling, threatening and other related activities, we have seen one party seek to improve its bargaining position and the probable outcomes it will achieve by altering the other party’s assessment of the other’s alternative to this negotiated agreement, its reservation price, the range of utilities (or the balance of utilities and disutilities) it associates with various possible outcomes. These activities range from “providing information” to “warnings,” to “threats,” to the destruction of the other’s best alternative to negotiated agreement. Such speech acts may be either true or false and the destruction of alternatives may be real or, as in A Pretty Woman, feigned.

5. The Rhetorics by which We Manage Another’s Understanding of Us, of Themselves, and of Their Situation, including Their Relationship to Us

A. Their Understanding of Who We Are

Among a negotiator’s most important rhetorical purposes involves her efforts to construct, or at least to shape, her adversary’s understanding of the negotiator herself – her efforts to construct, or at least to shape, her adversary’s perception of the negotiator’s own persona and of her qualities and characteristics. Thus she may want to be perceived as trustworthy and as worthy of the other’s respect, on the theory that these perceptions will enhance the rhetorician’s credibility and, through that, her ability to shape her adversary’s perception of the situation, of the various objects of negotiation, and of her reservation price. This rhetorical purpose, once identified, is usually discussed in terms of Aristotle’s concept of “ethos” and sometimes such a discussion might be extended to include Kenneth Burke’s treatment of rhetoric as “identification.” On closer examination, these two ideas, however useful they may be as starting points, seem part of a much larger universe of rhetorical strategies that will, in various circumstances, serve a negotiator’s rhetorical purpose.

We begin then with Aristotle who, in his Rhetoric, introduces us to the idea of a speaker’s “ethos.” There he catalogues three “modes of persuasion furnished by the

spoken word.” The second and third of these modes involve appeals to logic and appeals to the emotions, but the first, he tells us, “depends on” and arises out of “the personal character of the speaker.”

Persuasion is achieved by the speaker’s personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided . . . . It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.37

Narrowly understood, ethos might simply be the quality of being perceived as honest, trustworthy, and credible (and as disinclined toward misrepresentations or other strategic behavior) – under circumstances in which representations made by persons perceived in those ways are likely to be more effective than are similar statements made by others. The credibility and effectiveness of such representations, involving matters like the negotiator’s reservation price of the value of the thing offered in negotiations, translates directly into effectiveness in securing results through negotiations.

Seen less in the narrow terms of credibility than in the broader terms of virtue or goodness, ethos may help us to understand the power that is sometimes exercised by such extraordinary persons as Mohatma Gandhi or Martin Luther King. When the subject of the negotiation can be presented as a moral demand, and when the person presenting the demand is perceived as holding greater moral authority than the person resisting the demand, then – at least in certain circumstances involving powerful audiences – the options open to the person who resists the demand may be greatly reduced. The negotiator’s virtue and goodness are then a source of power in that negotiation, a source of power that will produce different results than would otherwise have been available. This form of power may be particularly important when the moral demand is presented by a Martin Luther King and resisted by a Bull Connor.38

Kenneth Burke offers a related idea when he argues that “rhetoric is identification” – and more specifically, the rhetorician’s ability to call forth in his audience the belief that the speaker is “like them.” Thus he tells us that “you persuade a man only insofar as you can talk his language by speech, gesture, tonality, order,

38 Such, I think, was the ethos-based power that Fanny Lou Hamer carried when she presented the case of the Mississippi Freedom Democrats to the 1968 Democratic Convention. And such, I think, was the power with which Anne Anderson – a dedicated, working class mom who had lost her child – threatened the executives of Beatrice Foods in the case reported by Jonathan Harr in A CIVIL ACTION.
This, it would seem, is the principle at work in the following report of an apprentice car salesman:

Mirror the customer, Joe P. had told us. This is natural behavior. Somebody yawns, you yawn. Somebody scratches is ear. . . . But if you can scale it up you can help move a customer toward the close of a sale. So if he’s a liberal then you’re a liberal, too. And if he hates welfare cheats, then you think they should be in jail. The Bonneville prospect told me that he worked as a salesman himself. I told him I liked being a salesman. I told him I thought salesmen had got a bad rap.

This reminds us, if we need reminding, of the old truth that Aristotle would not have wanted to admit: that what ultimately matters for these purposes is not who we really are but who we are able successfully to present ourselves as being, that what matters is not that a person actually is trustworthy and good but that they are perceived to be trustworthy and good.

A third major writer whose work is relevant to this subject is the sociologist Erving Goffman. In The Presentation of Self in Everyday Life (1959) and On Face-Work: An Analysis of Ritual Elements in Social Interaction (1967), Goffman offers and develops the idea that, in interacting with one another, people are continuously – and unavoidably – involved in the processes of “presenting” some chosen “self,” of assuming some “line” and claiming some “face,” of saving, losing, maintaining, managing and defending “face.” He further demonstrates, among other things, that people become psychologically invested in the “face” they present and in its being accepted, approved and respected by those to whom it is presented; that the person to whom a face is presented may either accept or in various ways challenge that “face”; that a situation in which a person’s “face” is “lost” or becomes unstable is an “episode” that requires some form of “resolution.”

41“It is not essential, then, that a Prince should have all the good qualities I have enumerated above, but it is most essential that he should seem to have them. Nay, I will venture to affirm that if he has and invariably practises them all, they are hurtful, whereas the appearance of having them is useful. Thus, it is well to seem merciful, faithful, humane, religious, and upright, and also to be so; but the mind should remain so balanced that were it needful not to be so, you should be able and know how to change to the contrary.” NICCOLO MACCHIAVELLI, THE PRINCE, ch. 18 para. 6/10, p. 128 (Ninian Hill Thompson trans., 3d ed. 1913) (1532).
42In ERVING GOFFMAN, INTERACTION RITUAL (1967).
43Well before Goffman, anthropologists had developed the idea “face” as a way of understanding certain of the differences between eastern and western cultures. See, e.g., RUTH BENEDICT, THE CHRYSANTHEMUM AND THE ROSE (1946). See generally the Woody Allen movies in which he prepares his apartment for the arrival of a date; ELLEN FEIN & SHERRIE SCHNEIDER, THE RULES: TIME TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT (1996) (be mysterious, uninterested and hard to get; have interesting or popular books in full view and hide the Prozac)
An example of the rhetoric of self-presentation may be found in an ancient account of a still more ancient war. In Virgil’s *Aeneid*, the Greeks under the leadership of Ulysses (Odysseus) laid siege for 10 years on the city of Troy before, appearing finally to abandon the war, their army sailed away and left behind a huge wooden horse. Faced with the mystery of this horse, the Trojan priest Laocoon unsuccessfully warned his countrymen to “beware of Greeks even bearing gifts.” The same day the Greeks withdrew, the Trojans also discovered a man named Sinnon. Sinnon admitted he was Greek, though he seemed to understand that this admission would be reason enough for the Trojans to kill him. He then also presented himself as the enemy of the Trojan’s enemy Ulysses and as a victim of the treachery for which Ulysses was chiefly known among the Trojans. According to his story, Sinnon was kin to Palamedes, a famous Greek who had famously opposed the war with Troy. For this, on a trumped-up charge and on perjured testimony, Ulysses’ Greeks put Palamades to death. Sinnon, in loyalty to his slain kinsmen, had himself spoken against the war and for that, again through Ulysses’ treachery, had been cast out by the Greeks and abandoned to face death at Trojan hands. Bravely and honorably he had remained loyal to his kin, and bravely and honorably he now accepted his certain death.

While his loyalty to Greece had been offset by his loyalty to his kinsman, by Ulysses’ treachery, and by the Greek’s desecration of the goddess Minerva’s shrine, Sinnon presented himself as showing no interest in actions that might be calculated to save his life. Even now, facing the gravest danger, he defiantly honored the truth—“Fortune has made a derelict of me, but the bitch won’t make an empty liar of me, too.” Thus he revealed the secret of the horse and the Trojans took it for the perfect truth. It was, he told them, designed to appease Minerva so the Greeks would win; it was designed so the Trojans could not take it into their city (unless, it went without saying, they breached its walls); and if the Trojans were to draw it into their city then the children of Greece would be doomed. Utterly convinced of Sinnon’s virtue, honor and trustworthiness, the Trojans breached the walls of their city and delivered the horse to its center. The rest, as they say, is ancient history.

Because of the limits imposed by this essay, I will not attempt anything like a complete catalogue of the persona and characteristics that a person might choose to present in the course of a negotiation. Instead I will merely offer a preliminary list of possibilities.

(1) The good, honest, credible person who may be trusted to tell the truth, as described in Aristotle’s concept of ethos and as (falsely) exemplified by Virgil’s Sinnon.

(2) The loyal servant who, because of his known loyalty, may be trusted to tell the truth. This is the position (falsely) exemplified by

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Shakespeare’s Iago in his dealings with Othello.45

(3) The person who, by virtue of his circumstances or disinterest, may be regarded as credible or trusted to tell the truth, as with Virgil’s Sinnon and with the old man in the film 12 Angry Men (1957).

(4) The person who would move heaven and earth to help you out, and who you should be ready and willing to help. This is the self-presentation that drives the “short con” in David Mamet’s film House of Games (1987).

(5) The person who is like her opposite number, who shares her values and interests, and who is a member of her group – as theorized by Burke as the rhetoric of “identification” and as exemplified by the apprentice salesman’s efforts to “mirror the customer.”46

(6) The person who likes and admires the person with whom he is dealing, including flatterers, yes-men and sycophants.47

(7) The interrogating policeman who is (or seems to be) sympathetic and concerned for the interests of the suspect.48

(8) The powerful man who is worth pleasing because of his power to confer advantage, as in the case of the Godfather and of certain apparently successful and well-connected lawyers.

(9) The powerful and dangerous man is worth pleasing because of his power to do bad things to his adversaries. Examples include the Godfather, the madman (see below), and Sean Connery’s Chicago cop in The Untouchables 1987.)

45WILLIAM SHAKESPEARE, OTHELLO (1604-05).

46Compare DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1936) (don’t talk politics or religion); ELLEN FEIN & SHERRIE SCHNEIDER, THE RULES: TIME TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT 34 (1996) (follow his lead, talk about what he wants to talk about).

47BALDASSARE CASTIGLIONE, THE BOOK OF THE COURTIER (1528); SHAKESPEARE, JULIUS CAESAR (1599-1600) (flattery delivers Caesar to the Senate despite the warnings and the omens); SHAKESPEARE, KING LEAR, Act I, Scene 1 (1605-06) (two of the his three daughters tell Lear what he wants to hear); THOMAS HARDY, FAR FROM THE MADDING CROWD (1874) (Sargeant Troy’s philosophy for dealing with women); DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1936); KENNETH BURKE, A RHETORIC OF MOTIVES 55-56 (1950) (flattery, broadly understood, is the essence of persuasion); MAN IN THE GRAY FLANNEL SUIT (1956) (Tom learns to “Tell the man what he wants to hear”); ERVING GOFFMAN, PRESENTATION OF SELF IN EVERYDAY LIFE (1959) (rich clients demand flattery and admiration from the prostitutes they hire); A.R. HOCHSCHILD, THE MANAGED HEART 109 (1983); Roger Fisher & Wayne H. Davis, Six Basic Interpersonal Skills for a Negotiator’s Repertoire, 3 NEGOT. J. 117 (1987) (“Acknowledge merit in something they have done. It is almost always possible to find something meritorious that the other side has done - perhaps in an area apart from what is being negotiated. By acknowledging that, we can communicate that we recognize and respect their worth as people.”); DEBORAH M. KOLB, NEGOTIATION THEORY THROUGH THE LOOKING GLASS OF GENDER 15 (1994) (flattery as a tool of the powerless: “Flatter them, be sweet and grateful. You do it and then move on.”); New Yorker review of Dan Rather’s book, fall 2000 (say nice things in print so they’ll give you access when you need it).

48FRED E. IMBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION (1953).
(10) The person who is worthy of attention, respect and deference, including the distinguished senior partner in the law firm as well as the practitioner of nonviolent civil disobedience.

(11) The practical man who is not a zealot and with whom one can reasonably deal.

(12) The zealot who is not a practical man and thus cannot be bought off cheaply. This takes at least two forms: (a) the man of principle who will not be bought off or cowed into submission, as with the civil rights advocate who has shown herself willing to suffer great harms and indignities for her cause and (b) the man who is obsessively and irrationally committed to winning at any cost or the big-city law firm that has carefully cultivated a reputation for loving to litigate, playing hardball, and taking no prisoners.

(13) The man who, like Shakespeare’s Henry V at Harfleur, can control neither himself nor his troops once the battle has begun.49

(14) The madman. “I call it the madman theory, Bob,” Richard Nixon once said to a top aide. “I want the North Vietnamese to believe I’ve reached the point where I might do anything to stop the war. We’ll just slip the word to them that ‘for God’s sake, you know Nixon is obsessed about Communists. We can’t restrain him when he’s angry - and he has his hand on the nuclear button’ - and Ho Chi Minh himself will be in Paris in two days begging for peace.”50

49 William Shakespeare, Henry V. In Act III, Scene III, Henry stands before the besieged city of Harfleur and, in demanding surrender, announces that “For as I am a soldier, / A name that in my thoughts becomes me best, / If I begin the batt’ry once again / I will not leave the half-achieved Harfleur / Till in her ashes she lie buried. / The gates of mercy shall be all shut up, / And the fleshed soldier, rought and hard of heart, / In liberty of bloody hand shall range / With conscience wide as hell, mowing like grass, / Your fresh fair virgins and your flow’ring infants.” And further: “What rein can hold licentious wickedness / When down the hill he holds his fierce career? / We may as bootless spend our vain command / Upon th’enrag’d soldiers in their spoil / As send precepts to the leviathan / To come ashore.”

(15) The person who is reasonable and neither dishonest, pushy, grasping, presumptuous, ungracious, egocentric, self-righteous, arrogant, coercive, nor any of those other qualities that may provoke resistance additional to that which might be called for by the substance of the parties’ differences.

(16) The lawyer who presents himself to his clients as the insider and the “dean” of local divorce lawyers.51

(17) The competent, knowledgeable and well-prepared negotiator who is presumably immune from the manipulations that might succeed against the naive.52

(18) The inexperienced negotiator who is helplessly out of his depth, the young woman who finds it expedient to be dumb,53 the detective who is hopelessly outclassed by his adversary (e.g., Peter Falk’s Columbo), and the simple country lawyer (Jimmy Stewart’s character in Anatomy of a Murder (1959)).

(19) The hustler who disguises his competence and plays below his game in order to draw his adversary into higher commitments.

(20) The litigator or poker player who feigns strength on a weak hand (bluffs)54 or, in a slightly weaker version, feigns unwarranted optimism in order to increase his adversary’s assessment of what it will take to settle.

(21) The person who claims a higher and dominant status relative to his opposite number, as in the case of bill collectors, or who claims a lower and happily subordinate status, as in the case of flight attendants and various other service workers,55 or who “passes” by hiding his working class background while attending an elite eastern law school.

In the end, there is virtually no end to the list of self-presentations which may carry, or be thought to carry, some form of advantage in negotiations. A person may wish to be seen as high-minded or venal, as quick-witted or slow, as rational or not, helpless or ready to help, as personally pleasant or not, as innocent or sometimes even as culpable,


52 Christina J. Taylor and Sharon M. Dawid, Bargaining for a New Car: The Knowledgeable versus the Naive Consumer, 59 Psychol. Rep. 284-86 (1986) (“knowledgeable” consumers carried a price guide and asked for a price offer on a car with a specific set of options; “naive” consumers did not carry price guide and asked salesperson to review available options; “knowledgeable” consumers got the better prices).


54 DANIEL SPANIER, TOTAL POKER (1977).

as strictly professional or deniably seductive and potentially available.\textsuperscript{56}

\section*{B. Their Understanding of Who They Are}

The enormous power of rhetoric is often seen not in a speaker’s construction of the way in which the audience understands and constructs the speaker but, instead, in the speaker’s construction of the way the audience understands and constructs itself. One negotiator can, in dealing with his adversary, construct her as a competent negotiator and, by implication, as one who has no reason to feel vulnerable or defensive in his dealings with her adversary. Taking this one step further, he can construct her as someone who is not just competent but who is being enormously effective in the particular negotiation at hand. “You’re killing me,” he might say, and if he says it effectively it can work to his advantage in two ways. First, it can register as part of the dance of distributive bargaining, doing so in a way that bears upon the sufficiency of the parties’ respective concessions and on the speaker’s nearness to his reservation price. And second, this the point of this section, it speaks directly to the adversary’s sense of how she is being perceived and how she is doing \textit{vis a vis} this particular adversary and, accordingly, the likelihood that she will proceed with defensiveness or with generosity.\textsuperscript{57} In related examples, a negotiator might construct her adversary as an honorable person who would never lie in such a situation as this, or as a practical man who, though he may work for the government, understands (and perhaps better still identifies with) the problems and needs of industry. It is then merely a variation on this construction of one’s adversary as competent when one party constructs himself or herself as young and helpless and constructs his or her opposite number (as distinct from, for instance, “adversary”) as strong and competent and ready to help one who is young and helpless.\textsuperscript{58}

Examples of this form of rhetoric are easily found in political discourse, where speakers seek, often among other things, to construct, to reconstruct, or to transform their audience’s sense of who it is. This is, in a certain sense, the rhetoric of constituting and defining communities and, as such, it may involve two distinct parts. In the first such part, a community is created by the creation or the underscoring or the privileging of some particular boundary by which one can understand who is within

\textsuperscript{56}See also, e.g., ELLEN FEIN \& SHERRIE SCHNEIDER, \textsc{The Rules: Time Tested Secrets for Capturing the Heart of Mr. Right} (1996).

\textsuperscript{57}As flattery, it may also operate as part of the rhetoric of gifts and reciprocity. See infra Part VII.

\textsuperscript{58}Constructions of one’s adversary as someone who, though he works for the government, understands the problems and needs of industry may sometimes be accompanied by suggestions concerning the possibility of future employment opportunities. Similarly, constructions of oneself as young and helpless and of the other as strong and competent may be accompanied by suggestions of sexual availability. Those situations are, I believe, properly understood as proposed exchange transactions (or fraudulent offers of exchange transactions) that are ancillary to pre-existing negotiations.
the community and who is outside it. In the other, the speaker defines the nature of the community, the dominant values, the way it does business, the obligations that one member owes to another, and the relation of those who are members of the community with those who are not. Usually, the purpose of this rhetoric is to draw a boundary in such a way that both the speaker and the intended audience are inside the community that is defined; certain other people are outside of that community, and those inside the community share the values, the beliefs, or the commitments to action that the speaker seeks to instill in his audience. This may be illustrated with examples drawn from the propaganda films of World War II, the rhetoric of the American civil rights movement, and Scout’s inadvertent speech to the lynch mob in To Kill a Mockingbird (1962).

In the Nazi propaganda films made during World War II, the boundary is always drawn so that the Aryan race is in and the Jews are out; the Aryan race is in and the Poles are out; the Aryan race is in and other Europeans are out. The target of this rhetoric, and of this boundary-drawing, was the German Aryan community, as the film-makers sought to enhance its solidarity and, more particularly, its solidarity vis a vis those other groups that were defined as being on the other side of the boundary. The Nazi films then would not only define these communities through the drawing of boundaries, they also defined these communities by constructing them as having distinctive natures and values. According to those films, we (the Germans) are powerful. We’re proud. We’re strong. We’re set on getting what’s rightfully ours. We’re totally committed to our cause. And thus we’re unstoppable. They, here the Jews as constructed in the Nazi propaganda films, are vermin and rats. They’re spreaders of pestilence. They’re suited only to being killed or to serving us. They (the Poles) are criminals who are finally going to be made to pay for their crimes.59

In the American propaganda films of World War II, made by Frank Capra, the boundary that is drawn for purposes of defining who’s in and who’s out of the community is drawn in such a way that Hitler, Mussolini and Hirohito are out. “They are monsters and if you ever meet them on the street you must not hesitate to act.” And with them, the Germans, the Italians and the Japanese people are out. As to the nature and values of the group that’s out, they’re monsters, huns and barbarians. Tyrants and mobs. They murder other people’s children and, in their madness, they deprive their own children of their childhoods. They mean to conquer us and to destroy everything we value and to take our children from us. Then, for “our” part, we are the sort of people who don’t like to fight but by God we’ll take care of our children and we’ll do what needs to be done. All in the name of family, democracy, Christian values, and the American way of life.60

Similar examples are found in the rhetoric of the civil rights movement of the

59 See, e.g., Triumph of the Will (1935); The Eternal Jew (1940).
60 E.g., Prelude to War (1942); The Nazis Strike (1942); Divide and Conquer (1943); Battle of Britain (1943); Battle of Russia (1943); Battle of China (1943); The Negro Soldier (1944); War Comes to America (1944); War Comes to America (1944); Know Your Enemy: Japan (1945).
1960’s, or more exactly, in the rhetoric of that movement to which I, as a young white church-going northerner with access to the evening news, was exposed and through which I, as one part of one relevant audience, found myself constructed. It was a rhetoric through which various members of the various audiences were presented with various choices about the community to which they belonged, about who spoke for them and who didn’t, about what values mattered in that community, and, in Kenneth Burke’s terms, who it was with whom the audience would identify and who it was with whom it would dis-identify.

It was my experience that those with whom my part of the audience did not identify – those from whom we recoiled in growing horror – were those who, as we saw it (which is what matters) preached hatred and prejudice and insisted on the illegitimate prerogatives of race; lynched or condoned the lynching of black men; committed senseless violence and brutality under the color of law; defied the law of the land to keep black children from receiving the education that was their due; and used firehoses and dogs to suppress peaceful demonstrators who sought nothing more than the right to vote. At the same time, those with whom we did identify were those who embodied the definitive American commitment to equality and the definitive Christian ideals of charity and love and regard for one’s neighbor; who went in peace and respected just laws and opposed violence against innocent people; and who held what we saw as the high ground where we, too, wanted to stand. It was, I think, in this way that a great many white Americans came strongly to identify themselves, at least for a time, with the dignity, the righteousness, the vision and the values not of southern whites but of southern blacks and with the leadership of Martin Luther King. And through their rhetoric, Dr. King and others carried forward the project – to which Thomas Jefferson, Abraham Lincoln and Frank Capra had made earlier contributions – not just of revealing to America either its pre-existing values or the implications of those values but of constructing and constituting America as a place in which those values were held.

Scout’s inadvertent speech to the lynch mob in To Kill a Mockingbird offers a final illustration. Again we have the contest over the boundaries that determine who is in, and who is not in, the community and over the nature of the community, its values, the way it does business, and the obligations that its members owe to one another. Who is to be believed? Whose lives, whose pain and whose honor counts? Members of the lynch mob operated out of a definition of community in which whites were in and blacks were out and, more particularly, to which the mob and Atticus Finch all belonged and to which the black man accused of rape did not. In a certain sense this was the subject of most of the movie, as Atticus refused to be bullied into that understanding, in which he held firm to the idea of a community that included its black citizens.

There is then, in addition, a contest to define the nature of the community, the dominant values, the way it does business, the obligations that one member of the community owes to other members of the community. To the lynch mob, both before and after the trial, we (defined in a way that includes whites but not blacks) assign
very high value to protecting the honor of our women, even if they are lying about what happened, and virtually no value to the life of black men who may have to be sacrificed for the sake of protecting the honor of white women. For Atticus, we (defined as all good citizens, black and white) are committed to the rule of law, we will not take the law into our own hands, we will not permit or approve perjury, and we certainly will not engage in lynchings. And for Scout, we (all of us who live together) are neighbors, we depend on one another, we care about each other’s welfare, we exchange gifts, we care about our children and the values we try to teach them, we know the difference between right and wrong, and we won’t do things that we know to be wrong.

Scout’s speech to the lynch mob is simple but effective, and it lacks even the hint of formal argument or talk about rights and wrongs. Throughout, Scout seems to have no understanding of who these men are or why they’re gathered around Atticus at the door to the jailhouse. Then she recognizes and speaks to Walter Cunningham, a man whom Atticus has evidently been helping with some kind of legal problem.

“Hey, Mr. Cunningham, How’s your entailment gettin’ along?”

No response.

“Don’t you remember me, Mr. Cunningham? I’m Jean Louise Finch. You brought us some hickory nuts one time, remember?”

Still nothing.

“I go to school with Walter . . . He’s your boy ain’t he? Ain’t he, sir?”

A faint nod from Cunningham.

“He’s in my grade . . . and he does right well. He’s a good boy . . . a real nice boy. We brought him home for dinner one time. Maybe he told you about me, I beat him up one time but he was real nice about it. Tell him hey for me, won’t you?”

After some more talk from Scout about how “entailments are bad an’ all that,” Cunningham lowers himself to Scout’s level and takes her by the shoulders: “I’ll tell him you said hey, little lady.”

“Then he straightened up and waved a big paw. ‘Let’s clear out,’ he called. ‘Let’s get going, boys.’”

Thus through Scout’s rhetoric, the community is redefined, reconstituted and transformed. It becomes something like a PTA meeting to which the parents have inappropriately brought pitchforks, guns and rope. And once the lynch mob has

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61 Harper Lee, To Kill a Mockingbird (1960) (this is the text from the novel, the 1962 screenplay omits reference to Scout having beaten up Walter).
disappeared, the men somehow sheepishly go home to their families.

C. Their Understanding of Their Situation, including Their Relationship to Us

If it is sometimes possible, through the speech acts of rhetoric, to manage someone else’s understanding of who we are and their working understanding of who they are, it is also sometimes similarly possible to manage someone else’s understanding of the situation they are in. In one way, of course, the rhetorics of selling and threatening can be said to operate on another person’s understanding of their situation—and there may be some unavoidable overlap between this “rhetoric” and those others. But I’d like to set aside the question of the exact relationship between these categories and simply offer some illustrations of what I here have in mind.

One such illustration can be found in the American civil rights movement and the rhetoric by which it did some of its most important work. Over a long period of time and through a long and varied set of speech acts, white northerners came to believe that there were two sides to this fight and that they, the white northerners, had to choose one of those two sides. On one side were humble, long-suffering, peace-loving, church-going, God-fearing, non-violent, turn-the-other-cheek and grievously-victimized black Americans. And on the other, there were arrogant, violent, ignorant and unchristian men, variously armed with lynch-ropes, bombs, badges, dogs and firehoses—all of whom were white. Not only did white northerners slowly come to the view that there to be two and only two sides in this conflict, and not only did they slowly conclude these two sides to be constituted in these particular ways, but white northerners also came increasingly to believe that they had to choose between these two sides. In that way, the speech acts of the civil rights conflict—as mediated by the national media—decisively shaped white northerners understanding of the situation they were in.\(^\text{62}\)

Another illustration—this one involving much smaller two-party negotiations—can be drawn from the literature of police interrogation. Here interrogators seeking confessions are advised to be friendly and sympathetic, to minimize the moral seriousness of the offense, and to indicate that they regard others (sometimes even including the victim) as bearing most of the responsibility.\(^\text{63}\) They are also advised to assume an air of confidence and to adopt various strategies intended to suggest that, under the circumstances, the jig is up. Thus the interrogator is told to call attention to the subject’s “physiological and psychological ‘symptoms’ of guilt.”\(^\text{64}\)

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\(^{62}\)Examples of “which side are you on?” and “you’re either with us or against us” and “you’re either part of the solution or you’re part of the problem.” See, e.g., the current administration’s early rhetoric concerning the war on terrorism.

\(^{63}\)FRED E. IMBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION (1953)

\(^{64}\)Id. at 154.
A fairly reliable symptom of deception is a condition describable as “dryness of the mouth.” It may be observed in a subject by his swallowing motions accompanied by repeated attempts to wet the lips, which are sometimes so dry and sticky that upon parting they emit a smacking sound. . . .

Whenever this condition is observed the interrogator should call it to the subject’s attention by first asking the question – “Your mouth’s very dry, isn’t it?” After receiving the usual affirmative reply, it is well to supplement this question with another – “Feels like you have a mouthful of cotton, doesn’t it?” Then the interrogator should comment as follows: “That’s the result of your lying; the glands in your mouth which produce the saliva are not functioning properly – they’ve just about quit for the time being; you can drink all the water your stomach can hold without getting any relief. There’s only one remedy, and that is to tell the truth.”

Or the interrogator might explain that, under the circumstances, it’s not too late to turn his life around.

“You know what will happen to you if you keep this up, don’t you? This time you’ve taken a relatively small amount of money; next time it will be more, and then you’ll do it more often. You’ll finally decide it’s easier and more exciting to get what you’re looking for at the point of a gun. You’ll begin packing a rod. Then someday you’ll get excited and pull the trigger when the muzzle’s resting against somebody’s belly. You’ll run away and try to hide out from the police. You’ll get caught. There’ll be a trial, and when it’s all over, despite the efforts of your parents and relatives who in the meantime have probably spent their last dime in trying to save your neck, you’ll either have to spend the rest of your life in the penitentiary or else sit down on the hot seat and have a lot of electricity shot through your body until your life’s been snuffed out. Listen, fellow, take may advice; now’s the time to put the brakes on – before it’s too late.”

Or he might explain that, when there are two suspects, one of them always talks first and gets off easy.

“You know as well as I do that in all these cases where two or more persons pull off a job like this, someone always ends up talking, and in this case it might as well be you. So let’s get

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65 Id. at 155.
66 Id. at 174.
going before somebody leaves you holding the bag. Don’t let the other fellow get his licks in first and put all the blame on you. You say your piece first, and then we can believe you. But if you wait until the other fellow has his say, no one’s going to believe your story even when you do decide to tell the truth.”

6. The Rhetoric of Narrative or Storytelling

Lawyers and other advocates have probably always known, at some level, that stories matter, that they can be highly persuasive, that they are inherently contestable, and that some stories are somehow better than others. We might even say that the job of a litigator is to fashion, present and defend a linked series of stories – one about the case as a whole, others about particular episodes, actors or witnesses, still others about the law – and in various ways to oppose some or all of the stories that are offered by the other side. Though I couldn’t at the time have given it a name, most of my thirteen years as a practicing litigator was spent (1) keeping track of the stories that could be told in light of the information available to the other side, including the information secured through discovery; (2) creating and constructing the stories most favorable to our position; (3) developing, through discovery and otherwise, the factual and other pieces with which we could contest and destabilize the stories the other side might seek to tell; and then (4) actually contesting the stories they actually did seek to tell. And I understood, for instance, that my best appellate writing was often done in the statement of facts that nominally preceded the beginning of the argument, knowing that, if I could have my way with the court in my statement of facts, my burden of persuasion in the formal argument might all but disappear.

All this is consistent with, and perhaps expressive of, the fact that stories are absolutely central to human life. It is through stories that we give order and sense to our lives, especially our social and moral lives. It is through stories that, meeting our need for such things, we impose order and meaning upon the raw data of our experience. It is through the construction of coherent personal narratives that we give meaning and purpose to our everyday lives. We “walk all day long through a forest of narrative” and such narratives are central to human life “in all periods, in all places, in all societies.” Humans are “story-telling animals” who define themselves

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67 Id.at 171.
68 E.g., J.Hills Miller, Reading Narrative (1998).
and then transmit those values through narratives. Stories are, at the very least, one of our primary modes of representation and of reasoning.

But it is one thing to understand the ubiquity, the importance, the power and the contestability of stories and quite another to understand the sources – what some would call the pragmatics – of their importance, power and contestibility. Consideration of those matters begins with the structural elements of a narrative. In the first instance, those include characters, to whom qualities and characteristics are assigned and who sometimes carry the burden of acting; plots; and such usually lesser elements as setting. They also include events, some more central to than others; episodes; conventional trajectories that can usually be described in such terms as beginnings, middles and ends or as complications and resolutions; causalities (e.g., he acted the way he did because of an unhappy childhood, or because his serotonin was out of whack); as well as themes and meanings. They also have a narrator, to whom reference may never be made, and an auditor (audience or reader). The auditor is an essential element of a narrative because it is only through the auditor that a narrative can fulfill its function. Even more importantly, the auditor always becomes engaged, in one degree or another, in supplementing the narrator’s text – sometimes in ways that are highly idiosyncratic to a particular auditor – by filling in gaps, fleshing out details, inferring causes, assigning motives and meanings, assessing the characters and the action, forming diverse relationships to the various characters, responding in various ways to the plot, anticipating what has not yet “happened” in the story and generally making “sense” of the story. It is this engagement of the auditor’s interest, curiosity, engagement, absorption, anticipation and participation that accounts in large part for a story’s persuasive power and for what has sometimes been described as their power to

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74 Recognizing that we fashion many stories for which we ourselves may be the first, and perhaps only, auditor.

75 TERRY EAGLETON, *Literary Theory* 76 (1983) (“... although we rarely notice it, we are all the time engaged in constructing hypotheses about the meaning of the text. The reader makes implicit connections, fills in gaps, draws inferences and tests out hunches; and to do this means drawing on a tacit knowledge of the world in general and of literary conventions in particular. The text itself is really no more than a series of ‘cues’ to the reader, invitations to construct a piece of language into meaning.”); BARBARA DECONCINI, *NARRATIVE REMEMBERING* 125 (1984) (All plots, whether historical or fictional, combine in varying degrees sequence and pattern. Sequence responds to our fundamental story-following curiosity. We listen to a story to find out what happens next. But stories satisfy as well our sense-making propensities. We want to know why it happens, what the connection among the events is. Plot emerges in this paradoxical competition between sequence and pattern.”); Tom Trabasso, *Causal Representation of Narratives, 10 READING PSYCHOL. 67-83* (1989).
The process by which the audience supplements the text then brings us to the final element of the narrative – what semioticians would call the “intertexts” by reference to which the auditor will do his work. These intertexts include the other stories that are already known to the auditor, the other earlier stories by virtue of which the trajectory of the current story may be “conventional” (e.g., other earlier horror films by reference to which we know something bad is about to happen in this one). They may include the earlier stories we have heard, or ourselves constructed, about human nature and how things work and why people do the things they do. And they may include all those things that have, for each of us differently, been absorbed into what we think of as “common sense.” These intertexts ultimately include all our “tacit knowledge of the world in general and of literary conventions in particular.”

Narratives have been described as having two related structures, one horizontal and chronologically sequential and the other hierarchic and thematic. In the first, one episode follows another in a way that is chronologically plausible and coherent; in the second, the characters, their actions, the episodes and the plot fit together in a way that makes thematic sense and is in that way plausible and coherent. In this way there are two types or two forms of coherence and plausibility by which an auditor may assess a narrative. Moreover, within these two structures, a narrative – both as a whole and in its parts – may exhibit varying degrees of plausibility (including compatibility with what is taken for common sense), coherence, unity and closure. As a general matter, stories are contestable in the degree to which they are lacking in any of these features – and they may be made contestable by any rhetorical challenge that may diminish any of these features.

For now, however, it is not my purpose to explain all of the elements of which narratives may be comprised or to detail the pragmatics by which they might operate. Rather, I simply seek to demonstrate that narratives – stories – can be powerfully persuasive; that they persuade in different ways than do, for instance, formal arguments; that some instances of story-telling are rhetorically powerful while others are not; that the rhetorical power of narratives can operate within the arenas of disputing and negotiation; and that, difficult as it may be, it is theoretically possible to explain the effectiveness of narratives and story-telling in terms of a coherent “rhetoric of narrative or story-telling” comprised – as are each of the others we have seen – of

76Patricia Ewick, & Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 LAW AND SOC. REV. 197, 213 (1995) (“Well-plotted stories cohere by relating various (selectively appropriated) events and details into a temporally organized whole . . . . The coherent whole, that is, the configuration of events and characters arranged in believable plots, preempts alternative stories. The events seem to speak for themselves; the tale appears to tell itself.”).
77TERRY EAGLETON, LITERARY THEORY 76 (1983).
specifiable speech acts of a kind that can be studied, practiced and learned.

7. The Rhetoric of Reciprocity

Anthropologists and novelists have long reminded us, and we are constantly forgetting, that market exchanges are not the only kind of transactions by which a society can organize itself and its economy. Indeed, market transactions are a fairly recent invention. Moreover, much that goes on even in our own society cannot be explained in terms of arm’s-length exchange transactions, especially but not exclusively in the domains of families and friends. And many of these non-exchange transactions are easily understood as transactions within gift economies in which gifts circulate in a system of reciprocity which can be breached but can also be restored.

Many of the anthropologists’ illustrations come from non-western communities. A classic example is the potlatch common to the cultures indigenous to the northern Pacific coast of North America. There, food is transferred in ways that the anthropologists cannot explain in terms either of payment or investment or loan. Rather, they conclude, the transfer can only be described as a gift in which “the act of donation is an affirmation of goodwill.”

Further, we are told, when one member of these tribes has been insulted by another, the victim of the insult may, rather than either demanding a retraction and an apology or hiring a lawyer to bring an action in defamation, give a gift to the man who has insulted him. At that point, the perpetrator of the insult may “make a return gift, adding a little extra to demonstrate his goodwill.” As in the case of the potlatch, the gifts affirm the goodwill of the parties, act as “an agent of social cohesion,” and thus may cure the breach.

One time when I was puzzling over all this, I was involved in what might have been a minor dispute with a neighbor who, it was credibly alleged, had been nipped on the ankle by our puppy. Skin was broken, a small amount of blood flowed, the victim took a short precautionary trip to the emergency room, and then promptly sought redress. We apologized, took steps to see that it didn’t happen again, and expressed our willingness to take care of any expenses. The neighbor sent us a bill for all the costs arising from his visit the emergency room. At that point we realized that he, like us, worked for the university – and that the trip to the emergency room was fully insured. No matter, he said, because we were at fault there was no reason for these


expenses to be paid by the insurance company, despite the fact that they were fully and properly covered.

In one final effort to break the impasse, and having recently been re-reading Lewis Hyde’s *The Gift*, I sent another note expressing what had been expressed before and including a gift certificate for a Sunday brunch for two at our town’s best and newest restaurant. For the first time in a good while, nothing was heard from the neighbor. Finally, fully six months later, we received a brief and cordial note explaining that our neighbor and his wife had recently had their brunch, that but for our gift they would never have indulged themselves, and that the food had been excellent and plentiful. They thanked us and it was clear that all had finally been forgiven and that peace had been restored along the northern boundary. Did the gift make a difference? Did it matter that it involved good and plentiful food? Did it matter that it was an unconditional gift and not an offer of settlement through an exchange transaction? I suspect, though I might find it hard to prove, that the answer to all of those questions is yes.

Another example is found in David Lean’s *Lawrence of Arabia* (1962) When Lawrence is first going to Prince Feisel’s camp, he is solely in the company of a Bedouin guide Tafas (Zia Mohyeddin). At one meal, Lawrence removes his pistol from its holster and, without any particular intention, sets it down in front of Tafas. The guide’s eyes become large, Lawrence understands that Tafas is dazzled at the sight of the gun, picks it up and reaches it toward his guide saying “Here, take it.” Tafas, a little overwhelmed, says “First I take you to our Lord Feisel; then you give it to me.” Lawrence replies “Take it now.” Accepting the extraordinary gift, the guide offers a gift to Lawrence. “Bedouin food,” he says, reaching his dinner to the Englishman. Lawrence accepts the offered food, examines it, eats some, and says – in what we understand is not the Englishman’s true judgment of its culinary merits – “Good.” “More,” offers Tafas, and Lawrence bravely accepts and eats again.

I also suspect that the idea of the gift exchange and what I am calling the rhetoric of reciprocity is at least a partial explanation for the fact that adversaries in negotiations often engage in certain otherwise hard-to-explain pleasantries in conjunction with their negotiations – and that these pleasantries often include good food. The parties may meet at a restaurant that is favored by both of them, they exchange pleasantries, they express interest in one another’s families and colleagues, they share appreciation for last night’s concert (or TV episode) or for some great old car or someone’s fine new office or handling of some prior case or good looking secretary. All of this may bear upon the building of trust or the rhetorics by which we manage another’s understanding of who we are, of who they are, or of the situation. But I think it would be a clear mistake to overlook the ways in which there is also at work a rhetoric of reciprocity and a working of a gift economy.\(^{81}\)

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\(^{81}\)The analytics of reciprocity may also be useful in our understanding of apologies, which have long been a mystery to most of those who have written about them – and which have been a total mystery to most of those who have written about negotiations.
8. Conclusion

The process of negotiation is richer and more complex than has generally been acknowledged. There is no single rhetoric in which negotiators do – or somehow ought to do – their work. Not the rhetoric of distributive bargaining, not the rhetoric of integrative bargaining, and not the rhetoric of principles and formal argumentation. Nor is the rhetoric of formal argument somehow the same as the rhetoric of integrative (or win-win) bargaining. Nor have we begun to exhaust the field when we confine our attention to distributive and integrative bargaining and such tensions and incompatibilities as may exist between the two.

Rather, there are at least seven distinct rhetorics within which negotiators pursue their purposes. They are (1) the rhetoric of distributive bargaining (haggling), (2) the rhetoric of integrative or “win-win” bargaining, (3) the rhetoric of principles and formal argumentation, (4) the allied rhetorics of selling and threatening, (5) the rhetorics by which we manage another’s understanding of who we are, of who they are, and of their situation and their relationship with us or others, (6) the rhetoric of narration and story-telling, and (7) the rhetoric of reciprocity. There are, of course, areas of overlap among these categories. And I have no doubt that the catalogue as a whole remains incomplete. But if we are serious about understanding the process of negotiation – and about providing our students with the skills of a negotiator – it seems to me we must acknowledge the importance of these diverse rhetorics. And then improve our understanding of how each of these rhetorics may operate, the ways in which each might bear upon the conduct and the outcome of negotiations, and the wide range of ethical questions that may arise within them.