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## Resistance Is Not Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion

Peter Reilly

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# Resistance Is *Not* Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion

PETER REILLY\*

*A core competency for people working in law or business is the ability to influence and persuade: People need to become expert at getting others to agree, to go along, and to give in. The potential “targets” of one’s influence throughout a given workday are seemingly endless and include clients and customers, co-counsel, opposing counsel, supervisors, direct reports, contractors, subcontractors, consultants, secretaries, judges, juries, witnesses, police officers, court personnel, and others. Moreover, that influence is largely exerted through words spoken and behaviors exhibited within the context of a negotiation. And yet, leading academics have argued that the vast majority of academic writing on negotiation has ignored the element of interpersonal influence. This Article was written to help correct this glaring omission.*

*This Article underscores the notion that throughout each day, people move rapidly and fluently between the roles of persuasion “agent” (that is, one who attempts to persuade others) and persuasion “target” (that is, one whom others attempt to persuade). If an “agent” party is attempting to persuade, the receiving or “target” party must understand the various tactics, strategies, and techniques being employed in those attempts, as well as ways to resist and defend against them. This Article provides this knowledge and understanding so that all parties, whether agents or targets, can be more effective negotiators. Those who are not aware that these techniques exist and who cannot recognize them and resist them place themselves (and their clients) at a clear disadvantage with respect to negotiation outcomes and final settlement results. It is only by recognizing and responding to various strategies and techniques of influence and persuasion that negotiators can begin to resist their powers and nullify their impacts.*

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\* Associate Professor of Law, Texas Wesleyan School of Law. J.D., Harvard Law School; L.L.M., Georgetown University Law Center; Hewlett Fellow in Conflict Resolution and Legal Problem-Solving, Georgetown University Law Center (2002–2005). I am grateful for the comments and guidance I received throughout this project from Cynthia Alkon, Richard Birke, Jonathan Cohen, Charles Craver, Kay Elliott, Michael Higdon, Kondi Kleinman, Jill Levickas, Carrie Menkel-Meadow, Tim Mulvaney, and Jean Sternlight. I also wish to thank the librarians at Texas Wesleyan School of Law for their most helpful assistance, as well as Kyla Hand for her excellent research assistance. Of course, all errors are my own.

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INTRODUCTION

According to urban legend,<sup>1</sup> casinos in Las Vegas and around the world rely on numerous subtle ways to influence customers into becoming the most physically inexhaustible and spend-happy people on earth. Casinos are said to rely on certain colors (shades of red are allegedly most effective) for wall coverings, carpets, and furniture because those colors have been “proven” to keep people awake and spark endless energy reserves in people. Loud, upbeat music plays in the casino elevators, putting customers in a festive, money-spending mood as they are delivered from the parking garage or hotel room floors to the main casino level.

In addition, special machines are said to emit pleasant, mood-enhancing perfumes into the air throughout the game-playing areas of the casino. Other machines are said to ensure oxygen-rich air to enliven and embolden customers as they continue to play slots and cards for hours on end. Endless cocktails are delivered free to any game-playing adults to help loosen up both players and wallets. The carpeting is said to be designed with confusing and chaotic patterns and colors so people’s attention will be drawn from the floor back to the slot machines and gaming tables.

The use of casino “chips” rather than cash makes the stakes (and losses) seem somehow less real. Restaurants and shops are strategically

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1. An urban legend is a story or anecdote “based on hearsay and widely circulated as true.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1377 (11th ed. 2005). Information regarding persuasion strategies and tactics used by casinos can also be found on the Internet, although it is difficult to corroborate the information as sources and citations are not made available to the reader. *See, e.g., Casino Tricks to Keep You Gambling*, ONLINE CASINO & POKER PORTAL, <http://www.online-casinos.co.uk/Casino/Casino-Gambling-Articles/Casino-Tricks-To-Keep-You-Gambling-740.html> (last visited Feb. 25, 2013).

positioned within the complex so that access is impossible without first walking through game-playing areas.<sup>2</sup> Skills—or game and card players who are actually casino employees rather than genuine customers—are said to be planted at tables and machines to stimulate play because, after all, nobody likes to gamble alone. Slot machines with all sorts of lights, bells, sirens, and whistles are said to be designed to keep players entertained, energized, and awake—and to call attention to *any* payout that occurs on the floor, no matter the size. Finally, the casinos are said to rid the game-playing areas of all clocks and windows so people lose track of time and cannot see outdoors to tell if it's daytime or nighttime.

All these strategies and tactics of influence and persuasion are said to be effective because the casino patrons are not *aware* of them; therefore, customers are not in the frame of mind to guard against such measures, or to attempt to resist their impacts. This is precisely what can happen in the context of negotiation if people are not aware of the various tactics and strategies that others might employ to influence or persuade, to change one's mind or alter one's position.<sup>3</sup>

In other words, in the case of influence and persuasion, awareness and knowledge truly equal power. This Article aims to help prevent negotiators from being taken advantage of by persuaders and manipulators—meaning people who exhibit the full range of ethical and non-ethical negotiation behaviors seen in the “real world,” from the most honest and transparent to the most dishonest and deceitful<sup>4</sup>—who employ various strategies and tactics of influence as they attempt to get to yes and get what they want. Of course, the information set forth can be used

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2. DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT “THEY” SAY 95 (1999).

3. As one scholar puts it, human beings have graduated from using physical force as the favored tool of persuasion, to using “language and metalanguage, with refined functions of the mind.” Sally Miller Gearhart, *The Womanization of Rhetoric*, 2 WOMEN'S STUD. INT'L Q. 195, 195 (1979).

4. See ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 132 (2d ed. 1991) (“Perhaps the most common form of dirty trick is misrepresentation about facts, authority, or intentions.”); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 142 (1982) (“A common ploy is to exaggerate the importance of what one is giving up and to minimize the importance of what one gets in return. Such posturing is part of the game. In most cultures these self-serving negotiation stances are expected.”); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 3 (1987) (“It is against the rules for lawyers to lie, but their ability to deceive through other means is at least accepted and frequently applauded.”). In one survey on lying, attorney respondents indicated that parties lied about material facts 23% of the time in the non-mediated negotiations in which they participated. Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 123 (2007). The survey, on file with Professor Peters at the University of Florida Levin College of Law, defined material facts as “event, subject, and other specifics affecting deals or dispute resolutions that fraud law would consider actionable as going beyond puffing or acceptable exaggeration.” *Id.* at 123 n.28 (internal quotation marks omitted). When the general public is polled on their perception of lawyers, the response is troubling. According to an ABA poll, only 22% of Americans consider lawyers to be “honest and ethical,” and furthermore, “the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower an individual's opinion of them.” Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll* 79 A.B.A. J. 60, 62 (1993).

as either a sword (to influence and persuade others) or as a shield (to resist or defend oneself against persuasion attempts made by others).<sup>5</sup> Moreover, the more skillfully one can identify, employ, and resist strategies and tactics of influence and persuasion, the better one can negotiate. As one expert in negotiation adroitly pointed out over thirty years ago: “[A] tactic perceived is no tactic.”<sup>6</sup>

This Article was also written to explore both the theory and practice of the issues involved and to attempt to link the two. As Carrie Menkel-Meadow reminds us: Lawyers need to know *both* theory and skills.<sup>7</sup> As human relations expert Mary Parker Follett might put it, I hope to shed light on how one can bring insights on this topic from the theoretical “mind” level to the behavioral “motor” level.<sup>8</sup> Much of the following information is fairly straightforward and, with mindful effort and minimal practice, can be immediately applied to everyday personal and professional negotiations.

Some of the persuasion concepts and tactics discussed in this Article have been studied and written about in other areas of academia (marketing, political science, psychology, communication, rhetoric, social work, etc.), and yet, for whatever reason, negotiation scholars across the disciplines have largely failed to adequately shine a spotlight on this information. As Deepak Malhotra and Max Bazerman state, “the vast majority of writing on negotiation has ignored the element of interpersonal influence. Because negotiators spend a great deal of time

5. See Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 3 (1994) (“In everyday life, people often move rapidly and fluently between the roles of target and agent. Their persuasion knowledge supports this flexibility by providing them with the resources necessary to do the basic tasks of persuasion coping and persuasion production. There is presumably a fairly close connection, therefore, between people’s coping knowledge and what they know that helps them plan, construct, and execute their own influence attempts.”).

6. HERB COHEN, YOU CAN NEGOTIATE ANYTHING 138 (1980).

7. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 595 (1994) (“I hope to . . . expose . . . the false dualism of so-called intellectual rigor in legal ideas and ‘science’ and the presumed ‘weakness’ of skills training by demonstrating that both theory and skills are ‘legal science’ and rigorous, and both are also incomplete and partial statements of what a lawyer needs to know.”); see also John C. Kleefeld, *Rethinking ‘Like a Lawyer’: An Incrementalist’s Proposal for First-Year Curriculum Reform*, 53 J. LEGAL EDUC. 254, 255 (2003). Kleefeld suggests the creation of a first-year course that:

in an integrated fashion, aims to instill a culture of professional competence and ethics while at the same time laying the foundation for reflective and critical thinking about law. I do not subscribe to the dichotomous view that lawyerly and scholarly competencies are vying concepts; both are important, and the development of one influences and informs development of the other. We need scholarly practitioners; we also need practical scholars. The course I envision—one that would supplement, rather than supplant, doctrinal analysis—aims to nurture both types of competency.

*Id.*

8. Albie Davis, *An Interview with Mary Parker Follett*, in NEGOTIATION THEORY AND PRACTICE 17 (William Breslin & Jeffrey Z. Rubin eds., 1991).

trying to persuade each other to agree to their desired outcome, this seems to be a glaring omission.”<sup>9</sup>

This Article will begin to help correct this omission. More specifically, I hope this Article can be used to help persuade those who run law schools (meaning professors, deans, trustees, and other people occupying teaching, administrative, and leadership posts) to make a greater effort to incorporate the theory and practice of persuasion into the school curriculum. I concur with Gerald Wetlauffer’s opinion that “law is the very profession of rhetoric. We are the sons and daughters of Gorgias himself.”<sup>10</sup>

Similarly, Michael Smith argues that lawyers are the guardians of three important bodies of knowledge: “critical analysis, argumentation, and persuasion.”<sup>11</sup> Yet the opportunity for law students to learn the theory and application of persuasion principles and mechanisms seems largely limited to the following courses: (1) Trial Advocacy or Appellate Advocacy (which teach students how to persuade a court or jury through the written and/or spoken word); (2) Legal Research and Writing (which teaches students how to persuade courts or other lawyers through the written word); and (3) courses in ADR (or “appropriate” dispute resolution as many now call it<sup>12</sup>), which touch on issues of persuasion in the context of negotiation, mediation, and arbitration.<sup>13</sup> Of those courses, the only *required* course for law students at most schools is Legal Research and Writing. I would argue that a unit entitled “Persuasion

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9. Deepak Malhotra & Max H. Bazerman, *Psychological Influence in Negotiation: An Introduction Long Overdue*, 34 J. MGMT. 509, 510 (2008). Scholars have long pointed out that persuasion is a core or central element of the negotiation process. One prominent scholar of negotiation declared nearly three decades ago: “Negotiation consists of assessment, persuasion, and exchange. Combined, these processes account for most of the actions a negotiator takes and most of the stages through which a negotiation proceeds.” Robert J. Condlin, ‘Cases on Both Sides’: *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 67 (1985).

10. Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1554–55 (1990). Note that Aristotle defined rhetoric as “the faculty of observing in any given case the available means of persuasion.” ARISTOTLE, *Rhetoric bk. I*, in RHETORIC AND POETICS 19, 24 (W. Rhys Roberts & Ingram Bywater trans., 1984). Note, too, that Gorgias (c. 485–380 B.C.) was a Greek sophist, pre-Socratic philosopher, and rhetorician. Along with Protagoras, Gorgias forms the first generation of Sophists.

11. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 363 (2d ed. 2008).

12. Professor Carrie Menkel-Meadow states, “We now call it ‘appropriate dispute resolution,’ rather than ‘alternative dispute resolution,’ precisely to signal that different processes may be appropriate for different kinds of disputes or in different types of settings.” Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 979–80 (2001).

13. There are numerous legal advocacy and legal writing books containing important sections on rhetoric and persuasion. *See, e.g.*, CAROLE C. BERRY, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* (3d ed. 2003); CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* (5th ed. 2006); DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* (2003); LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, *PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION* (2d ed. 2001).

Knowledge”<sup>14</sup> should be incorporated into that course,<sup>15</sup> thereby ensuring that *all* law school graduates, nationwide, are introduced to the power and immediate relevancy of material that is useful in the broadest sense, given its applicability to a vast array of legal and business problems and practice areas.<sup>16</sup> Two persuasion knowledge scholars underscore the ubiquity of the topic in everyday (professional and non-professional) life:

In everyday life, people often move rapidly and fluently between the roles of [persuasion] target and agent. Their persuasion knowledge supports this flexibility by providing them the resources necessary to do the basic tasks of persuasion coping and persuasion production. . . .

Once we appreciate the many functions that persuasion knowledge performs, its value and scope become apparent. It is a resource to which people must have immediate access during any interaction in which the need may arise to recognize and manage, or to construct and deliver, a persuasion attempt.<sup>17</sup>

Lawyers, businesspeople, and anyone else involved in day-to-day negotiations are constantly moving between the roles of persuasion *agent* and persuasion *target*. If one negotiation party is making attempts to persuade, the receiving or “target” party should have an understanding of the various tactics and techniques that are being employed in those attempts, as well as possible defenses thereto. This Article attempts to provide this knowledge and understanding so that *all* parties, whether agents or targets, can be more effective in the negotiation.

The Article is divided into three Parts: Part I sets forth working definitions of persuasion and resistance (including the so-called “four faces” of resistance as they relate to persuasion—*reactance*, *distrust*, *scrutiny*, and *inertia*).

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14. See generally Friestad & Wright, *supra* note 5; see also Sherman J. Clark, *The Character of Persuasion*, 1 AVE MARIA L. REV. 61, 68 (2003) (“[T]here are risks inherent in the fact that we are not always conscious of exactly what we do when we persuade. The most obvious risk is simply that *we may be less successful than we could be if we were willing to give the matter more thought*. Even elite athletes devote a certain amount of attention to mechanics, if not during a game then in practice.” (emphasis added)).

15. Another option could be to create a “mini-course” in legal persuasion that is shorter in length than the more traditional courses such as property, contracts, civil procedure, or torts. Indeed, the mini-course could be modeled after a course taught by Professor Howard Sacks at Northwestern Law School during the 1957–58 school year. The course, entitled “Professional Relations,” was offered without credit and was taught (in four classes lasting two hours each) over the span of two weeks. Howard R. Sacks, *Human-Relations Training for Students and Lawyers*, 11 J. LEGAL EDUC. 316, 322 (1959).

16. Persuasion can be a necessary component of obtaining resolution in various kinds of matters and disputes that are oftentimes settled outside the courtroom, including adoptions, mergers, wills, contracts, incorporations, and divorces. Moreover, persuasion can be a central element in resolving criminal cases that don’t go to trial, as plea bargaining accounts for the vast majority of outcomes of criminal cases. See Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 163 n.1 (2007) (discussing how plea bargaining, despite its critics, “shows no sign of decreasing in importance”).

17. Friestad & Wright, *supra* note 5, at 3.

Part II discusses persuasion and resistance more generally in the context of negotiation. It also sets forth several important models and theoretical foundations to provide a context for understanding different types of persuasion, as well as various principles and mechanisms involved in both giving and receiving persuasion messages. Included in this Part will be a discussion of the Elaboration Likelihood Model, Inoculation Theory, the Approach-Avoidance Conflict Model, Alpha-Omega persuasion strategies, and Robert Cialdini's six "weapons" of influence.

Part III, the core of this Article, offers information, rooted in empirical research, regarding different strategies, tactics, and mindsets that persuaders employ as they attempt to get what they want through negotiation. Specifically, I offer strategies and tactics parties might exhibit or implement to persuade and influence people during a negotiation. In discussing the techniques, I hope to convey a sense of how the particular strategy works, why it is effective and, perhaps most important of all, how one can effectively *resist* it or defend oneself against it.

Although this Article is targeted to lawyers and businesspeople, the suggestions I offer are applicable to those working in any other field, occupation, or circumstance where people interact with other people, negotiate, and work to achieve solutions and agreements acceptable to all parties involved.

## I. RESISTANCE AND PERSUASION: TOWARD DEFINITIONS

### A. DEFINITION OF PERSUASION

*Webster's Third New International Dictionary* defines persuasion as "an act or the action of influencing the mind by arguments or reasons offered or by anything that moves the mind or passions or inclines the will to a determination," or "the condition of having the mind influenced (as to decision, acceptance, or belief) from without."<sup>18</sup>

Two leading scholars in the field of persuasion define it as "a conscious attempt by one individual to change the attitudes, beliefs, or behavior of another individual or group of individuals through the transmission of some message."<sup>19</sup> Persuasion, then, falls short of the more blatant "coercion."<sup>20</sup> While coercion might take the form of using guns or economic sanctions to "get to yes," persuasion relies on the power of verbal and non-verbal communication.

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18. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1688 (1993).

19. ERWIN P. BETTINGHAUS & MICHAEL J. CODY, PERSUASIVE COMMUNICATION 3 (4th ed. 1987).

20. *But see* Gerald R. Miller, *On Being Persuaded*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 3, 4 (James Price Dillard & Michael Pfau eds., 2002) ("[M]uch persuasive discourse is *indirectly* coercive; that is, the persuasive effectiveness of messages often depends heavily on the credibility of threats and promises proffered by the communicator.").

## B. DEFINITION OF RESISTANCE

*Webster's Third New International Dictionary* defines resistance as “the act or an instance of resisting,” the “power or capacity to resist,” or “an opposing force.”<sup>21</sup> Resistance can be an *outcome* (that is, the outcome or end result of being able to withstand change and not be moved despite pressure to change), or it can be a *motivational state* (that is, having the motivation to oppose change, to put up oppositional force against pressures of influence and change, regardless of whether, in the end, that force of resistance is effective or ineffective).

Some people are more resistant to persuasion than others simply due to individual differences in personal traits such as intelligence and personality.<sup>22</sup> In addition, there will be certain *issues* that are so important to people—that are so fundamentally imbedded into the core of what they think, feel,<sup>23</sup> and believe—that movement on the issue is effectively impossible.<sup>24</sup> Someone’s stance on abortion might be such an issue.<sup>25</sup> A person’s fanatical allegiance to a particular athletic team might be another.

Before a negotiation begins, then, it can be helpful to learn if there are certain attitudes that will not move—that are of such high importance that they are surrounded by a seemingly impenetrable wall of resistance to influence and change.

Scholars of influence suggest that toward any given issue, a person’s “attitude importance” will generally be high or low.<sup>26</sup> Moreover, when a person’s *highly important* attitudes are threatened, the person will have a strong reaction both emotionally (with increased anger and irritation) and cognitively (with increased counterarguments).<sup>27</sup> For example, in one

21. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1932 (1993).

22. Scholars in the area of influence and persuasion suggest that people who are *highly intelligent*, people who have a *high need for cognition* (meaning they like to think deeply, thoroughly, and carefully about any given issue), and people who are *highly argumentative* (meaning they like to argue and attack other people’s positions), tend to be more resistant to influence and persuasion than other people. See generally Curits P. Haugtvedt & Richard E. Petty, *Personality and Persuasion: Need for Cognition Moderates the Persistence and Resistance of Attitude Changes*, 63 J. PERSONALITY & SOC. PSYCHOL. 308 (1992); Dean Kazoleas, *The Impact of Argumentativeness on Resistance to Persuasion*, 20 HUM. COMM. RES. 118 (1993); Nancy Rhodes & Wendy Wood, *Self-Esteem and Intelligence Affect Influenceability: The Mediating Role of Message Reception*, 111 PSYCHOL. BULL. 156 (1992).

23. See generally Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOTIATION J. 301 (2005).

24. See Stanley Feldman, *Structure and Consistency in Public Opinion: The Role of Core Beliefs and Values*, 32 AM. J. POL. SCI. 416, 422 n.2 (1988).

25. See Brad J. Sagarin & Sarah E. Wood, *Resistance to Influence*, in THE SCIENCE OF SOCIAL INFLUENCE: ADVANCES AND FUTURE PROGRESS 321, 323 (Anthony R. Pratkanis ed., 2007) (“Attitudes about abortion . . . are often connected to attitudes about religion, morality, freedom, personal liberty, women’s rights, and so on. Such deeply embedded attitudes are resistant to change because a change in one attitude threatens to cause an uncomfortable state of imbalance or a cascade of changes to other attitudes.” (internal citation omitted)).

26. *Id.* at 322.

27. *Id.*

experiment, people in favor of allowing gays into the military were shown a speech arguing strongly *against* that position.<sup>28</sup> Half of the participants were “high” in attitude importance on the issue (meaning they agreed with statements such as, “My attitude towards gays in the military is very important to me personally”).<sup>29</sup> The other half of the participants were “low” in attitude importance on the issue (meaning they agreed with statements like, “I don’t have very intense feelings about this issue”).<sup>30</sup>

The speech contained five strong arguments in opposition to gays in the military, such as, “Gays in the military undermine unit cohesion and therefore combat performance.”<sup>31</sup> Participants listened to the speech and then reported (1) their emotional reactions to the speech (such as anger or happiness), (2) their cognitive reactions to the speech (such as counterarguments to what they were hearing), and (3) their post-speech attitudes regarding gays in the military.<sup>32</sup>

It was determined, not surprisingly, that even though *all* the participants began the study in favor of gays in the military, the participants who were “low” in attitude importance were significantly less successful in defending their attitudes than were participants who were “high” in attitude importance.<sup>33</sup> Indeed, the latter exhibited strong resistance to the speech both emotionally (with anger) and cognitively (with more counterarguments).<sup>34</sup> The investigators concluded that these quick and forceful emotional and cognitive responses will occur in a person whenever issues high in attitude importance are threatened.<sup>35</sup>

With this research in mind, it is important for negotiators to try to get a sense, through early discussions, if other parties have certain issues that are high in attitude importance. Obviously, the emotional and cognitive responses generated when discussing those issues will shed light on their relative importance. In the end, it might be possible to win favorable movement on those issues, but doing so could require significant expenditure of resources and/or concessions.

### C. THE FOUR FACES OF RESISTANCE

Eric Knowles and Jay Linn, two experts in the area of resistance in persuasion, describe what they call the “four faces” of resistance: *reactance*, *distrust*, *scrutiny*, and *inertia*.<sup>36</sup> They suggest that these are not

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (internal quotation marks omitted).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Eric S. Knowles & Jay A. Linn, *The Importance of Resistance to Persuasion*, in RESISTANCE AND PERSUASION 6, 7 (Eric S. Knowles & Jay A. Linn eds., 2004).

different kinds of resistance, but rather “different perceptual stances toward it, much the same way an object viewed from four directions may present varied retinal projections but still be seen as the same entity.”<sup>37</sup> The “four faces” are introduced to underscore that the more knowledge readers have about resistance, the more mindful and effective they will become in both *persuading others* and in *resisting persuasion attempts* made by others.

### I. Reactance

Jack Brehm coined the term “reactance” to refer to the negative emotional reaction people feel when they believe someone else is threatening to eliminate their choices in life, or their range of alternatives.<sup>38</sup> When one person attempts to influence another person, the target can feel reactance, which motivates the target to resist the influence attempt and to protect or restore the threatened freedom(s).<sup>39</sup> Reactance can be displayed in numerous ways, including opposition, disobedience, obstinacy, contrariness, or passive aggression.<sup>40</sup>

Brehm identified two variables that contribute to the intensity (or lack of intensity) of reactance displayed: (1) the nature of the attempt at influence; and (2) the number and importance of the freedoms at stake.<sup>41</sup> Regarding the first variable, if the attempt at influence is coercive, unwanted, or seemingly arbitrary, then reactance will be more intense. Likewise, if the influence attempt is more collaborative, indirect and subtle, or seemingly justified, then reactance will be more muted. And regarding the second variable, reactance will become stronger and more intense as the threatened freedoms become more numerous and more important to the person.<sup>42</sup>

### 2. Distrust

In the context of negotiation, people can become defensive and guarded when counterparts make proposals, offers, or suggestions for change. The party receiving the proposals and offers usually wants to know all the facts and circumstances surrounding the issues involved, as

37. *Id.* at 6.

38. See generally JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966); SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981).

39. See Donald A. Saucier & Russell J. Webster, *Social Vigilantism: Measuring Individual Differences in Belief Superiority and Resistance to Persuasion* 36 PERSONALITY & SOC. PSYCHOL. BULL. 19, 21 (2010) (“The motivational state of reactance may . . . produce efforts to reassert one’s freedom through oppositional behavior (e.g., by resisting the restrictions, exhibiting backlash effects, or aggressing against the agent imposing restrictions).”).

40. See generally BREHM, *supra* note 38.

41. Jack W. Brehm, *Psychological Reactance: Theory and Applications*, in 16 ADVANCES IN CONSUMER RESEARCH 72, 72–75 (Thomas K. Srull, ed., 1989).

42. *Id.*

well as the motives of all other parties to the negotiation. Until this information can be obtained, a sense of distrust can permeate the process.<sup>43</sup>

### 3. *Scrutiny/Skepticism*

When people realize that someone is trying to influence them (e.g., through requests, pleas, or persuasive messages), they oftentimes react by turning highly focused attention toward the matter at hand.<sup>44</sup> Every part of the request or message is thoroughly examined, tested, evaluated, and questioned. The scrutiny can lead to finding real or imagined weaknesses in the message or proposal, which in turn can lead to counter-argument, counter-proposals, ambivalence, doubt, or outright rejection.

This seems to be especially true for lawyers, largely because of the decisionmaking style that tends to be dominant among lawyers when compared to people in the general population. Specifically, based upon results of the widely used Myers-Briggs Type Indicator personality test,<sup>45</sup> about 73% of male law students and 60% of female law students prefer “Thinking” as their decisionmaking style.<sup>46</sup> In the general population, only about 60% of males and 35% of females prefer “Thinking” as their decisionmaking style.<sup>47</sup> Researchers conclude that the “Thinking” style people “prefer to come to closure in a logical, orderly manner,” and they “can readily discern inaccuracies and are often critical.”<sup>48</sup> Lawyers having the “Thinking” decisionmaking style are particularly effective at exhibiting both scrutiny and skepticism while analyzing data and arguments in the context of negotiation.

### 4. *Inertia*

Inertia is the desire to not change; the quality focuses not so much on *resisting* change as it does on simply staying put or staying the same.

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43. See Roy J. Lewicki et al., *Trust and Distrust: New Relationships and Realities*, 23 *ACAD. MGMT. REV.* 438, 439 (July 1998) (defining trust in terms of “confident positive expectations regarding another’s . . . words, actions, and decisions”).

44. R.E. PETTY & J.T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986).

45. The Myers-Briggs Type Indicator is one of the most extensively used personality tests in the world. The test provides scores on four continua: Introversion/Extraversion, Sensing/Intuiting, Thinking/Feeling, and Judging/Perception. The Myers-Briggs “type” of law students and lawyers has been investigated in several studies, all of which report the prevalence of “Thinking” over “Feeling.” See Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 *J. LEGAL EDUC.* 460, 465–66 (1967); Frank L. Natter, *The Human Factor: Psychological Type in Legal Education*, 3 *RES. PSYCHOL. TYPE* 55, 55–67 (1981); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 *CUMB. L. REV.* 63, 80–81, 91–92, 96–97 (1995); Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 *CAP. U. L. REV.* 979, 1008–19 (2002).

46. SUSAN J. BELL, *FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER?* 152 (2d ed. 1992).

47. *Id.*

48. *Id.*

The goal, then, is to avoid disrupting the status quo, initiating new actions, or spending energy considering the merits of new ideas or proposals.<sup>49</sup> Inertia can mean unresponsiveness to the persuader, or inattentiveness to the details and specifics of the offer, proposal, or persuasion message. Indeed, the persuader usually experiences this kind of resistance as passivity, avoidance, or disengagement.<sup>50</sup>

Again, the “four faces” are introduced to underscore that the more knowledge readers have about resistance, the more mindful and effective they will become in both *persuading others* and in *resisting persuasion attempts* made by others. Indeed, the ability to recognize the four faces in oneself or in negotiation counterparts can help a person to decrease or altogether overcome the role they play in resistance.

For example, a counterpart’s strong reactance or skepticism displayed upon hearing a particular proposal can be seen as more of a *process stage* that the counterpart is temporarily passing through on a longer journey toward ultimate agreement. In fact, recognizing such a stage within the negotiation could become something one does on a routine basis when he or she “goes to the balcony” during a negotiation. William Ury eloquently describes going to the balcony thusly:

When you find yourself facing a difficult negotiation, you need to step back, collect your wits, and see the situation objectively. Imagine you are negotiating on a stage and then imagine yourself climbing onto a balcony overlooking the stage. The “balcony” is a metaphor for a mental attitude of detachment. From the balcony you can calmly evaluate the conflict almost as if you were a third party. You can think constructively for both sides and look for a mutually satisfactory way to resolve the problem.<sup>51</sup>

As Ury notes, going to the balcony allows negotiators to distance themselves from their “natural impulses and emotions.”<sup>52</sup> It is *this* ability that allows one to understand that, yes, one of the “four faces” of resistance can be detected arising either in oneself or in one’s negotiation counterpart. Through mindfulness and “going to the balcony,” the negotiator is able to either (1) increase her own resistance to being persuaded in that particular negotiation, or (2) to work to patiently overcome the counterpart’s resistance, whether it be through ongoing conversations, intervention by third parties, references to objective criteria, or another tactic.

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49. Knowles & Linn, *supra* note 36, at 7–8.

50. See James Wallihan, *Negotiating to Avoid Agreement*, 14 NEGOTIATION J. 257, 257 (1998) (discussing what the author calls “avoidance bargaining” or “the use of negotiation for the purpose of avoiding agreement” (emphasis omitted)).

51. WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 37–38 (1993).

52. *Id.* at 38.

## II. RESISTANCE AND PERSUASION: BUILDING A CONTEXT

A good deal of activity in the fields of law and business involves persuasion, that is, getting people to approach things in a certain way, to resolve things in a particular manner, to go along with this or that idea—in short to agree, to give in, or to relent. The context might be formal or informal; it might be a client interview, negotiation, mediation, arbitration, administrative hearing, pre-litigation conference, court battle, or settlement conference. Whatever the context, lawyers spend their working hours dealing with and trying to persuade all kinds of people (including clients, witnesses, judges, secretaries, police officers, court officers, other lawyers, etc.) to do all manner of things in all kinds of situations.<sup>53</sup> As one scholar puts it: “We lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results *through our strategic speaking*.”<sup>54</sup>

Of course, this Article will also address tools and behaviors of persuasion that go beyond mere words and “strategic speaking.” First, however, it is important to understand that persuasion comes in different packages or forms that people have for centuries attempted to organize and categorize.

### A. TWO FUNDAMENTAL TYPES OF PERSUASION

The idea that there are two fundamental types of persuasion can be traced at least to Aristotle, who made a distinction between persuasion involving emotion and passion (*pathos*) and persuasion involving reason and logic (*logos*). Aristotle’s *Rhetoric* is the earliest authoritative analysis of persuasive discourse and argumentative techniques and is the source of numerous Roman treatises on the topic.<sup>55</sup> Roman rhetoricians and lawyers like Cicero<sup>56</sup> and Quintilian,<sup>57</sup> relying on Aristotle’s rhetorical

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53. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927 (1980) (discussing negotiation as an “almost galactic” process by which one “deals with the opposing side in war, with terrorists, with labor or management in a labor agreement, with buyers and sellers of goods, services, and real estate, with lessors, with governmental agencies, and with one’s clients, acquaintances, and family”). See generally John Lande, *Teaching Students to Negotiate like a Lawyer*, 39 WASH. U. J.L. & POL’Y 109 (2012).

54. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1220 (1990) (emphasis added). See generally Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011).

55. The term “rhetoric” sometimes refers to a rhetorical treatise written by a Greek or Roman author. Rhetoric is also used in the way that Aristotle would use it: the “faculty [or power] of discovering in the particular case what are the available means of persuasion.” ARISTOTLE, *THE RHETORIC OF ARISTOTLE* bk. VII (Lane Cooper trans. 1932).

56. Marcus Tullius Cicero (circa 106–45 B.C.) was a Roman statesman, lawyer, and teacher whose major works on rhetoric include *DE ORATORE*, *BRUTUS*, and *ORATORE*.

57. See MARIUS FABIVS QUINTILIAN, *INSTITUTIO ORATORIA* 397 (H.E. Butler trans., 1954) (“There are . . . three aims which the orator must always have in view; he must instruct, move, and charm his hearers.”). Marius Fabius Quintilian (circa 35–95 A.D.) was a Roman teacher of public speaking and rhetoric whose major rhetorical work is *INSTITUTIO ORATORIA*.

analyses, divided persuasive discourse, (and legal arguments in particular), into three separate categories: (1) logical argument, or *logos*; (2) ethical appeal or credibility, or *ethos*; and (3) emotional argument, or *pathos*.<sup>58</sup> As Cicero wrote more than two thousand years ago regarding the persuasive power contained within human emotion: “For men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute.”<sup>59</sup>

A strong academic interest in the topic of persuasion was jump-started in America during World War II. Specifically, psychologist Carl Hovland and his colleagues were asked by President Franklin D. Roosevelt and his administration to investigate how to boost soldier morale and persuade them to want to continue fighting against the Japanese.<sup>60</sup>

Later, Hovland and his colleagues worked to discover the sequences of information-processing states that are central to the success of persuasive communication. They suggested that persuasion entailed learning message arguments and that it occurred in a series of steps. Specifically, in order to be persuaded, individuals had to attend to, comprehend, learn, accept, and retain the message.<sup>61</sup> This made intuitive sense to other scholars in the area; indeed, there is evidence that learning can be one component of persuasion—the more people learn and comprehend message arguments, the more likely they are to accept the positions being advocated.<sup>62</sup>

Yet the early work of Hovland and his colleagues missed the mark in that it assumes the listener is a passive, sponge-like creature instead of

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58. Note that while classical rhetoricians created these three separate categories for purposes of analysis and discussion, they did not consider *ethos*, *logos*, and *pathos* as being completely separable from each other. Rather, each category is connected to, and helps define, the other two. See ARISTOTLE, *supra* note 55, bk. VIII (Lane Cooper trans., 1932); see also John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 DAYTON L. REV. 83, 92–93 (1993). For an article that links the ancient Greek and Roman rhetoricians to modern legal advocacy, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994). For a general discussion of *ethos*, *logos*, and *pathos*, see Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEG. WRITING 61, 72–78 (2001–2002).

59. WALTER R. FISHER, HUMAN COMMUNICATIONS AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION 37 (1987) (quoting Cicero’s DE ORATORE). Aristotle had an extensive treatment of emotions in his treatise RHETORIC. He discusses emotions in pairs of opposite emotions, (one negative and one positive), in keeping with his concept of balance in rhetoric. The pairs include the following: (1) anger and calmness; (2) enmity and friendliness; (3) fear and confidence; (4) shame and shamelessness; (5) unkindliness and kindness; (6) pity and indignation; and (7) envy and emulation. Cooley, *supra* note 58, at 101 (citing ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 124–72 (George A. Kennedy trans., 1991)).

60. C.I. HOVLAND ET AL., EXPERIMENTS ON MASS COMMUNICATIONS (1949).

61. C.I. HOVLAND ET AL., COMMUNICATION AND PERSUASION (1953).

62. See generally Shelly Chaiken et al., *Principles of Persuasion, in SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 702 (E.T. Higgins & A.W. Kruglanski eds., 1996).

an active, thinking person whose own mental reactions to messages play a critical role in the process of persuasion. As one investigator puts it:

[A listener] does not sit there listening and absorbing what is said without any counteraction on his part. Indeed, it is more likely that under such circumstances, while he is listening to the persuasive communication, he is very actively, inside his own mind, counter-arguing, derogating the points the communicator makes, and derogating the communicator himself.<sup>63</sup>

Researchers spent the next forty years investigating this interactive process between the source of the persuasive message, and the target of that message. Finally, in 1986, two scholars took this research and produced an integrated model called the Elaboration Likelihood Model (“ELM”).<sup>64</sup> When investigating persuasion, current scholars tend to focus on this model because it has generated a tremendous amount of research and offers a comprehensive framework for understanding communication effects:

[N]ot only did the ELM take the various existing theories of persuasion and organize them . . . it also took the multitude of processes by which variables could impact attitudes that were articulated in prior research and theory and organized them into a finite set, specifying when they operated.<sup>65</sup>

#### B. ELABORATION LIKELIHOOD MODEL

ELM was proposed by Richard Petty and John Cacioppo.<sup>66</sup> *Elaboration* refers to the extent to which a person thinks about (or mentally modifies) arguments contained in a given communication.<sup>67</sup> *Likelihood* (referring to the probability that an event will occur) is used to state that elaboration can be either likely or unlikely.<sup>68</sup> Elaboration is assumed to fall along a continuum: On one end, a person thinks deeply about a given issue; on the other end, a person gives very little active thought or mental energy to the issue. ELM, then, suggests when people should be particularly likely to elaborate, or not elaborate, on persuasive messages.<sup>69</sup>

In ELM, there are two routes to persuasion: the “central route” and the “peripheral route.” The “central route” allows one to carefully

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63. Leon Festinger & Nathan Maccoby, *On Resistance to Persuasive Communications*, 68 J. ABNORMAL & SOC. PSYCHOL. 359, 360 (1964).

64. See Richard E. Petty & Pablo Brinol, *Persuasion: From Single to Multiple to Metacognitive Process*, 3 PERSP. ON PSYCHOL. SCI. 137, 143 (2008).

65. *Id.* at 140.

66. See generally Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 124 (Leonard Berkowitz ed., 1986).

67. *Id.* at 128.

68. *Id.* at 128–29.

69. RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 130 (4th ed. 2010).

scrutinize the content and quality of an offer, proposal, or persuasion message, check for internal consistency, and consider the arguments (are they strong or weak?), the reasoning (is it logical?), and conclusions (are they reasonable given the available information and evidence?) in light of one's own beliefs, experiences, and stored knowledge.<sup>70</sup> People tend to rely on the "central route" when the issue at hand is important and highly relevant to their lives. Moreover, persuasion through this route has been shown to: (1) be more durable and resistant to change<sup>71</sup> and (2) entail a great deal of mental effort, requiring both deliberate attention and allocation of mental resources.<sup>72</sup>

The "peripheral route" to persuasion, on the other hand, relies less on deep thinking and processing of rational appeals. Instead, people are influenced by "peripheral cues," or various factors that can produce attitude change without one having to actively think about the matter under consideration. In those instances, the persuader will turn to emotionally persuasive appeals, ranging from humor to sympathy to fear. Or the persuader will rely on simple persuasion cues and factors, such as (1) source credibility displayed through professional status, social status, or job title, (2) the number of arguments (or length of arguments) put forth in the persuasion message, (3) physical attractiveness of the source, or (4) confidence in presentation as exhibited through eye contact, body posture and gestures, facial expressions,<sup>73</sup> and speaking style<sup>74</sup> (such as tone, volume, speed, and accent).<sup>75</sup> People tend to rely on the "peripheral

70. See generally RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986).

71. Kipling D. Williams & Lara Dolnik, *Revealing the Worst First: Stealing Thunder as a Social Influence Strategy*, in *SOCIAL INFLUENCE: DIRECT AND INDIRECT PROCESSES* 213, 227 (Joseph P. Forgas & Kipling D. Williams eds., 2001).

72. Alison Ledgerwood et al., *Changing Minds: Persuasion in Negotiation and Conflict Resolution*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 455, 458 (Morton Deutsch et al. eds., 2006).

73. For an excellent discussion of the role of facial expressions, eye contact, and body posture and gestures as they relate to nonverbal persuasion, see Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 *KAN. L. REV.* 631, 642–47 (2009).

74. For excellent advice on how to persuade a judge, see Judge Gerald Lebovits, *Winning Through Integrity and Professionalism*, *THE ADVOCATE* (Bronx County Bar Ass'n), Summer 2009, at 14 ("Understate; never overstate. Less is more. Overstatement is unethical while quiet understatement persuades . . . . While arguing to judges, lawyers should speak about passionate subjects without speaking passionately. Passionate performances might convince juries but not judges.").

75. Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 *LAW & PSYCHOL. REV.* 301, 309 (2005) ("Varying the speed of one's speech affects credibility and helps create a temporal framework for events or actions. Studies show that 'rapid speaking (to a point) tends to increase believability,' while 'unnaturally slow speech is [perceived] as an indicator of uncertainty . . .'" (alterations in original) (footnote omitted)); see Craig Lambert, *The Psyche on Automatic: Amy Cuddy Probes Snap Judgments, Warm Feelings, and How to Become an 'Alpha Dog'*, *HARV. MAGAZINE*, Nov.–Dec. 2010, at 48, 52 (discussing cutting-edge work by Lakshmi Balachandra, a Fellow at Harvard Law School's Program on Negotiation, whose research indicates that

route” when the issue at hand is of minor importance, when there is not enough time (or too much distraction) to think deeply about the issue, or when the issue has little relevance in their lives.<sup>76</sup>

### C. RESISTANCE, PERSUASION, AND INOCULATION THEORY

Resistance and persuasion are part of a back-and-forth process. Specifically, resistance is the tug-of-war partner with persuasion: One party targets a second party with a persuasion message, the targeted party (sometimes) resists, and then the first party attempts to overcome that resistance. And on and on it goes in a cyclical fashion. As two persuasion scholars jointly state, “Just as it takes two opposing teams for a tug-of-war competition, resistance and persuasion are opposing yet integral parts of a persuasive interaction.”<sup>77</sup> However, if one is not armed with knowledge about a particular persuasion strategy or tactic, she can fall prey to it without even realizing what happened. Only if the tactic or strategy put forth by the first party is recognized and understood by the targeted party can it then be resisted.

William McGuire first identified that *persuasion* and *resistance* to persuasion form a dynamic process.<sup>78</sup> McGuire identified *motivation*<sup>79</sup> and

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the success of venture-capital pitches to investors is influenced more by nonverbal factors such as “calmness,” “passion,” “eye contact,” and “lack of awkwardness” than by the content of the presentations. Professor Amy Cuddy says the research indicates that the success of venture-capital pitches to investors turns on factors like “how comfortable and charismatic you are. The predictors of who actually gets the money are all about how you present yourself, and nothing to do with content.”)

76. See generally PETTY & CACIOPPO, *supra* note 70; see also PERLOFF, *supra* note 69, at 133–35; Chaiken, *supra* note 62, at 711–12; Carsten K. W. de Dreu, *Motivation in Negotiation: A Social Psychological Analysis*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 114, 121 (Michele J. Gelfand & Jeanne M. Brett eds., 2004) (“[N]egotiators with high epistemic motivation are more likely to engage in deliberate, deep, and systematic processing of available information, and they search additional information about the task and their opponent. Negotiators with low epistemic motivation, in contrast, are more likely to engage in heuristic processing of information.”); Ülku D. Demirdögen, *The Roots of Research in (Political) Persuasion: Ethos, Pathos, Logos and the Yale Studies of Persuasive Communications*, 3 INT’L J. SOC. INQUIRY 189, 196 n.1 (2010); Petty & Brinol, *supra* note 64, at 140–41; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?* 6 S. CAL. INTERDISC. L.J. 1, 22–25 (1997); Brad J. Sagarin et al., *Dispelling the Illusion of Invulnerability: The Motivations and Mechanisms of Resistance to Persuasion*, 83 J. PERS. & SOC. PSYCHOL. 526, 528 (2002); Donna Shestowsky, *Psychology and Persuasion*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 362, 363–66 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 436–38 (2006).

77. Knowles & Linn, *supra* note 36, at 8.

78. William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, *supra* note 66, at 191, 192–96.

79. There are numerous reasons why people are motivated to resist being persuaded, including but certainly not limited to: (1) the information conflicts with one’s strongly held beliefs or attitudes; (2) one senses that another person is trying to trick him or her; or (3) others are attempting to lie or use a tactic in a manipulative fashion, such as when they use flattery as a manipulative attempt to achieve ulterior goals. Sagarin et al., *supra* note 76, at 528.

*argument*<sup>80</sup> as being key elements involved in influence and change.<sup>81</sup> Specifically, if a person has little motivation and no (or few) counterarguments to a persuasion message, then that person can oftentimes be persuaded. But if the targeted person's motivation could be increased, and if counterarguments could be made available, then the influence could be successfully resisted.

One practical application of this dynamic process is called "inoculation theory," which is a technique to strengthen resistance to persuasion.<sup>82</sup> The theory draws a comparison between the human body's mechanisms to ward off disease and the brain's mechanisms to defend itself against potentially persuasive messages. Just as introducing a weakened form of an attacking virus into the human body will stimulate antibodies, so too will exposing a person to a weak dose of opposition arguments stimulate the production of counterarguments.<sup>83</sup> Thus, inoculation theory works exactly like a flu shot: Resistance to persuasion can be induced by exposing individuals to a small dose of arguments against a particular idea, coupled with appropriate criticism of those arguments. As one scholar writes, "by motivating receivers, and then preemptively refuting one or more potential counterarguments, inoculation spreads a broad blanket of protection both against specific counterarguments raised in refutational preemption and against those counterarguments not raised."<sup>84</sup>

Inoculation theory is quite common in the world of politics. Politicians are able to anticipate attacks from their opponents, and sometimes preempt those attacks through the use of inoculation techniques.<sup>85</sup> For example, in the 2008 election, Barack Obama used the technique in trying to build voter resistance to Republican opponent John McCain. Specifically, the Obama campaign wanted to "inoculate"

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80. See Gerald B. Wetlaufer, *The Rhetorics of Negotiations* 9–10 (Univ. of Iowa Coll. of Law, Working Paper, 2005) ("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 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 they don't] cease being arguments if they are not.").

81. McGuire, *supra* note 78.

82. *Id.* at 200–02.

83. Michael Pfau, *The Inoculation Model of Resistance to Influence*, in *PROGRESS IN COMMUNICATION SCIENCES* 133, 137–38 (George A. Barnett & Franklin J. Boster eds., 1997).

84. *Id.*

85. See generally MICHAEL PFAU & HENRY C. KENSKI, *ATTACK POLITICS: STRATEGY AND DEFENSE* (1990).

the voters so they would be “resistant” and not assign weight to McCain’s significant foreign affairs experience.<sup>86</sup>

First, Obama acknowledged McCain’s service to his country:

Now let there be no doubt. The Republican nominee, John McCain, has worn the uniform of our country with bravery and distinction, and for that we owe him our gratitude and respect. And we’ll also hear about those occasions when he’s broken with his party as evidence that he can deliver the change that we need.<sup>87</sup>

Obama then set forth the counterargument:

But the record’s clear: John McCain has voted with George Bush 90 percent of the time. Senator McCain likes to talk about judgment, but, really, what does it say about your judgment when you think George Bush was right more than 90 percent of the time? I don’t know about you, but I’m not ready to take a 10 percent change on change.<sup>88</sup>

While it can be debated how effectively the technique was employed in this particular instance, it was clearly employed: Voters were exposed to a small dose of arguments building up McCain’s foreign affairs experience, immediately followed by criticism of those very arguments. Surely Obama and his team were hoping this “inoculation” would spread a broad blanket of protection against both specific and general arguments trumpeting McCain’s foreign affairs experience as superior to Obama’s own.

#### D. THE APPROACH-AVOIDANCE CONFLICT MODEL, ALPHA-OMEGA PERSUASION STRATEGIES, AND CIALDINI’S SIX “WEAPONS” OF INFLUENCE

Kurt Lewin tells the story of a child at the beach whose toy floats in the surf at the water’s edge.<sup>89</sup> The child runs toward the ocean to retrieve the toy. But as he gets closer, the large splashing waves scare him away. He stops five or six steps away from the toy and is stuck in that position. If he backs away, his desire for the toy would impel him to move forward. If he steps closer to the water, the danger of the waves would force him to move back. At this point (the point of “equilibrium”), the little boy is stuck between “approach” and “avoidance.”<sup>90</sup>

John Dollard and Neal Miller formalized Lewin’s description into a more formal theory, the approach-avoidance conflict model.<sup>91</sup> More recently, two scholars of persuasion, Knowles and Linn, have applied the model to the topic of resistance and persuasion.<sup>92</sup> They focus on what they

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86. PERLOFF, *supra* note 69, at 132.

87. *Id.*

88. *Id.*

89. Kurt Lewin, *Frontiers in Group Dynamics*, in *FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS BY KURT LEWIN* 188, 188–237 (D. Cartwright ed., 1951).

90. *Id.*

91. *See generally* JOHN DOLLARD & NEAL MILLER, *PERSONALITY AND PSYCHOTHERAPY* (1950).

92. Eric S. Knowles & Jay A. Linn, *Approach-Avoidance Model of Persuasion: Alpha and Omega*

believe to be a primary implication of the model—that there are two fundamentally different ways to create change, two different strategies for promoting movement toward a goal: (1) so-called “Alpha” strategies,<sup>93</sup> which “promote change by activating the approach forces, thereby *increasing the motivation to move toward the goal*,”<sup>94</sup> and (2) so-called “Omega” strategies,<sup>95</sup> which “promote change by minimizing the avoidance forces, thereby *reducing the motivation to move away from the goal*.”<sup>96</sup>

A prolific and influential investigator of both Alpha and Omega persuasion strategies is Cialdini, who is credited with organizing a large body of scholarship into six general categories, or tools of influence and persuasion—tools that Cialdini refers to as “weapons of influence.”<sup>97</sup> The “weapons” are discussed at length in his book *Influence: The Psychology of Persuasion*. Cialdini’s work has had an extensive impact on how scholars conduct, analyze, and apply research in the area of persuasion; moreover, within the context of negotiation, the tools provide powerful insight into how one can effectively (1) lower the negotiation defenses of other people, (2) overcome resistance to interpersonal persuasion, and (3) bring about the give-and-take necessary for achieving agreements acceptable to all parties involved. Following is a brief summary of the six tools of influence and persuasion.

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*Strategies for Change*, in RESISTANCE AND PERSUASION, *supra* note 36, at 117, 119–20.

93. The Alpha strategies include the following: (1) making messages more persuasive (create strong arguments that justify and compel action); (2) adding incentives (add extra inducements for compliance, including interpersonal ones such as being liked for an opinion or choice); (3) increasing source credibility (make the source more expert or attractive to increase his or her persuasiveness); (4) providing consensus information (show that many people are doing it, thinking it, or wanting it); (5) emphasizing scarcity (tell the target that few exist, and only for a short time; scarcity makes the opportunity seem more attractive); (6) engaging the norm of reciprocity (small, gratuitous favors obligate the recipient to reciprocate); (7) emphasizing consistency and commitment (create small actions or reframe the target’s prior actions to appear consistent with the requested behavior). Knowles & Linn, *supra* note 92, at 120.

94. *Id.* at 119 (emphasis added).

95. The Omega strategies include the following: (1) sidestepping resistance (redefine the interaction with the persuasion target as not involving influence, e.g., it’s merely a “consultancy” or “conversation”); (2) addressing resistance directly (address sources of reluctance by lowering costs, counter-arguing concerns, or offering guarantees); (3) addressing resistance indirectly (build confidence, esteem, and self-efficacy in the persuasion target to remove reluctance); (4) distracting resistance (distract the persuasion target’s attention to interfere with her counter-arguing the persuasion message); (5) disrupting resistance (disrupt complacency to bring attention to the message—like if a panhandler on the street asks passersby to please give him ‘thirty-seven cents,’ the resulting confusion can lead to much higher compliance rates); (6) consuming resistance (provide persuasion target with prior opportunities to resist—some argue that asking the persuasion target repeatedly for a ‘yes’ might eventually lead to a ‘yes’ rather than the usual ‘no’ response); (7) using resistance to promote change (frame a message so that resistance to it promotes change, e.g., reverse psychology). *Id.* at 123.

96. *Id.* at 119 (emphasis added).

97. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* xii (1993).

I. *Reciprocation: People Should Give to Others What They Want to Receive in Return*

Through reciprocity, people tend to repay in kind what others have provided them. Even uninvited favors, gifts, and acts of kindness give people a sense of indebtedness that they feel must be reciprocated.<sup>98</sup> It works at the smallest and subtlest level of human activity and interaction. For example, one might find herself smiling at a coworker just because the coworker smiled first. States one scholar regarding reciprocity: “The rule was established to promote the development of reciprocal relationships between individuals so that one person could *initiate* such a relationship without the fear of loss. If the rule is to serve that purpose, then, an uninvited first favor must have the ability to create an obligation.”<sup>99</sup>

Charities rely on the rule of reciprocity to improve fundraising results. When the Disabled American Veterans organization used a traditional fundraising letter to appeal for donations, the yield rate was 18%.<sup>100</sup> However, when the group started enclosing a very small gift along with the fundraising letter (personalized, self-adhesive address labels printed with the recipient’s name and address), the response rate nearly doubled to 35%.<sup>101</sup>

Based on the rule of reciprocity, negotiators can attempt to elicit desired behaviors from other parties by first displaying those behaviors. Whether it’s a sense of trust, increased openness and cooperation, or a more pleasant and even-keeled demeanor, negotiators need to first model the behaviors they want to see from others.

For example, in the book *Destructive Emotions: How Can We Overcome Them? A Scientific Dialogue with the Dalai Lama*,<sup>102</sup> emotions researcher Paul Ekman devises an experiment between a Tibetan monk and an “aggressive, rather confrontational” university science professor.<sup>103</sup> Ekman observes the monk and the professor speak to each other for

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98. It isn’t always *positive* acts that are reciprocated. There are instances of negative acts, emotions, and behaviors that people feel compelled to reciprocate as well. See, e.g., *Michelson Responds to Williams’ “I Don’t Particularly Like the Guy” Comment*, ESPN (Dec. 15, 2008), <http://sports.espn.go.com/golf/news/story?id=3770488> (“Steve Williams drew the ire of the world’s third-ranked golfer when, during an event in New Zealand, he said, ‘I wouldn’t call Mickelson a great player, ‘cause I hate the [expletive],’ according to The Guardian newspaper of Britain. In a next-day interview with another newspaper, the New Zealand-based Star Times, Williams also said, ‘I don’t particularly like the guy. *He pays me no respect at all and hence I don’t pay him any respect.* It’s no secret we don’t get along either.’” (emphasis added)).

99. CIALDINI, *supra* note 97, at 30.

100. *Id.*

101. *Id.*

102. DANIEL GOLEMAN, *DESTRUCTIVE EMOTIONS: HOW CAN WE OVERCOME THEM? A SCIENTIFIC DIALOGUE WITH THE DALAI LAMA* (2003).

103. *Id.* at 17–18.

fifteen minutes on a topic about which there was strong disagreement (specifically, whether one should abandon science and become a monk).<sup>104</sup>

As predicted, the aggressive professor starts the conversation with high emotional arousal. However, over the course of the fifteen minutes, the professor's arousal begins to slowly dissipate. At the conclusion of the brief conversation, the professor states: "I couldn't be confrontational. I was always met with reason and smiles; it's overwhelming. I felt something—like a shadow or an aura—and I couldn't be aggressive."<sup>105</sup>

It's unclear if this outcome was an example of "emotional contagion" (that is, where the monk's emotions spread like a cold to the professor),<sup>106</sup> or if it was a result dictated by the rule of reciprocity (that is, where the monk was being reasonable and smiling toward the professor, so the professor felt compelled to return the same behavior in kind). Whatever the answer, it appears that people initially displaying aggressiveness can wind up transforming their own behavior and demeanor to align more with that of the person with whom they are interacting (which, in this case, was open, cooperative, and friendly).

The rule is also applicable to litigation matters. In addition to bargaining over the substantive matters of a case, lawyers who are preparing for litigation have to negotiate numerous logistical matters (e.g., discovery and deposition schedules). Because of the rule of reciprocity, if one side's attorneys make concessions on logistical matters, that could result in similar concessions being made by the other side.

## 2. *Commitment and Consistency: People Tend to Remain Committed to Positions and Consistent in Their Behaviors*

The commitment and consistency rule suggests that once people take a stand or go "on the record" in favor of a particular position or stance, they generally adhere to that position or stance. Cialdini discusses a study in which researchers ask half the residents of a large apartment complex to sign a petition supporting the building of a recreation center for people with disabilities.<sup>107</sup> Among those who are asked, agreement to sign is nearly 100%.<sup>108</sup> (Remember, half the residents are never even approached to sign the petition.<sup>109</sup>)

Two weeks later, *all* residents of the complex are approached and asked to make a donation for such a center.<sup>110</sup> Among those who were

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104. *Id.* at 17.

105. *Id.* at 18.

106. David R. Caruso et al., *Emotional Intelligence and Emotional Leadership*, in *MULTIPLE INTELLIGENCES AND LEADERSHIP* 55, 64 (Ronald E. Riggio et al. eds., 2002).

107. Robert B. Cialdini, *Harnessing the Science of Persuasion*, *HARV. BUS. REV.*, Oct. 2001, at 72, 76–77.

108. *Id.* at 76.

109. *Id.*

110. *Id.*

never asked to sign the petition, just over 50% make a donation to the project. However, among those who *did* sign the petition, donation rate rises to 92%.<sup>111</sup>

Cialdini suggests that the residents who signed the petition felt obligated to live up to their commitment.<sup>112</sup> Cialdini adds that the obligation was actually increased because the commitments were *active* (meaning they were spoken out loud or written down or otherwise made explicit in an active way), *public* (meaning they were made known to other people verbally, through writing, or through other forms of communication such as photographs, etc.), and *voluntary* (meaning they were made under one's free will rather than through force, coercion, or imposition from some outside source or party).<sup>113</sup>

If a negotiator makes an active, public, voluntary commitment to something, (e.g., a set of principles, a criterion of fairness, an objective standard,<sup>114</sup> a reservation or aspiration point,<sup>115</sup> or the best alternative option to making a deal<sup>116</sup>), the commitment and consistency rule suggests it will thereafter be difficult for her to change views on that particular matter.<sup>117</sup>

Consider the summer 2011 negotiation that took place in Congress regarding raising the debt ceiling. Many members of Congress signed a "no new tax" pledge sponsored by Americans for Tax Reform.<sup>118</sup> Signing the pledge is another example of an active, public, voluntary commitment; it ties the signatory parties' hands to a certain extent, making it difficult for them to engage in back-and-forth bargaining behavior where concessions can be traded in the course of hammering out a final agreement.

Or consider a personal injury lawyer who tells a client that he will be able to secure \$200,000 to settle a particular matter out of court. If the lawyer acted too hastily in arriving at the \$200,000 figure and soon determines the settlement value to be no more than \$100,000, he might

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111. *Id.*

112. *Id.*

113. *Id.* at 76–77.

114. *Objective standards* are outside, independent, third party experts or information sources that can help determine the value or worth of a deal component within a negotiation in a more objective fashion. For example, the objective standard used in valuing a used car might be the *Kelley Blue Book*. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 13 (1999).

115. In a negotiation, the *reservation point* is one's "bottom line," or the maximum amount that a buyer will pay (or minimum amount the seller will accept) for a good, service, or other legal entitlement. The *aspiration point* is just the opposite: It is the best deal one could possibly hope to achieve or obtain through the negotiation process. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–94 (2000).

116. FISHER ET AL., *supra* note 4, at 100 ("[BATNA] is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.")

117. See Sagarin & Wood, *supra* note 25, at 323.

118. William G. Gale & Brennan Kelly, *The 'No New Taxes' Pledge*, 104 TAX NOTES 197, 200 (2004).

be so embarrassed by the initial public commitment to \$200,000 that he cannot bring himself to encourage his client to accept a generous settlement offer of \$125,000.

Or consider union versus management negotiations where, hypothetically, the union representative publicly declares he “won’t agree to any deal that doesn’t include 100% health care benefits.” Because the commitment is made publicly, it is difficult for the union representative to make any change whatsoever on that particular negotiation point (even if new information suggests that a change in position might be better, overall, for the union membership). Thus, making a public commitment during a negotiation can lead to decreased flexibility in a process where compromise, concessions, and trades can sometimes result in overall superior agreements for everyone at the table.

Consider yet another kind of negotiation: jury members negotiating with each other on whether a particular criminal defendant is innocent or guilty. In American criminal cases, the jury must reach a unanimous decision in order to convict or acquit the accused. If the jury cannot reach a unanimous decision, the case ends in a mistrial or “hung jury,” and the costly trial process might begin anew.

During deliberations, jury members tend to periodically poll the jury members for a vote count on defendant guilt versus innocence.<sup>119</sup> This polling can take place either by “show of hands” or by secret ballot.<sup>120</sup> Based on the effects of public commitment, two scholars predicted that juries that used the “show of hands” polling procedure would be less likely to reach a unanimous verdict than juries who used secret ballots.<sup>121</sup> They predicted that once a juror has committed publicly to a position (by visibly raising a hand or not raising a hand), then she will be resistant to changing that vote.<sup>122</sup>

The researchers created eighty-nine mock juries.<sup>123</sup> Each jury read several case summaries and then tried to reach a unanimous verdict in each of the cases. Half the juries used only “show of hands” voting during deliberation; the other half used only secret ballots.<sup>124</sup>

The researchers found that when the cases were relatively clear-cut and most jurors could quickly agree on a particular verdict, then the “show of hands” and secret ballot voting procedures produced equivalent numbers of hung juries.<sup>125</sup> However, when cases were not as clear-cut—when they were a “close call”—it was found that “show of hands” jury

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119. See Robert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, 48 J. PERS. SOC. PSYCHOL. 349, 349–52 (1985).

120. *Id.* at 351.

121. *Id.* at 349–52.

122. *Id.*

123. *Id.* at 352.

124. *Id.* at 352–53.

125. *Id.* at 361.

voting caused significantly more hung juries than did voting by secret ballot.<sup>126</sup> As the researchers explain, “[b]eing publicly identified with a position may force early commitment to that position and make it difficult to change one’s position without appearing inconsistent or irresolute.”<sup>127</sup>

The lesson for persuasion in the context of negotiation is to create an environment where parties can feel free to come to the bargaining table with an open mind and *without* having made (or having to make) public commitments to a particular position or set of goals. With any luck, conversations leading up to the negotiation itself can set forth the general ground rule that parties will be open to talking about and seriously considering *numerous* possible options and package deals to satisfy various underlying interests of the involved parties, and thus parties will not issue any sort of statements or press releases with ultimatums or with unyielding commitments to certain positions within or certain outcomes for the negotiation. This can be difficult because the stereotype of hard positional bargainers is to rally support from their constituents by telling them exactly what they, the negotiators, will demand during the negotiation, what they will not accept, and that they will not yield until the final outcome of the negotiation conforms squarely with the various “take it or leave it” demands that were made.

It might also be agreed that the negotiation will take place in private with the press and outsiders excluded from the proceedings. This might not be possible in certain cases (for example, where so-called “open meeting” laws have been enacted to ensure public access to certain kinds of negotiation forums). However, in many instances, negotiating in private can make it easier for the parties to really listen to the views, arguments, and positions of all the parties involved, rather than feeling pressure to “play to the gallery” of constituents attending the negotiation—that is, showing how “tough” and stubborn one can be by exhibiting a largely unfriendly, unyielding, take-it-or-leave-it negotiation stance toward the other parties.

Finally, if a party to the negotiation *does* make public commitments, it is important for other parties in the negotiation to provide face-saving reasons (such as reasons why circumstances have changed) that allow the commitment-making party to gracefully back down from those commitments should they wish to do so.<sup>128</sup> As President John F. Kennedy stated in a speech at American University soon after the Cuban Missile Crisis: “Above all, while defending our own vital interests, nuclear powers must avert those confrontations which bring an adversary to the choice of either a humiliating defeat or a nuclear war.”<sup>129</sup>

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126. *Id.*

127. *Id.*

128. Birke & Fox, *supra* note 114, at 53.

129. KEVIN HILLSTROM, *THE COLD WAR* 270 (2006).

Or rather than potential nuclear threats, consider a more mundane matter involving commerce, such as a seller who states the familiar, “There is no way we can lower our price—this is our final offer.” If it later becomes clear that the price must be lowered to complete the sale, the other side needs to find a way to help the seller save face. Examples of such a statement include: (1) “I am glad I was able to find ways to compensate you for a lower price because I know you could not have lowered it otherwise,” or (2) “I realize that you are doing me a favor by reducing the price beyond what is normally possible, and I greatly appreciate it.”<sup>130</sup>

3. *Social Proof: People Tend to Follow the Lead of Other People—Especially People Who Are Similar to Oneself*

The principle of social proof suggests that, in many situations, people look to others to determine how to behave. This is one of the reasons why “laugh tracks” on television comedy shows are so effective—people laugh because *others* are laughing.<sup>131</sup>

Moreover, there is an important caveat to the general rule: Studies suggest that people are more likely to follow the examples of others whom they perceive to be *similar* to themselves in various ways—such as age, occupation, cultural or ethnic background, political or religious beliefs, socioeconomic status, educational attainment, sports-watching, hobby, travel, or exercise interests, professional accomplishment, or state or region of birth or residence.<sup>132</sup> Thus when trying to influence others in a negotiation—especially people who tend to be resistant to influence and persuasion—it will be more effective if the people or examples relied upon for “social proof” are similar to the people being targeted for influence. In one experiment, for example, residents of New York City were asked to return a lost wallet to its owner.<sup>133</sup> While people were highly likely to return the wallet when they learned that *another New Yorker* had previously attempted to do so, learning that someone from a

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130. DEEPAK MALHOTRA & MAX H. BAZERMAN, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* 278 (2007).

131. Raymond G.C. Fuller & Alan Sheehy-Skeffington, *Effects of Group Laughter on Responses to Humorous Material, A Replication and Extension*, 35 *PSYCHOL. REP.* 531, 533 (1974).

132. See Harvey A. Hornstein et al., *Influence of a Model's Feeling About His Behavior and His Relevance as a Comparison Other on Observers' Helping Behavior*, 10 *J. PERS. SOC. PSYCHOL.* 222, 225 (1968); see also Paul J. Silvia, *Deflecting Reactance: The Role of Similarity in Increasing Compliance and Reducing Resistance*, 27 *BASIC APPL. SOC. PSYCHOL.* 277, 278 (2005) (“Similarity increases the positive force toward compliance by increasing liking. Attraction to the communicator is a well-known force toward compliance. Liking another person increases the tendency to like objects that the other person likes. Similarity also enhances the communicator's credibility, which further increases the force toward compliance.” (citations omitted)).

133. Cialdini, *supra* note 107, at 72–76.

*foreign country* had tried to return the wallet had no impact on their decision one way or the other.<sup>134</sup>

#### 4. *Liking: People Tend to Say Yes to People They Know and Like*

At Tupperware parties, one person hosts a party for friends to demonstrate (and try to sell) Tupperware products. Studies have shown that the strength of the friendship bond between the seller and buyer is twice as likely to determine the sale as is a preference for the product itself.<sup>135</sup> And while some attendees of the party might not mind the “liking and friendship” element of the experience, others clearly do. As one person states regarding invitations to such parties:

It's gotten to the point now where I hate to be invited to Tupperware parties. I've got all the containers I need; and if I wanted any more, I could buy another brand cheaper in the store. But when a friend calls up, I feel like I have to go. And when I get there, I feel like I have to buy something. What can I do? It's for one of my friends.<sup>136</sup>

Research indicates that numerous factors can promote liking between two people; some of these factors include: physical attractiveness,<sup>137</sup> similarity<sup>138</sup> (e.g., in opinions, personality traits, background, lifestyle, dress, or interests), giving compliments,<sup>139</sup> exhibiting cooperative behavior,<sup>140</sup> and familiarity.<sup>141</sup> It is not a surprise, then, that investigators

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134. *Id.*; see Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 373 (1996) (“A negotiator should make a practice of asking the other party to justify its positions in terms of some objective criteria.”). The fact is that negotiators will oftentimes turn to “objective criteria” (or outside, independent, third party experts or information sources—such as the *Kelley Blue Book* value of a car—that can help determine the fair value or true worth of a particular deal component) as a tool of persuasion during a negotiation. Social proof is similar in that it, too, relies upon external factors and elements to add legitimacy, credibility, and persuasive force to various deal terms, options, and proposals that are being considered during the negotiation process. See generally ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Madan M. Pillutla & J. Keith Murnighan, *Fairness in Bargaining*, 16 SOC. JUST. RES. 241 (2003).

135. CIALDINI, *supra* note 97, at 168.

136. *Id.* at 168–69.

137. Research has shown that people automatically assign numerous favorable traits to highly attractive people, including talent, kindness, honesty, and intelligence. In a study of federal political candidates in Canada, it was found that physically attractive candidates received 2.5 times as many votes as less attractive candidates. In a study involving defendants in a criminal justice system, it was found that physically attractive defendants were twice as likely to avoid jail as the unattractive ones. Still other studies demonstrated that physically attractive people are better liked, more persuasive, and more frequently helped when they need assistance. *Id.* at 171–72.

138. Silvia, *supra* note 132, at 278.

139. Indeed, compliments seem to be such a powerful tool of liking and persuasion that research suggests that positive comments produce liking for the flatterer *even when they are untrue*. States Professor Robert Cialdini, “We are phenomenal suckers for flattery. Although there are limits to our gullibility—especially when we can be sure that the flatterer is trying to manipulate us—we tend, as a rule, to believe praise and to like those who provide it, oftentimes when it is clearly false.” Cialdini, *supra* note 97, at 175.

140. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 190 (1984) (“We are used to thinking about competitions in which there is only one winner, competitions such as football or chess. But the

determine those who tend to be cooperative (rather than competitive) during a negotiation are rated as more effective, on average, than those who are not.<sup>142</sup>

5. *Scarcity: Items and Opportunities Are Seen to Be More Valuable as They Become Less Available*

According to reactance theory, discussed above, people experience a negative emotional reaction when they believe someone else is threatening to eliminate their freedom (such as their choices in life or their range of alternatives). This might take the form of *supply limits* (“buy while supplies last”), *time limits* (“this is a limited time offer”), or *competition* (“if you don’t purchase my house this morning, someone scheduled to look at it this afternoon will surely buy it and you’ll miss out”).

In framing offers,<sup>143</sup> negotiators should remember that potential losses can be much more persuasive than potential gains. The power of “loss language” was demonstrated in a study involving a group of

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world is rarely like that. In a vast range of situations mutual cooperation can be better for *both* sides than mutual defection. The key to doing well lies not in overcoming others, but in eliciting their cooperation.”).

141. See CHARLES CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 65–72 (7th ed. 2012) (discussing the “Preliminary Stage” of negotiation).

142. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 19 (1983); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 164–65 (2002). Both of these scholars add valuable insights to an important, ongoing debate. In related research, leading economists have argued that both cooperation and honesty tend to promote long-term relationships and success in negotiation. See AXELROD, *supra* note 140, at 190. See generally ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF EMOTIONS* (1988); Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 86 (Kenneth J. Arrow et al. eds., 1995).

143. When a persuader builds an effective “frame” in order to present information from a particular angle or point of view, it can cause dramatic shifts in how the information is received by a listener. Consider, for example, when some politicians and policy advocates changed the frame of the “estate tax” by calling it the “death tax.” While Professor George Lakoff has argued the term “death tax” is a neologism used as a propaganda tactic to aid in efforts to repeal estate taxes, author and Republican party pollster Frank Luntz suggests the new frame was an effective, strategic, and morally sound way to garner public support for eliminating the tax. Says Luntz:

The public wouldn’t support it because the word ‘estate’ sounds wealthy. Someone like me comes around and realizes that it’s not an estate tax, it’s a death tax, because you’re taxed at death. And suddenly something that isn’t viable achieves the support of 75 percent of the American people. It’s the same tax, but nobody really knows what an estate is. But they certainly know what it means to be taxed when you die. I argue that is a clarification; that’s not an obfuscation.

*Frontline*, *The Persuaders*: Frank Luntz <http://www.pbs.org/wgbh/pages/frontline/shows/persuaders/interviews/luntz.html> (last visited Feb. 25, 2013). See generally GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004); FRANK LUNTZ, *WORDS THAT WORK: IT’S NOT WHAT YOU SAY—IT’S WHAT PEOPLE HEAR* (2007). For an excellent article on six techniques of the Socratic Method and their application in conflict reframing, see John W. Cooley, *A Classical Approach to Mediation—Part II: The Socratic Method and Conflict Reframing in Mediation*, 19 U. DAYTON L. REV. 589 (1994).

California home owners.<sup>144</sup> Half were told that if they fully insulated their homes, they would *save* a certain amount of money each day. The other half were told that if they failed to insulate, they would *lose* that same amount of money each day.<sup>145</sup> In the end, significantly more people insulated their homes when exposed to the loss language.<sup>146</sup>

Similar outcomes have occurred in health research. In one study, for example, pamphlets urging women to check for breast cancer through self-examinations are significantly more effective if the pamphlet uses “loss language” (such as, “You can lose several potential health benefits by failing to spend only five minutes each month doing breast self-examination”) rather than “gain language” (such as, “You can gain several potential health benefits by spending only five minutes each month doing breast self-examination”).<sup>147</sup>

In framing offers, negotiators should also keep in mind that *exclusive* information can be more persuasive than widely available data. For example, in one study, wholesale beef buyers more than doubled their orders when they were told that, due to poor weather conditions in foreign countries from where cattle was imported, there would likely be a scarcity of foreign beef in the near future.<sup>148</sup> But the orders increased by a whopping 600% when the beef buyers were told that *no one else had that information yet*.<sup>149</sup> As Cialdini states, “Apparently the fact that the news carrying the scarcity of information was itself scarce made it especially persuasive.”<sup>150</sup>

#### 6. *Authority: People Tend to Be Persuaded by Experts*

Modern life has become extraordinarily complex. For this reason, there are many areas (such as law, finance, medicine, and technology) where specialized knowledge from authorities and experts is required to answer even fairly basic questions that arise in the given area.

The authority principle states that people who are experts or who are in positions of authority tend to have influence over the way others think and behave. Perhaps the best known illustration of the principle is the work of Stanley Milgram, who did some groundbreaking studies on authority in the early 1960s.<sup>151</sup> Milgram discovered that (1) if the person

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144. Cialdini, *supra* note 107, at 72, 78.

145. *Id.*

146. *See id.*; *see also* Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 142, at 44, 54.

147. CIALDINI, *supra* note 97, at 239.

148. *Id.* at 255.

149. *Id.* at 255–56.

150. *Id.* at 256.

151. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57 (1965).

running a psychological experiment wears a simple white lab coat (to many, a sign of authority), and (2) if that person repeats (in a professional and monotone tone of voice), the instruction, “The experiment requires that you go on” to volunteers who are controlling the extent to which others will be subjected to electric shocks, *then* (3) the vast majority of people placed in that situation will continuously apply increased doses of electric shocks to supposedly suffering human subjects.<sup>152</sup> As Milgram states in the postscript to one of his articles:

With numbing regularity good people were seen to knuckle under the demands of authority and perform actions that were callous and severe. Men who are in everyday life responsible and decent were seduced by the trappings of authority, by the control of their perceptions, and by the uncritical acceptance of the experimenter’s definition of the situation, into performing harsh acts.<sup>153</sup>

If negotiators wish to use their own specialized knowledge to influence how matters will be considered and addressed during the process, the negotiators must first make their expertise known to the other parties involved. This information can be (1) stated verbally toward the beginning of the negotiation process (perhaps by telling anecdotes about successfully solving matters similar to the one on the agenda, or by discussing one’s advanced training, fellowships, or apprenticeships in the area involved); (2) placed in a résumé or CV that is read by all the parties; or (3) communicated through the display of awards, certificates, and diplomas that are visible throughout the office or negotiation area.

In some circumstances, negotiation parties will simply be ignored if they do not “toot their horn” with respect to their authority, training, knowledge, or expertise. In one study, physical therapy professionals were frustrated because so many of their stroke patients abandoned their prescribed exercise routines soon after leaving the hospital.<sup>154</sup> Upon interviewing the patients, it became clear they were simply not aware of the education and training required to become a physical therapist, and therefore the exercise advice tended to be largely discounted and ignored.<sup>155</sup> The solution? The director of the unit put on display the

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152. Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 ALA. L. REV. 611, 619–20 (2008). Fully 65% of the people placed in the situation administered shocks until they reached the maximum limit on the dial (450 volts). Thus, they continued to administer shocks well after complaints of pain (120 volts), complaints of heart trouble and demands to be let go (150 volts), shouts of “I can’t stand the pain!” (180 volts), screams of agony (270 volts), hysterical screams combined with complaints of heart trouble (330 volts), and, finally, complete silence (345 volts). Indeed, people were told that silence should be interpreted as a wrong answer, causing many people to continue administering the shocks after the period of silence began. The experiment was repeated numerous times with large numbers of subjects, but the results remained very consistent. *Id.* at 619.

153. Milgram, *Some Conditions of Obedience and Disobedience to Authority*, *supra* note 151, at 74.

154. Cialdini, *supra* note 107, at 75–77.

155. *Id.*

awards, diplomas, and certifications of all staff therapists, resulting in a 34% increase in exercise compliance.<sup>156</sup>

### III. PERSUASION STRATEGIES AND TECHNIQUES (AND RESISTING THEM)

Nearly all of the persuasion strategies discussed in this Article fall within either the “Alpha” or the “Omega” categories discussed above—that is, they either increase one’s motivation to approach or move toward the goal or deal, or they decrease one’s motivation to avoid or move away from the goal or deal. In order to recognize, and then resist or defend against, persuasion tactics and strategies being used by other parties, readers can ask themselves the following question throughout a negotiation:

Is what the other party is doing or saying at this instant merely a tactic or strategy of persuasion? More specifically, is there anything about their words or behaviors that makes me *more* likely to move *toward* or accept a given deal (or deal point) than I otherwise would? Or, alternatively, is there anything about their words or behaviors that makes me *less* likely to move *away from* or reject a given deal (or deal point) than I otherwise would?

Following is a list of mindsets, strategies, and techniques—many of them based on empirical research—that can be employed to influence and persuade others during a negotiation. Most of these are fairly subtle actions and behaviors; they are not “hard ball” tactics (such as “good guy, bad guy,”<sup>157</sup> “take it or leave it,”<sup>158</sup> “anger and threats,”<sup>159</sup> and “limited authority”<sup>160</sup>) that have been described and analyzed in previous writings

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<sup>156</sup> *Id.* at 77.

<sup>157</sup> See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 94–95 (2000). The “good guy, bad guy” routine is a variation of the “good cop, bad cop” interrogation tactic used in cop shows such as CSI, where the first interrogator (or “bad cop”) threatens to bully and even physically beat the prisoner into confession or submission. The second interrogator (the “good cop”) interferes with a much softer approach, causing the prisoner to work cooperatively with the “good cop.” In a commercial situation, the “bad guy” will adopt a very competitive and uncompromising position, along the lines of: “We won’t pay one cent more than \$3.85 per unit.” The “good guy” can then interject with a softer, seemingly more reasonable approach: “This company has been a great supplier to us for years. Surely we can pay \$4.05 per unit.” At that point, the salesperson might leap at the \$4.05 offer, even though the “good guy, bad guy” team had authority to spend much more. Note that sometimes a “good guy” will talk about an imaginary “bad guy” that is “back at the office” or somewhere else.

<sup>158</sup> *Id.* at 97.

<sup>159</sup> People who favor this persuasion technique tend to believe it will invariably result in their counterparts relenting and yielding to the bullying demands (i.e., they will “accommodate”). That, however, is not always the case. Research suggests some people will “fight fire with fire” by yelling and bullying right back (i.e., they will “compete”), which can lead to escalation and impasse. Still other people will leave the situation immediately in order to escape the confrontation all together (i.e., they will “avoid”). See MNOOKIN ET AL., *supra* note 134, at 51–56.

<sup>160</sup> Consider the person who negotiates long and hard for the purchase of a new car, only to be told by the salesperson: “Now I have to take this deal to my manager for approval.” The outcome is usually the same: The manager says to the clerk, “No, you’ve given away too much,” leading to another round of

about negotiation.<sup>161</sup> Nor are they tactics that “seek in some fashion, with varying degrees of dishonesty, to mislead or disorient unprepared negotiators into one-sided agreements” in favor of the person using the tactic.<sup>162</sup> Finally, they are not tactics used by “unprincipled” negotiators trying to “take advantage” of other people.<sup>163</sup> Nevertheless, they are powerful techniques that can influence how other people think and behave during a negotiation. In short, they are effective tools of influence and persuasion. Furthermore, negotiators who are not aware that these techniques exist—and who cannot recognize them and resist them—are placing themselves (and their clients) at a clear disadvantage with respect to negotiation outcomes and final settlement results.

The tactics and techniques are organized into four categories: (1) *making offers* (that is, when they should be made and how people might respond to them), (2) *organizational tactics* (the processes and mechanics of how issues will be structured and considered during a negotiation, such as whether there will be a written agenda, or whether an auction will be used as part of the negotiation process), (3) *communication techniques* (the issues surrounding particular communication vehicles used during a negotiation, such as email, texting, or face-to-face), and (4) *psychological techniques* (issues such as mood, emotions, and conflict, and how they play a role in one’s ability to think, analyze, and respond within the context of a negotiation).

While the persuasion theory discussed earlier in this Article will help readers understand how or why a given tactic or technique can be effective, a major takeaway from this Article will, I hope, be for readers to learn to recognize and shield themselves against the various tactics (i.e., to resist persuasion attempts made by others), even if those same

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negotiations and concessions. To resist or defend against this tactic, one must ask the other party whether they have full authority to settle, and he or she must do this *before* the negotiation process begins. Make it clear that you need to know all the people or offices that need to review and ultimately approve the deal, as well as anyone or any office that has the power to veto or derail a deal that has been agreed upon.

161. See CRAVER, *supra* note 141, at 254–306; MNOOKIN ET AL., *supra* note 134, at 211–23; G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 228–33 (2006); Adler & Silverstein, *supra* note 157, at 93–102; Michael Meltsner & Philip Schrag, *Negotiating Tactics for Legal Services Lawyers*, in *WHAT’S FAIR: ETHICS FOR NEGOTIATORS* 205, 205–11 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004); see also FISHER ET AL., *supra* note 4, at 129; Goodpaster, *supra* note 134, at 349–64 (listing commonly used hard-ball ploys and tactics, including “low-balling,” “nibbling,” the “salami,” “Boulwarism,” “good guy, bad guy,” the “red herring,” and others).

162. Adler & Silverstein, *supra* note 157, at 102.

163. As Fisher et al. stated in *GETTING TO YES*:

There are many tactics and tricks people can use to try to take advantage of you. Everyone knows some of them. They range from lies and psychological abuse to various forms of pressure tactics. They may be illegal, unethical, or simply unpleasant. Their purpose is to help the user ‘win’ some substantive gain in an unprincipled contest of will. Such tactics may be called tricky bargaining.

FISHER ET AL., *supra* note 4, at 129. See generally Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 *GEO. J. LEGAL ETHICS* 739 (2001).

readers decide for ethical or other reasons not to use the tactics as negotiation swords (i.e., to influence and persuade others).<sup>164</sup> And even though the tactics tend to be less obvious, less aggressive, and less well known than various negotiation “tricks” and hardball “ploys,” they are by no means less effective when employed toward the goals of influence and persuasion. By being able to recognize and respond to the techniques, negotiators can resist their powers and nullify their impacts.

#### A. MAKING OFFERS

##### *I. Presenting Choices in the Distant (Rather than Near) Future*

Nira Liberman and Yaacov Trope suggest that the value of an event changes depending upon whether it is in the distant future or the near future.<sup>165</sup> According to their Temporal Construal Theory, distant-future situations are construed at a “higher level” than are near-future situations.<sup>166</sup> In other words: People tend to focus on the *general and abstract* features of events that are in the distant future, but they tend to focus on the *specific and concrete* features of events in the near future.<sup>167</sup>

For example, consider a university professor who receives an invitation to present his or her research at an academic conference in the future. According to Temporal Construal Theory, if the conference is nine months down the road, the professor, in making the decision whether or not to attend, will tend to focus on the higher-level *general and abstract* elements of the conference, such as the general lure of the conference host city (think San Francisco . . .), the excitement of the local tourist attractions and restaurants, and even the value of what might be learned at the conference itself.

However, if the conference were to begin in a mere ten days, the professor, in making the decision whether or not to attend, will tend to focus on the lower-level *specific and concrete* elements involved, such as cost, the difficulty and inconvenience of travel, and logistical matters like making overnight kennel arrangements for the family pets.<sup>168</sup>

Thus if the matter being negotiated is an activity that will take place in the *distant* future, then paramount in the parties’ minds will be the higher-level general and abstract elements of the activity: Is it desirable? Is it moral? Is it in line with my personal or professional goals, values, and

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164. See Friestad & Wright, *supra* note 5, at 3.

165. Nira Liberman & Yaacov Trope, *The Role of Feasibility and Desirability Considerations in Near and Distant Future Decisions: A Test of Temporal Construal Theory*, 75 J. PERS. SOC. PSYCHOL. 5, 5–18 (1998).

166. *Id.* at 6–7.

167. *Id.* See generally Michael D. Sagristano et al., *Time-Dependent Gambling: Odds Now, Money Later*, 131 J. EXPERIMENTAL PSYCHOL. 364 (2002).

168. Yaacov Trope & Nira Liberman, *Temporal Construal and Time-Dependent Changes in Preference*, 79 J. PERSONALITY & SOC. PSYCHOL. 876, 887 (2000).

priorities? On the other hand, if the matter being negotiated is activity that will take place in the *near* future, then paramount in the parties' minds will be the lower-level specific and concrete elements of the activity: Is it feasible? Does it fit into my schedule? Does it fit into my budget?<sup>169</sup>

The implications of this theory upon resistance to persuasion in negotiation are very real: The investigators of the theory suggest that *time constraints* make up some of the lower-level specific and concrete elements of a given activity. This means that people tend to give little weight to time constraints when they are planning for the distant future, and will sometimes agree, during a negotiation, to accept more time-consuming responsibilities and burdensome activities if those responsibilities and activities will be occurring in the distant future.<sup>170</sup>

For example, a supervisor at a car manufacturing plant approaches a worker and says, "Starting in six months from now, would you agree to spearhead the production of our new car model in return for a 100% pay raise?" The worker might accept the offer, even though he is aware the new job responsibilities will require working eighty hours per week rather than his current forty, including many nights and weekends. The Temporal Construal Theory suggests that if the supervisor had made the same offer starting *next week* rather than six months down the road, the worker would be more likely to reject the offer.

*Resistance Strategy:* Before agreeing to a particular deal any part of which is going to take place in the distant future, it is crucial that one give careful thought to *exactly how he or she would assess those same deal terms if they were going to take place in the immediate future*. In the example from above, where a worker is asked if he wants to lead the production of a new car model starting six months down the road, the worker must ask himself: "How would I respond to this offer if my new role were to start *tomorrow* rather than six months from now?" By asking this question, the worker is more likely to think of the specific and concrete elements of his current life (such as the joys of playing golf in the evenings or coaching Little League on the weekends) that would be impacted by having to work the additional hours, and his response to the offer might be different.

Thus, negotiators who do not understand the implications of the Temporal Construal Theory might be persuaded to agree to deal terms they might reject out of hand if (1) the negotiation were taking place closer to the actual occurrence of the event in question, or (2) if they could successfully anticipate how they would assess those same deal terms as the event draws near or is about to start.<sup>171</sup>

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169. Liberman & Trope, *supra* note 165, at 11.

170. Trope & Liberman, *supra* note 168, at 877.

171. Liberman & Trope, *supra* note 165, at 11.

## 2. *Offering Multiple Choices*

If one expects resistance during the problem-solving phase of a negotiation, one strategy is to offer one's counterpart a choice among several possible alternatives. The motivation and ability to resist can then be satisfied through the alternatives that are rejected, even though one of the alternatives is ultimately accepted.<sup>172</sup> Two scholars suggest that giving a choice between just two different alternatives is sufficient.<sup>173</sup>

For example, if a child is resistant to doing his or her homework, the parent might sit down with the child and ask, "Okay, do you want to start with math first, or would you prefer to start with history?" Such a choice is sometimes referred to as an "alternative-choice double-bind" because while the child does indeed get to make a selection between two possible alternatives, both alternatives bind the child to the same outcome: starting on the homework.<sup>174</sup>

Of course, there are some who might suggest that using the alternative-choice double-bind technique borders on being manipulative and that while it might work on a child in the case of doing homework, it could lead an adult to resist *all* the alternatives being offered. Indeed, one of the investigators of the technique reported that when the strategy is employed for "personal advantage," it consistently leads to "bad results."<sup>175</sup> However, when it is used for "the other person's benefit," then there can be lasting benefit.<sup>176</sup> This conclusion appears to support the admonition by Roger Fisher that negotiators need to see themselves as problem-solving "colleagues (with somewhat differing interests) trying to work out a good solution to a difficult problem."<sup>177</sup> Fisher suggests that such an orientation can prevent parties from engaging in coercive tactics that tend to damage relationships.<sup>178</sup>

*Resistance Strategy:* Be wary of any negotiator who presents a number of alternatives along with some sort of "binding" technique. It is fine to respond that *none* of the suggested alternatives is acceptable, and then to present a list of one's own alternatives.

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172. See E.T. Higgins, *Promotion and Prevention as a Motivational Duality: Implications for Evaluative Processes*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 503, 503-25 (S. Chaiken & Y. Trope eds., 1999).

173. M.H. Erickson & E.L. Rossi, *Varieties of Double Bind*, 17 AM. J. CLINICAL HYPNOSIS 143 (1975); see CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (6th ed. 2009) (discussing "multiple equal offers").

174. Erickson & Rossi, *supra* note 173, at 143.

175. *Id.*

176. *Id.* at 144.

177. ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES 141 (1988).

178. *Id.* For thoughtful discussions on the art of choosing, as well as the difficulties that can be presented from having too many choices, see SHEENA IYENGAR, THE ART OF CHOOSING (2010); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003).

### 3. *Asking the Offering Party: “Is That Your Best Offer?”*

Some people look at negotiation as a tug-of-war process whereby parties initially set forth extreme offers and demands and then give back-and-forth concessions until the parties settle somewhere in the middle.<sup>179</sup> For an individual who negotiates in such a fashion, a *truthful* answer to the question “Is that your best offer?” would be something along the lines of, “Of course it’s not my best offer. The game is for me to start at one extreme, you to start at the other, and by the end of the process we will settle somewhere in the middle—hopefully closer to my extreme than to yours.”<sup>180</sup> But rarely, if ever, would such truthful words be uttered during a negotiation.

Others believe that making extreme initial offers in a negotiation and then proceeding to dance together toward the middle of those extreme offers amounts to little more than game playing, and they would rather make one reasonable and fair offer or demand at the beginning of the process, and settle at or very close to that point. For that person, a *truthful* answer to the question “Is that your best offer?” might be something like, “Of course it’s my best offer. I’m not here to try to play games and hide the ball. I threw out an offer that I think is fair and reasonable to all sides, and I’m not about to change it just because you asked that question.”<sup>181</sup>

*Resistance Strategy:* Even though the two approaches to negotiation mentioned above are substantially different, the “defense” to the question “Is that your best offer?” can be the same in either case. The defense is to explain why the offer is fair and reasonable—more specifically, why the benefits and attributes of the product or service do in fact justify the offer that was initially put forth. Objective standards and criteria can be used whenever possible, but other principles such as equity, equality, and need can inform the negotiation as well.<sup>182</sup> Other parties might disagree and continue to fight for concessions or for what they consider to be a more reasonable offer; nonetheless, the initial response to the question “Is that

179. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 767 (1984) (“The literature of negotiation presents a stylized linear ritual of struggle—planned concessions after high first offers, leading to a compromise point along a linear field of pre-established ‘commitment and resistance’ points. In such legal negotiations the compromise settlement point is legitimized by comparing it to the polarized demands of plaintiff and defendant . . .” (footnote omitted)).

180. See *id.* (“[T]he final outcome . . . will be at the ‘focal point’ midway between the first offers of each party.”).

181. For a thoughtful discussion of extreme first offers and possible responses, see Bruce Barry & Raymond A. Friedman, *Bargainer Characteristics in Distributive and Integrative Negotiation*, 74 J. PERSONALITY & SOC. PSYCHOL. 345, 347 (1998).

182. For a more thorough discussion of what is just and reasonable, see Carrie Menkel-Meadow, *Introduction to WHAT’S FAIR: ETHICS FOR NEGOTIATORS* xxxi (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (questioning the extent to which the justice of negotiated outcomes can be measured by principles such as equity, equality, need, social welfare, precedential value, likelihood of enforcement, and effects on others).

your best offer?” should be to try to defend the offer as just and reasonable.<sup>183</sup>

#### 4. *Providing a Guarantee*

Providing a guarantee, such as a money-back guarantee on a product or service, directly addresses resistance by removing fears involved in buying the product or service.<sup>184</sup> If the product doesn't work, doesn't fit, or has any number of other problems, it can be returned for a full refund. The Nordstrom department store is well known for its unconditional guarantee and “no questions asked” return policy.<sup>185</sup> In fact, one of the store's return stories long circulated in the press (even though scholars claim the story is actually a myth) is the customer who allegedly returned a set of tire chains, even though Nordstrom sells neither tires nor chains.<sup>186</sup> According to the myth, the employee followed the store's liberal return policy and provided the customer with a refund.<sup>187</sup>

A guarantee is an effective way to address any sort of ambivalence. When negotiating, people anticipate potential negative consequences of all kinds. For example, a couple engaged to be married might be resistant to rent a particular wedding reception area because it is outdoors and it might rain or the weather might be cold on the planned wedding day. The guarantee would state that if it rains, tents will be provided, and if it's cold, the tents will be pumped with warm air, or the reception will be moved to a beautiful space inside. Thus, the guarantee makes the proposal more desirable by removing various sources of ambivalence and reluctance, and thereby overcoming a central source of resistance.

*Resistance Strategy:* Guarantees are put into place to address resistance by removing fears. It is important to make sure that the guarantee is specific and addresses *all* potential fears. For example, a general guarantee such as, “We will do whatever we have to do to make your wedding reception a success,” is not specific enough. The guarantee has to be thorough and comprehensive by addressing the various disasters and contingencies that might occur: What is the guarantee if it is too cold outside for people to stand in the garden? What if it rains? What if the building burns down or there is a flood? And if the guarantee is that the wedding date can be moved to a different day with nice weather, then who gets to decide the new date? And is the courtyard already booked for any

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183. See generally Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOT. J. 223 (1993).

184. See, e.g., David Gabel, *Deregulation: Should the Local Telephone Market Be Next?*, 24 NEW ENG. L. REV. 39, 51 n.49 (1989) (“By signing long-term contracts with customers prior to beginning construction, an entrant would reduce its risk. The contracts could provide a guarantee that there will be sufficient business to cover the [entrant's] sunk costs.”).

185. David Solnet & Jay Kandampully, *How Some Service Firms Have Become Part of “Service Excellence” Folklore: An Exploratory Study*, 18 MANAGING SERVICE QUALITY 179, 186 (2008).

186. *Id.*

187. *Id.*

other date that the couple might want? In summary, it is important that if guarantees are going to effectively remove fears, those guarantees should be as comprehensive and specific as possible, with the consenting party having as much power and control over the guarantee as possible.

Guarantees can also take the form of a contingent contract. For example, if a sports hero is confident his playing in a game will lead to a sell-out stadium of 80,000 people, but the promoter is convinced that no more than 20,000 tickets will be sold, then a contingency agreement can be formed where the athlete is paid in direct proportion to the number of seats sold. Such a guarantee allows the player to reap large salary rewards if ticket sales are high, while simultaneously allowing the promoter to escape the risk of paying a high, “sell-out” type salary if far fewer seats end up being sold.

## B. ORGANIZATIONAL TACTICS

### *I. Trying to Cherry-Pick the Elements of a Deal*

Some parties will attempt to lock in specific elements of a deal as the negotiation progresses, rather than considering all the elements together as a group. So the party might say, “Before we get to anything else, I want to nail down the price.” Or they might say, “I accept *a*, *b*, and *c* of your offer, but I reject *x*, *y*, and *z*.”

*Resistance strategy:* While one can agree “in principle” to various elements of the deal, it must be stressed from the outset that no single element is agreed upon until all elements have been agreed upon (i.e., “*nothing* is agreed until *everything* is agreed”).<sup>188</sup> In the first example above, one might respond, “We can agree in principle on a price, but of course that is subject to change after we consider all the other elements of this deal, including warranties and service agreements.” In the second example from above, one might respond, “I had linked *a*, *b*, *c*, *x*, *y*, and *z* as a group, so if you are only interested in *a*, *b*, and *c*, then we’ll have to think about a new price for that more limited package.” Linking the various issues from the outset, and getting them all out on the negotiation table, simply prevents other parties from treating the negotiation like a buffet where they attempt to select (and limit the negotiation to) only the items they want.<sup>189</sup>

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188. See Kent Conrad, Chairman, U.S. Senate Budget Comm., Senate and House Conferees on the FY 2010 Budget Resolution (Apr. 27, 2009), available at [http://budget.senate.gov/democratic/index.cfm/files/serve?File\\_id=7a9d0d9d-e8bb-44db-a67d-ea12d5fac117](http://budget.senate.gov/democratic/index.cfm/files/serve?File_id=7a9d0d9d-e8bb-44db-a67d-ea12d5fac117) (“I want to make clear that while it has been reported in the press that there is a framework agreement, and there is, we also have an understanding that nothing is decided until everything is, and everything is not yet decided. So that is the posture we’re in.”).

189. See, e.g., Owen Lippert, *One Trip to the Dentist Is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 241, 277–78 (1998) (“Canada, the United States, and Mexico would have just cause to deny new

## 2. *Summarizing What Has Been Discussed so Far*

Negotiators periodically summarize the progress of the negotiation to ensure that all parties have a similar sense of what has been heretofore agreed upon. The technique can be particularly useful during an impasse, both to provide a reprieve, as well as to remind parties that progress has been made, and therefore *additional* progress is possible.<sup>190</sup>

Summarizing the negotiation's progress can be used to focus the negotiation on certain issues and topics, downplay other topics, or altogether avoid still other topics. The summarizing process is therefore a chance to exert power and control during the negotiation, and to influence and persuade regarding *what* will (or will not) continue to be negotiated, as well as *how* it will (or will not) continue be negotiated.<sup>191</sup>

*Resistance Strategy:* All parties must listen carefully during the summarizing process to make sure information is presented completely and accurately, especially regarding the more controversial aspects of the negotiation. One should not hesitate to correct the person conducting the summary, nor to interject information, nor to give a slightly different interpretation of matters or events being considered.

## 3. *Arriving with a Written Agenda for the Negotiation*

Arriving at a negotiation with a written agenda—preferably one that can be passed out to the other parties—can be highly advantageous because it can dictate the topics of discussion, the order in which they will be discussed, and the time allotted for each topic.<sup>192</sup> It can also include ground rules for communication procedures between parties and with the outside world, for example, (1) disallowing personal attacks, foul language, or interruptions to others who are speaking during the negotiation, (2) determining, in the context of a multi-party negotiation, whether two or more parties can briefly leave the negotiation room to have private conversations with each other—possibly building voting blocs or making side deals—before returning to negotiate with the larger group, (3) dictating the timing and duration of meals and other breaks, or (4) establishing issues of process surrounding the use of press conferences to report on progress or deadlocks.<sup>193</sup>

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signatories the complete tariff benefits of an expanded NAFTA if they got to 'cherry pick' which NAFTA obligations they would adopt. NAFTA was signed as a package deal and was only possible because of its all-or-nothing structure of negotiations. Each country weighed the trade-offs in NAFTA, then signed the agreement because *as a whole* it promised a net benefit." (footnote omitted)).

190. See generally Thomas M. Tripp & Harris Sondak, *An Evaluation of Dependent Variables in Experimental Negotiation Studies: Impasse Rates and Pareto Efficiency*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 273 (1992).

191. See generally Lawrence E. Susskind et al., *Parallel Informal Negotiation: A New Kind of International Dialogue*, 12 NEGOT. J. 19 (1996).

192. Albin, *supra* note 183, at 225–28.

193. *Id.*

*Resistance Strategy:* Parties should prepare their own agendas and have them copied for distribution at the negotiation. Parties can elect to adopt one particular agenda, or they can negotiate a compromise among the various agendas submitted.

#### 4. *Injecting Competition into the Negotiation*

In 1990, Ryohei Sato, a Japanese businessman, paid almost \$83 million for van Gogh's "Portrait of Dr. Cachet" at an international art auction.<sup>194</sup> This was *twice* the price that was expected to be received for the painting, as estimated by Christie's auction house.<sup>195</sup> Sato had, it appears, fallen victim to what psychologists call the winner's curse: when one discovers he or she has "won" the negotiation, but likely paid too much in doing so.

An auction is a situation that artfully injects competition into the negotiation process. Consider what happened in 1973, when ABC television agreed to pay \$3.3 million for a single television showing of the movie *The Poseidon Adventure*.<sup>196</sup> The figure "greatly exceeded the highest price ever paid previously for a one-time movie showing" (which was \$2 million for the movie *Patton*).<sup>197</sup> In fact, the payment was so excessive that ABC thought it would *lose* \$1 million on the *Poseidon* showing.<sup>198</sup> So how did the price escalate to such heights? It was likely due to the fact that it was the first time that a motion picture had been offered to the three networks (ABC, NBC, and CBS) in an open-bid auction.<sup>199</sup> The President of CBS describes the auction thusly:

We were very rational at the start. We priced the movie out, in terms of what it could bring in for us, then allowed a certain value on top of that for exploitation.

But then the bidding started. ABC opened with two million. I came back with two point four. ABC went to two point eight. And the fever of the thing caught us. Like a guy who had lost his mind, I kept bidding. Finally, I went to three point two; and there came a moment when I said to myself, "Good grief, if I get it, what the heck am I going to do with it?" When ABC finally topped me, my main feeling was relief.<sup>200</sup>

Auctions can take place in many contexts—not just when a business or a painting is placed "on the block" to be sold. Consider the "reverse auction," where I want to install a new swimming pool in my back yard. I acquire three different bids for the job. When the bids arrive, I notice they are all slightly different in terms of materials being used, date of

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194. \$82.5 Million Price for Portrait by van Gogh Brushes Aside Auction Record, MILWAUKEE SENTINEL, May 16, 1990, at 1.

195. *Id.*; see Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud: Corruption in the World of Art and Antiquities*, 8 CRIM. JUST. 16 (1994).

196. CIALDINI, *supra* note 97, at 264.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 265.

completion, warranties offered, etc. I then invite all three bidders to my home office where they will compete against each other in a “reverse auction.”<sup>201</sup>

I am able to selectively quote from each of the three bids, stressing aspects where their rival bidders have presented me with more favorable terms or conditions. If I am effective, I can probably get the bidders to slowly bid the price of the job downward or the quality of the product upward. The “reverse auction” works to my advantage because it increases the competitive process for the various rival bidders that hope to get my business.<sup>202</sup>

*Resistance Strategy:* Be on the lookout for when competition has been injected into the conversation. This might be done by (1) limiting the available supply of a good or service or (2) increasing the number of people bidding for or otherwise competing for those goods or services. More specifically, the winner’s curse can thrive in conditions (such as auctions) where there are numerous competitors for a limited supply, and where there is great uncertainty regarding the price of the items or services under consideration. In the particular case of auctions, one can research items being auctioned (e.g., What are comparable items worth? What price has this item fetched in previous auctions? Are there people, events, or circumstances that are helping to increase prices for this particular auction, or at this particular time?) and, based upon that research, one can set upper limits to what will be paid.

As for reverse auctions specifically, if one is given an offer to “re-bid” a job, do *not* re-bid it. If you decide to re-bid, do so only once, and inform the “reverse auction” leader that you will only submit a single re-bid. Support your presentation with as many experts and objective criteria as can be found in order to underscore that your bid is reasonable and fair, even in the eyes of trained experts who are not party to the negotiation (or to making a profit through the negotiation) and who are therefore unlikely to be biased in their assessment.

### C. COMMUNICATION TECHNIQUES

#### *1. Calling Another Party Unexpectedly by Telephone to Negotiate*

Catching another party “off guard” by calling them unexpectedly on the telephone to negotiate can be a tremendous advantage in terms of persuasion. When caught unprepared to discuss a given matter, parties

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201. See generally Takayuki Suyama & Makoto Yokoo, *Strategy/False-Name Proof Protocols for Combinatorial Multi-Attribute Procurement Auction* (Columbia Univ., Working Paper, 2004) (discussing a “reverse auction” situation where the buyer is in effect the “auctioneer” and the sellers are in effect the “bidders,” who proceed to bid the price to lower and lower levels).

202. See generally GUHAN SUBRAMANIAN, *NEGOTIATIONS: NEW DEALMAKING STRATEGIES FOR A COMPETITIVE MARKETPLACE* (2010).

will sometimes nonetheless attempt to “wing it” and engage in a conversation, thereby disclosing valuable information (about the case, about negotiation or litigation strategy, etc.).<sup>203</sup>

*Resistance Strategy:* If parties are not completely ready to negotiate, they should arrange a time for the telephoning party to call back at a later time for the negotiation. If the party is fully prepared, then he or she can proceed with the phone conversation, paying careful attention to clues from caller’s voice (tone, pitch, etc.) and choice of words. A party should be careful to not interrupt other parties, as well as to employ the strategic use of silence, both of which can lead to increased information disclosures.

2. *Using Email to Alter Information or Communication Flow, Style, and Cues*

In terms of persuasion, email can allow a party to exhibit a personality that is completely different from her own. For example, one whose personality is normally very friendly and accommodating can send emails that exhibit a more abrupt, confrontational, and competitive style of negotiation. Likewise, one whose personality is normally more abrasive and competitive can present an email with a sweet and friendly demeanor.<sup>204</sup>

Negotiating by email also gives the parties time to think about offers and other information being presented and to react to that information in their own time—away from pressures that can be associated with the immediate responses expected in face-to-face negotiations.<sup>205</sup>

In essence, negotiating through email changes the dynamic of communication in ways that can be strategically beneficial or detrimental, depending on the situation and depending on whether a person is trying to withhold information, or shape how that information is presented. For example, some people find it difficult to say “no” when they are face-to-face, but have no difficulty doing so by email. Others might find they are prevented from asking follow-up questions over email that they could easily ask (and demand answers to) in a face-to-face conversation.<sup>206</sup>

Finally, using email can allow one to be extremely careful regarding *what* information will be conveyed (e.g., whether it will be more detailed and complete, or whether it will be more opaque and vague), *how* it will be conveyed (e.g., what words, phrases, stories, or analogies will be used, and how the information will be organized, framed, emphasized, or

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203. See CRAVER, *supra* note 141, at 203–04; see also HERB COHEN, YOU CAN NEGOTIATE ANYTHING 209–15 (1980).

204. See generally Michael Morris et al., *Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 89 (2002).

205. See CRAVER, *supra* note 141, at 204–06.

206. *Id.*

slanted), and *when* it will be conveyed (e.g., in drabs and pieces over time, all together in one long message, or something in between).

*Resistance Strategy:* Suggest that you would rather resolve the issue in a face-to-face conversation, preferably in person. If it is not possible to meet in person, then through a technology such as video chat that will allow parties to communicate verbally as well as through facial expressions and body language, and all in “real time.” If that is not possible, suggest a conversation by telephone. Try very hard to avoid technologies such as texting, instant messaging, and emailing where words and punctuation marks are the only means of communication.

### 3. *Communicating Face-to-Face, or at Least by Telephone*

In groundbreaking research conducted by Albert Mehrabian, it was determined that 55% of a person’s communicated message is conveyed through body posture, gestures, and facial expressions; 38% is through one’s voice (tone, pitch, pace, etc.); and only 7% is through the words themselves.<sup>207</sup> This means that the most thorough and effective way to communicate information to another person is through face-to-face communication; the next best way is over the telephone so at least the voice can be heard; and the worst way is through any text-only device (such as emailing, texting, or instant messaging) where only words are used to convey the message.

Not surprisingly, Mehrabian’s research also suggests that people who communicate using words alone are more likely to come to an impasse during negotiation.<sup>208</sup> Indeed, Leigh L. Thompson, author of *The Mind and Heart of the Negotiator*, states that “people are more cooperative when interacting face-to-face than via other forms of communication.”<sup>209</sup> She adds that in negotiations without personal, face-to-face contact, “things do not move very well, and relationships between people are often strained and contentious.”<sup>210</sup>

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207. Paul Ekman et al., *Relative Importance of Face, Body, and Speech in Judgments of Personality and Affect*, 38 J. PERSONALITY & SOC. PSYCHOL. 270, 270–77 (1980); John W. Kennish, *How to Read Body Language: Non-Verbal Cues Can Turn into Clues That Help Lead You to the Truth*, 17 PA. LAW. 28, 28–31 (1995); Laurie Shanks, *Whose Story Is It, Anyway? Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 525 (2008) (discussing the role body language, including “mannerism, gesture, [and] tone,” can play in conveying information). See generally PAUL EKMAN, *EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE* (2004).

208. Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 338 (2008) (“All in all, experiments tend to show that [computer-mediated-communications] creates less consensus, and thus leads to more impasses than [face-to-face]. Rapport seems to be the key, since the rate of agreements clearly increases when there is personalization or a feeling of belonging to the same group.” (footnote omitted)).

209. LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 273 (2d ed. 2000).

210. *Id.*

One communication scholar suggests that the “human moment,” which he describes as an encounter between people requiring “physical presence and their emotional and intellectual attention,” has started to disappear completely from modern life.<sup>211</sup> This instructor of psychiatry at Harvard Medical School discusses the various advantages of the “human moment” as follows:

[P]ositive human-to-human contact reduces the blood levels of the stress hormones epinephrine, norepinephrine, and cortisol.

Nature also equips us with hormones that promote trust and bonding: oxytocin and vasopressin. . . . [T]hese hormones are always present to some degree in all of us, but they rise when we feel empathy for another person—in particular when we are meeting with someone face-to-face.<sup>212</sup>

Research also suggests that these bonding hormones are at suppressed levels when people are physically separate, which could be one reason why it is easier (and more likely) for a person to deal harshly with another person through email than when talking face-to-face.<sup>213</sup> Furthermore, scientists hypothesize that face-to-face conversations stimulate two crucial neurotransmitters: dopamine, which enhances both pleasure and attention, and serotonin, which reduces both worry and fear.<sup>214</sup>

The implications of this research are clear and profound: If people negotiate face-to-face, they are more likely to trust each other, to build rapport<sup>215</sup> and bond with each other, and to feel empathy toward each other.<sup>216</sup> This increases the chances that people will actually *like* each other, which Cialdini has forcefully argued plays a dramatic role in their ability to influence and persuade each other.<sup>217</sup>

*Resistance Strategy:* While some might suggest that engaging in negotiation behaviors that increase the likelihood for the generation of trust, rapport, and empathy is always a positive development, there might be instances when a negotiator wants to *avoid* their generation. For

211. Edward M. Hallowell, *The Human Moment at Work*, HARV. BUS. REV., Jan.–Feb. 1999, at 58, 59.

212. *Id.* at 63. See generally Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J. L. & POL’Y 189 (2012).

213. Hallowell, *supra* note 211, at 63.

214. *Id.*

215. The most effective behaviors for building and maintaining rapport during negotiation include facing the other party directly, leaning forward, keeping arms open instead of crossed, smiling, nodding, having good but not overbearing eye contact, and sharing personal and shared interests in order to develop a greater sense of connection. JOHN W. COOLEY, *MEDIATION ADVOCACY* 167 (2d ed. 2002); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 503 (2008).

216. See Habib Chamoun & Randy Hazlett, *The Psychology of Giving and Its Effect on Negotiation*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 151, 152 (Christopher Honeyman et al. eds., 2009) (“Mutual empathy opens channels of cooperativeness and willingness to explore different options, enhancing the creativity of the parties and the willingness to listen to what either party has to say in a negotiation.”).

217. See CIALDINI, *supra* note 97, at 167–207.

example, consider the negotiator who wishes, for whatever personal or professional reasons, to remain absolutely separated and distant from the other negotiation party in absolutely every respect—physically, emotionally, psychologically, etc.—and therefore does not want to develop or continue any kind of bond or ties or relationship with that other party.

One such case might be a daughter who was sexually molested by her father, and she is negotiating a financial settlement with the father as part of a civil lawsuit in the case. In such a case, it would be easier to maintain distance and separation between the two parties if they did not communicate face to face. Instead, the parties might choose to hire an agent to negotiate on their behalf,<sup>218</sup> or, if they wanted to be more directly involved in the negotiations, they could do so through email, instant messaging, or texting.

#### D. PSYCHOLOGICAL TECHNIQUES

##### *1. Starting with Small Requests That Can Open the Door for Larger Requests*

Salespeople are taught that they are more likely to obtain a large sale by starting with a small one. The purpose of the small transaction is not profit; rather, it is commitment. As stated in the trade magazine *American Salesman*:

The general idea is to pave the way for full-line distribution by starting with a small order . . . . Look at it this way—when a person has signed an order for your merchandise, even though the profit is so small it hardly compensates for the time and effort of making the call, he is no longer a prospect—he is a *customer*.<sup>219</sup>

Thus by starting with a small sale or a small request and achieving success or agreement, it is easier to make larger and larger sales and requests. Two academics provide a classic example of this technique, often called the “foot-in-the-door” technique. In the study, researchers asked homeowners if they would place a very large public service billboard on their lawns that read, “Drive Carefully.”<sup>220</sup> Only 17% of households agreed to placement of the huge billboard.<sup>221</sup>

In the second phase of the experiment, a *different* group of homeowners is asked to display a very small, three-square-inch sign that reads, “Be A Safe Driver,” near their homes, and nearly everyone agrees

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218. See generally NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE (Robert H. Mnookin & Lawrence E. Susskind eds., 1999).

219. Francis Greene, *The “Foot-in-the-Door” Technique*, AM. SALESMAN, Dec. 1965, at 14, 14.

220. Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 199–202 (1966).

221. *Id.* at 200–01.

to the request.<sup>222</sup> But two weeks later, those same homeowners are approached again and asked if they will now place the massive “Drive Carefully” public service billboard on their lawns.<sup>223</sup> Compliance rises dramatically to 76%.<sup>224</sup> The study illustrates the technique perfectly: A small request made initially raises very little resistance, and agreement to the small request provides the gateway for larger and more dramatic requests and changes down the road.<sup>225</sup>

Researchers suggest that the “foot-in-the-door” technique works because there is a change in self-perception that occurs when a person carries out the initial request.<sup>226</sup> Specifically, once people agree to the initial request, they begin to see themselves differently; their attitudes start to change, and suddenly they see themselves as the kind of people who agree to certain kinds of requests.<sup>227</sup>

Similarly, negotiating smaller, less controversial issues at the beginning of a negotiation can serve to build momentum and lead to positive feelings between the negotiating parties. Investing time and energy while working together, even to solve easy matters upon which there is little or no disagreement, nevertheless works to build rapport and strengthen relationship bonds. The hope is that this strong foundation will increase the likelihood that the more difficult and controversial deal points can then be successfully tackled and agreed upon.<sup>228</sup>

*Resistance Strategy:* Be mindful that agreeing to very small requests made by others can lead to larger and larger requests. Consider stating up front something like, “Yes, I can accommodate this small request, but unfortunately that is all I will be able to do.” In addition, consider being explicit about putting the most difficult issue(s) of the negotiation up front and center. Other parties might put up some resistance to such a plan, but remain resolute and explain that you do not want to waste time and energy settling a number of easy issues if, in the end, the most difficult issues cannot be successfully addressed. A powerful supporting

222. *Id.*

223. *Id.*

224. *Id.*; see CIALDINI *supra* note 97.

225. One scholar says the foot-in-the-door technique is similar to a “bobble-head” effect: Once the message recipients start nodding “yes,” it’s likely they will continue to nod “yes.” Stanchi, *supra* note 76, at 418–19. See David Crump, *The Social Psychology of Evil: Can the Law Prevent Groups from Making Good People Go Bad?*, 2008 BYU L. REV. 1441, 1447 (2008) (pointing out that the “foot-in-the-door” technique can also be used for more violent and sinister purposes: “[P]olitical regimes that use torture would be able to recruit torturers by small steps: first, by having newcomers stand guard, then by having them observe, and then by inducing minor participation.”).

226. DANIEL O’KEEFE, *PERSUASION: THEORY AND RESEARCH* 170–71 (1990).

227. Michael Burgoon & Erwin P. Bettinghaus, *Persuasive Message Strategies*, in *PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH* 144, 156 (Michael E. Roloff & Gerald R. Miller eds., 1980).

228. See Hon. Myron S. Greenberg & Megan A. Blazina, *What Mediators Need to Know About Class Actions: A Basic Primer*, 27 *HAMLIN L. REV.* 191, 223 (2004) (discussing how it can be beneficial to start with small issues before tackling larger issues to help establish momentum in negotiations).

argument is that the smaller, yet-to-be-decided issues can then be used as trades and concessions during the rest of the negotiation.

## 2. *Using the Powers of Emotional Contagion*

Research consistently shows that groups of negotiators in a positive mood obtain significantly larger “joint gains” than do negotiators either in a neutral or negative mood.<sup>229</sup> Researchers have also found that people negotiating in a positive mood behave less competitively, are more willing to use integrative strategies, and tend to formulate more optimistic, cooperative, and integrative action plans.<sup>230</sup> Moreover, it seems to require very little time and effort to put people in a sufficiently better mood that leads to better results: One group watched a funny video,<sup>231</sup> and another group read funny comics and received a small gift.<sup>232</sup>

Interestingly, investigators find that the mood of one set of negotiators matters even if those with whom they negotiate are in a different mood. Thus, even when those in a more positive mood negotiate with those who are in a more negative mood, the ones in the more positive mood are still likely to do better.<sup>233</sup> The research indicates that positive mood increases “cognitive flexibility” and improves “creative problem solving across a broad range of settings.”<sup>234</sup> It also influences the way people make judgments, remember, and process social information—

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229. See Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEHAV. & HUM. DEC. PROC.* 175 (1997); Peter J.D. Carnevale & Alice M. Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation*, 37 *ORG. BEHAV. & HUM. DEC. PROC.* 1, 2 (1986); Roderick Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-esteem and Mood*, 56 *ORG. BEHAV. & HUM. DEC. PROC.* 110, 116–17 (1993). Note that while there is not much evidence regarding how mood affects individual (as opposed to joint) gains, Professor Clark Freshman suggests that this lack of evidence might result merely from the “ideologies of negotiation scholars.” States Freshman: “Among leading scholars in the legal academy . . . there are various ideological tendencies that obscure a focus on the bottom-line for any given individual. It is as if negotiation scholars aspire to be Brandeisian counselors to the situation, with benefits to any given individual secondary.” Clark Freshman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 *J. DISP. RESOL.* 1, 15–16 (2002).

230. Joseph P. Forgas, *On Being Moody but Influential: The Role of Affect in Social Influence Strategies*, in *SOCIAL INFLUENCE: DIRECT AND INDIRECT PROCESSES*, *supra* note 71, at 162–63.

231. See Kramer et al., *supra* note 229.

232. See Carnevale & Isen, *supra* note 229.

233. Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 *J. PERS. & SOC. PSYCHOL.* 565, 569–71 (1998).

234. Alice M. Isen, *On the Relationship Between Affect and Creative Problem Solving*, in *AFFECT, CREATIVE EXPERIENCE, AND PSYCHOLOGICAL ADJUSTMENT* 3, 3 (Sandra W. Russ ed., 1999). See Jennifer S. Mueller & Jared R. Curhan, *Emotional Intelligence and Counterpart Mood Induction in a Negotiation*, 17 *INT’L J. CONFLICT MGMT.* 110, 112 (2006) (“An impressive body of research has shown that positive mood and related variables (e.g. liking, satisfaction) play a pivotal role in the development and maintenance of positive social interaction, such as higher levels of cooperation, fewer contentious behaviors, more helping behavior, higher levels of organizational spontaneity, and higher supervisor ratings of performance.” (citations omitted)).

processes that are “all implicated during the course of a typical negotiation.”<sup>235</sup>

In addition, research suggests that moods are contagious. Within a negotiation, emotions can spread similar to a fast-spreading disease in a process known as “emotional contagion.”<sup>236</sup> Daniel Goleman, an expert on emotions and author of the ground-breaking book *Emotional Intelligence*,<sup>237</sup> concludes that emotions can spread between individuals “like electricity through wires.” He explains:

The reason . . . lies in what scientists call the open-loop nature of the brain’s limbic system, our emotional center. A closed-loop system is self-regulating, whereas an open-loop system depends on external sources to manage itself. In other words, we rely on connections with other people to determine our moods. . . .

. . . .

Scientists describe the open loop as “interpersonal limbic regulation”; one person transmits signals that can alter hormone levels, cardiovascular functions, sleep rhythms, even immune functions, inside the body of another. That’s how couples are able to trigger surges of oxytocin in each other’s brains, creating a pleasant, affectionate feeling. But in all aspects of social life, our physiologies intermingle. Our limbic system’s open-loop design lets other people change our very physiology and hence, our emotions.<sup>238</sup>

While starting a negotiation by watching a funny video might be inappropriate or unprofessional, one should be mindful of the role that mood can play in achieving superior results for all parties involved.

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235. Leigh L. Thompson et al., *Some Like It Hot: The Case for the Emotional Negotiator*, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 141 (Leigh Thompson et al. eds., 1999).

236. Caruso et al., *supra* note 106, at 64.

237. DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995). See John D. Mayer et al., *Emotional Intelligence*, in HANDBOOK OF INTELLIGENCE 396 (Robert J. Sternberg ed., 2000). Goleman’s initial approach to emotional intelligence included five components: knowing one’s emotions, managing emotions, motivating one’s self, recognizing emotions in other people, and handling relationships. *Id.* Three years after publishing EMOTIONAL INTELLIGENCE, Goleman’s ideas were expanded, in WORKING WITH EMOTIONAL INTELLIGENCE, to include twenty-five competencies grouped into the same five basic categories (though the labels changed): (1) self-Awareness (emotional awareness, accurate self-assessment, self-confidence); (2) self-Regulation (self-control, trustworthiness, conscientiousness, adaptability, innovation); (3) motivation (achievement, commitment, initiative, optimism); (4) empathy (understanding others, developing others, service orientation, diversity, political awareness); and (5) social Skills (influence, communication, conflict management, leadership, change catalyst, building bonds, collaboration/cooperation, team capabilities). DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE (1998). See Caruso et al., *supra* note 106, at 62.

238. Daniel Goleman et al., *Primal Leadership: The Hidden Drive of Great Performance*, 79 HARV. BUS. REV. 42, 46 (Dec. 2001). The authors report that “scientists have captured the attunement of emotions in the laboratory by measuring the physiology—such as heart rate—of two people sharing a good conversation.” As the interaction begins, the bodies of the two people operate at different rhythms. However, fifteen minutes into the conversation, “the physiological profiles of their bodies look remarkably similar.” The authors recount studies where even completely *nonverbal* expressiveness can affect other people. In one such study, three strangers sat facing one another in complete silence; after facing each other for just one or two minutes, it was found that the most emotionally expressive of the three transmitted his or her mood to the other two. *Id.* at 47.

Everything in the negotiation environment that might influence the general mood of the negotiators is relevant: from the physical environment (including temperature, noise levels, and the physical attractiveness of the space), to matters such as availability of snack food and beverages, restroom breaks, and parking availability.

The key finding with respect to persuasion is that being in a good mood can make a negotiator behave in a more *cooperative* fashion. In other words, the negotiator is more inclined to meet the needs of the other party, whether through making concessions or through agreeing to follow a different plan of action.<sup>239</sup>

*Resistance Strategy:* The key is to be aware that being in a good mood during a negotiation (whether that mood existed upon entering the negotiation or was generated through food or another factor at the negotiation itself) is something that can impact how cooperative, agreeable, and giving one might be during the negotiation. One must therefore always ask the question: Am I agreeing to this deal because it is fair and reasonable, or am I agreeing to this deal because I happen to be in a good mood?

### 3. *Acknowledging the Other Party's Resistance*

While research supporting this proposition is still in its infancy, it appears that an effective way to turn resistance against itself is to simply acknowledge it.<sup>240</sup>

Intuition suggests that identifying and labeling resistance might give it power and credence. However, as Knowles and Linn have discovered through their research: “Acknowledging the resistance, labeling it, and making its role overt may have the paradoxical effect of defusing its power and rendering that resistance less influential.”<sup>241</sup>

In two separate studies, Knowles and Linn took short statements such as, “[P]arking at [this university] is easier and cheaper than at most universities,” followed by a measurement of how much the reader agreed with the statement.<sup>242</sup> Half the readers were given the statement alone; the other half were given the statement preceded by an acknowledgment of resistance, e.g., “You’re not going to believe this, but . . .”<sup>243</sup> It turned

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239. Forgas, *supra* note 230, at 162–63.

240. Several scholars have written eloquently on the power of simply acknowledging and “naming” what a negotiation matter is truly about—warts and all—even when doing so might be uncomfortable for the speakers and/or listeners. See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC’Y REV. 631 (1980–1981); Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1984 AM. B. FOUND. RES. J. 905 (1984).

241. Eric S. Knowles & Jay A. Linn, *Approach-Avoidance Model of Persuasion: Alpha and Omega Strategies for Change*, in RESISTANCE AND PERSUASION 138 (Eric S. Knowles & Jay A. Linn eds., 2004).

242. *Id.* at 138–40.

243. *Id.* at 139.

out that in *all* the versions where the target's resistance was acknowledged before the main point of the statement was made, there were higher acceptance scores than in the versions that did not first acknowledge resistance.<sup>244</sup>

Knowles and Linn argue that their studies demonstrate that attitude change can occur without persuasion. In their investigation, there was no persuasive attack or counter-argument directed toward the resistance.<sup>245</sup> The resistance was merely *acknowledged*. Their studies also confirm that acknowledging resistance during a conversation does not empower that resistance; indeed, it appears to defuse it and decrease its potency.<sup>246</sup>

Negotiators, then, can use to their advantage brief statements acknowledging the target's resistance. Knowles and Linn showed that in all of the following examples, quickly acknowledging resistance [found in brackets] before setting forth the main message of the statement effectively reduced resistance and increased acceptance:

Dr. Stubblefield, a university physicist, says, "Most people [don't think so, but they] have the ability to move objects through mental effort."

The psychiatric nurse at Charter Vista Hospital says, "[It's really weird and sounds bizarre, but] when it is a full moon our psychiatric patients get crazier than at other times."

A professor of medicine said recently, "[You're not going to believe this, but] within 50 years, the average life expectancy will pass 100 years."

A Dean of Students at the university says, "[I know you will not want to agree with this, but] if students paid a little more tuition, they would get a much better education."

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Dr. Stubblefield, a facilities planner for the university, says, "[I know you will not want to agree with this but] parking at the University of Arkansas is easier and cheaper than at most universities."<sup>247</sup>

*Resistance Strategy:* It is very helpful to be aware of the finding that Party A's resistance to Party B's statement can be decreased (and Party A's acceptance of the statement correspondingly increased) merely by Party B's acknowledgment of Party A's resistance. This is an instance where the adage "A tactic perceived is no tactic"<sup>248</sup> might be applicable. In other words, while it does not appear that scholars have tested the proposition, it makes sense that simply being *aware* of the finding—or being aware that said outcome tends to occur under said circumstances—would render the outcome less likely to occur.

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244. *Id.*

245. *Id.* at 139–40.

246. *Id.*

247. *Id.* at 140.

248. COHEN, *supra* note 6, at 138.

#### 4. *Employing the Strategic Use of Silence*

One scholar advises that sometimes lawyers and other negotiators need to stop talking: “Silence can be the best way to get another person to start talking. This can be hard sometimes—most lawyers are not good with silence. . . . As any good psychotherapist will tell you, all kinds of feelings may surface in silence.”<sup>249</sup>

Every semester, I do an exercise with my negotiation students to underscore the power of silence. I have them stand up and, when I give the signal, they are told to “shake hands hello” and then to wait for my next instruction. The only rule is that they absolutely cannot talk at all during the entire course of the exercise, except to say “hello” or “nice to meet you.”<sup>250</sup> After I give the signal, the students all shake hands, say hello, and wait for the next instruction.

I then don’t say anything for a full sixty seconds.

Consistently, the students grow very uncomfortable during the exercise. Many of them begin to smirk or laugh uncomfortably, look at the walls of the classroom, or cast their gaze at the floor or the ceiling. In several classes, I have had students literally fall to the ground in hysterics because they are laughing so hard.

In debriefing the exercise, students report how uncomfortable they felt during the exercise, how they were not able to look the other person in the eyes during the silence, and that the sixty seconds seemed to go by in rather painful, slow motion. I explain that they have just felt the power of silence. It is easy to think about the rule in a theoretical sense; it’s difficult for students to fully grasp its power until they experience it for themselves.

*Resistance Strategy:* Effective negotiators must learn to be comfortable with silence—both on the giving end and the receiving end. It can be surprising what information is produced (through talking) by one party when he or she is confronted with another party’s silence. Silence can lead one to feeling uncomfortable, which in turn can lead to one’s talking, thereby divulging crucial information to the other side. It can be argued that “information is the lifeblood of any negotiation” and that, “at its core, negotiation is about protecting sensitive information of one’s own (to prevent oneself from being exploited) while extracting information from other parties.”<sup>251</sup> Silence is a potent tool that has the potential of accomplishing both tasks: Being silent can prevent oneself

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249. Abbe Smith, *The Lawyer’s “Conscience” and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 493 (2007).

250. One additional “rule” is that students cannot look at the professor during the exercise. Not being able to look at the professor forces them to look at their counterpart or at their surroundings—an experience that drives home the point that eye contact combined with silence can quickly lead to uncomfortable feelings.

251. Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 533–34 (2009).

from divulging important information, while simultaneously prompting one's counterparts to fill the "dead air" with important information that they might not otherwise divulge.

##### 5. *Pleading, Cajoling, and Hounding*

As part of her job, Abbe Smith has to represent (and therefore negotiate with) poor people accused of serious crimes, including death penalty matters. Oftentimes, her clients lack experience and expertise in navigating an incredibly complex (and sometimes unjust) justice system, so there are instances when scared and headstrong clients will take the following ill-advised but nonetheless resolute negotiation position: "I ain't takin' no plea."<sup>252</sup>

The advice Smith gives to people representing such clients is excellent and at times counterintuitive. Her ideas underscore the notion that selecting tools of persuasion is an art that depends on the history and context of a situation, as well as the personalities involved. Not all negotiations take place in pleasant environments with relaxed parties wearing nice clothing. Some negotiations involve deathly scared clients sitting in dingy prison holding cells with armed security officers guarding the door.

Important lessons and insights can be drawn from both contexts, and I believe Smith's advice in how to approach persuasion in the context of representing, counseling, and negotiating with these "unpopular clients"<sup>253</sup> is applicable to all manner of professional experts whose jobs entail doling out counsel and advice to (sometimes inexperienced, uncompromising, or just plain wrong) clients in the course of helping those clients navigate complex business, political, legal, or other waters. To get her clients to "lower their defenses, and ultimately get them [to] change their minds,"<sup>254</sup> Smith employs the following techniques, which she has learned over several decades of fighting on the front lines of difficult and hard-fought criminal defense legal battles:

First, lawyers can and should "pester and hock and hound."<sup>255</sup> This, says Smith, requires time: "You have to be willing to do a lot of talking, find different ways of saying the same thing, and be willing to repeat yourself."<sup>256</sup> There is no need to "fear for the relationship" as long as counsel makes it clear that, in the end, it is the client's decision and

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252. See Abbe Smith, "I Ain't Takin' No Plea": *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 11 (2007).

253. See Smith, *supra* note 249.

254. *Id.* at 494.

255. *Id.* at 492.

256. *Id.*

counsel will abide by that decision—even zealously defending the client at trial if that is what the client decides to do.<sup>257</sup>

Second, the decisions made by the client are extremely important and counsel is therefore permitted, and even encouraged, to “[f]ilibuster, plead, argue, cajole” and “[s]ometimes cry.”<sup>258</sup>

Third, counsel should not worry about exerting too much pressure—but should worry instead about “failing to exert enough.”<sup>259</sup> With that in mind, counsel may resort to forceful language, “even verbal abuse, even yelling.”<sup>260</sup> Indeed, “[b]adgering, cajoling, needling, riling, inciting—all are methods that might help a client to finally see the light.”<sup>261</sup>

To underscore the lengths to which Smith is willing to go in meeting her persuasion goals, she concludes her list of tools with the following thought: “I have mixed feelings about enlisting the judge or prosecutor to help persuade the client, but I would not rule it out entirely.”<sup>262</sup>

*Resistance Strategy:* This is yet another instance where the adage “A tactic perceived is no tactic”<sup>263</sup> seems to apply. Yes, it is difficult to withstand the pressure that can result when a counterpart is relentless and aggressive in her pleading, arguing, cajoling, badgering, needling, and even crying. But one must learn to be resolute in the face of such behaviors. This does *not* mean fighting back or “fighting fire with fire.” Rather, it means remaining resolute. There might be reaction, interaction, and conversation between the parties involved, but in the end a party must remain unmoved in her position. It might be easier to remain so if one implements Ury’s idea of “going to the balcony,” where the use of “a mental attitude of detachment” allows one to “calmly evaluate the conflict almost as if [she] were a third party.”<sup>264</sup>

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257. *Id.* See NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.3(b) (1995) (“The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.”); see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION § 4-5.2 cmt. at 201 (3d ed. 1993) (allowing the use of “fair persuasion” but not “undue influence” in counseling a defendant to accept a plea bargain); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 131 (1995) (“[H]ow hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client’s ability to make informed decisions, the certainty of the harm, the client’s rationale for his or her decision and the means used to change the defendant’s mind.”).

258. Smith, *supra* note 249, at 493 (alterations in original) (quoting KEVIN M. DOYLE, HEART OF THE DEAL: TEN SUGGESTIONS FOR PLEA BARGAINING 70 (1999)).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 495.

263. COHEN, *supra* note 6, at 138.

264. URY, *supra* note 51, at 37–38.

### 6. *Adding a Very Small Concession or “Deal Sweetener”*

There are times when, after a great deal of back and forth in a negotiation setting, adding a very small concession or “extra” to one’s offer can finally tip the balance of the scales toward a “yes” from the other side. This might be a small change in price or warranty, adding extra training at no additional charge, or perhaps extending a sale price for a short period of time.

*Resistance Strategy:* It is important to be mindful of how much value the small “extra” is really bringing to the table. The bottom line is: Perhaps the small “extra” is simply too small to legitimately influence the outcome of the negotiation. In attempting to assess the situation, one should ask the following four questions of himself or herself: (1) Why am I suddenly willing to say yes just because the other side has thrown in a small “extra” to the deal? (2) Is the tactic an appeal to my emotions more than anything else—perhaps a way to cash in on the rapport and relationship that have developed during the negotiation? (3) Am I willing to say yes because I see their small “extra” as a sign that they have hit their reservation point and therefore are not in a position to add anything else of substance to their offer? And (4) am I *correct* in making this assumption that they have hit their reservation point?

### 7. *Using Reference Anchors Creatively*

Consider a student who is selling boxes of chocolates door-to-door for a school fundraiser. If he knocks on a door and says, “Would you please buy this \$2 box of chocolates?,” the comparison price for the potential customer is \$0 (not buying anything at all)—an option many people will decide upon. However, if the student were to say, “Can you buy this \$2 box of chocolates, or perhaps this larger \$5 box?,” then the comparison price for the \$2 box becomes the high anchor price of \$5, and many customers will likely opt for the \$2 box of chocolates.<sup>265</sup>

The “door-in-the-face” influence technique works in a similar fashion. The technique involves making a request so large it is very likely to be rejected.<sup>266</sup> However, immediately following the rejection, a smaller request is made. The target’s rejection of the larger request makes acceptance of the smaller request more likely.

In one experiment, for example, people were approached and asked if they would be willing to volunteer two hours per week, for the next two years, at a local juvenile detention center. As one might imagine, nobody agreed to the request.<sup>267</sup> However, 50% of those to whom the

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265. See Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 *EXPERIMENTAL PSYCHOL.* 67, 70–71 (2002).

266. O’KEEFE, *supra* note 226, at 171; see Stanchi, *supra* note 76, at 426–27.

267. O’KEEFE, *supra* note 226, at 171–72.

request was made immediately agreed to a follow-up request, which was to take a small group from the detention center to the zoo for two hours.<sup>268</sup> Only 17% of those in the control group, to whom no initial request was made, agreed to the one-time zoo trip.<sup>269</sup> Clearly, one of the mechanisms at play in the technique<sup>270</sup> is that the first, large request presents a high reference anchor against which the smaller, follow-up request can be favorably judged.<sup>271</sup>

*Resistance Strategy:* Negotiators must try to evaluate all anchors, and offers, *separately* and *individually*. If chocolate bars or toasters (or anything else) are part of a negotiation, one must ask, “How would I respond if each of these items or ideas were offered separately, or even on separate days?” Thus, with the chocolate bars, how would one respond if the \$2 chocolate bar were offered separately, in complete isolation? Would the offer be accepted? If not, then the fact that a \$5 chocolate bar is also offered will not influence the outcome of the negotiation.

Moreover, negotiators must work hard to evaluate anchors or offers separately and individually even in cases like the “zoo” offer from above. Although the recipient of the offers or requests might feel quite relieved upon hearing the second, smaller request of a one-time, brief trip to the zoo (and therefore feel almost *obliged* to accept such a comparatively small request after being “let off the hook” for the very large initial request), it is nonetheless still vital to consider each request or offer separately and in isolation. Doing so enables the persuasion target to quickly dismiss the initial (absurdly large) request and also to realize that even the second, smaller request might not be reasonable or desirable to accept in the given circumstance.

#### CONCLUSION

A core competency for people working in law or business is the ability to influence and persuade: People need to become expert at getting others to agree, to go along, to give in. The potential “targets” of one’s influence throughout a given workday are seemingly endless, including clients and customers, co-counsel, opposing counsel, supervisors, direct reports, contractors, subcontractors, consultants, secretaries, judges, juries, witnesses, police officers, and court personnel, to name a few. Moreover, that influence is oftentimes exerted through words spoken

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268. *Id.*

269. *Id.*; see Daniel J. O’Keefe, *Guilt as a Mechanism of Persuasion*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE, *supra* note 20, at 329, 333.

270. Another mechanism at play in this technique is the notion of reciprocity, see *supra* notes 98–106 and accompanying text, whereby one feels compelled to return in kind a favor or nice gesture put forth by another party. In this example, one might consider that decreasing the size of the request to a mere one-time zoo trip amounts to a favorable gesture that should be repaid by accepting the smaller request.

271. R.B. Cialdini et al., *Reciprocal Concessions Procedure for Inducing Compliance: The Door-in-the-Face Technique*, 31 J. PERSONALITY & SOC. PSYCHOL. 206, 206 (1975).

and behaviors exhibited within the context of a negotiation.<sup>272</sup> And yet, leading academics have argued that the vast majority of academic writing on negotiation has ignored the element of interpersonal influence.<sup>273</sup> This Article has sought to correct this omission.

In setting forth various techniques of persuasion and their respective defenses or antidotes, I have suggested that influence and persuasion can, at times, be soft and subtle, and that even these softer techniques can have dramatic impacts in terms of their ability to influence, to persuade, and to change the outcome of a conversation or negotiation. In fact, in many respects these softer strategies and tactics can have a *greater* impact than the “hardball” tactics of yesterday’s negotiations—tactics that are usually too obvious, too blunt, and too competitive to be effective in today’s more savvy and sophisticated worlds of law and business.

I also want readers to focus on changes that are taking place in everyday forms of communication and interaction (e.g., emailing, instant messaging, and texting) and to see their potential usefulness as vehicles of influence and persuasion, as well as their capacity for impacting how people think, converse, and interact as negotiators work to build rapport, trust (or distrust), knowledge, acceptance (or reactance), and, finally, reputation within the context of their dealings.

This general *awareness* is a central teaching point of this Article; I hope that readers hereafter will focus upon a particular question, statement, or action during a negotiation and ask themselves, in that moment, the following two questions: (1) Is what the other party is doing or saying right now merely a tactic or strategy of persuasion? And (2) how might I resist or defend myself against that strategy or tactic?

I suggest that this awareness, and the knowledge that flows from it, truly equals power in the context of negotiation—power that can help prevent negotiators from being taken advantage of by the persuaders who employ various strategies and tactics of influence as they attempt to get to yes and get what they want.

Those who are not aware that these techniques exist, and who cannot recognize them and resist them, are placing themselves (and their clients) at a clear disadvantage with respect to negotiation outcomes and final settlement results. It is only by being able to recognize and respond to various strategies and techniques of influence and persuasion that negotiators can begin to resist their powers and nullify their impacts.

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272. See Wetlauffer, *supra* note 54, at 1220 (“We lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results through our strategic speaking.”). I would argue that nearly every interaction or conversation with another person constitutes a negotiation (or at least a central building block of a negotiation)—including an opportunity to teach, to apprise, to query, to build trust, rapport, and reputation, and to influence and persuade.

273. See Malhotra & Bazerman, *supra* note 9, at 510 (“[T]he vast majority of writing on negotiation has ignored the element of interpersonal influence. Because negotiators spend a great deal of time trying to persuade each other to agree to their desired outcome, this seems to be a glaring omission.”).

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