

University of Kentucky

UKnowledge

Law Faculty Scholarly Articles

Law Faculty Publications

1994

Comparative Analysis of Labor Mediation Using a Bargaining Strength Model

Alvin L. Goldman

University of Kentucky College of Law, algold00@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Labor and Employment Law Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Alvin L. Goldman, *Comparative Analysis of Labor Mediation Using a Bargaining Strength Model*, 82 Ky. L.J. 939 (1994).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Comparative Analysis of Labor Mediation Using a Bargaining Strength Model

Notes/Citation Information

Kentucky Law Journal, Vol. 82, No. 4 (1993-1994), pp. 939-968

ESSAY

Comparative Analysis of Labor Mediation Using a Bargaining Strength Model

BY ALVIN L. GOLDMAN*

The comparison of different legal systems offers a number of analytical and research advantages, one of which is that it provides a laboratory for observing differences and similarities in the ways in which common regulatory and dispute resolution models operate in similar and dissimilar environments. This Essay uses that laboratory to illustrate how the bargaining strength model presented in *Settling for More: Mastering Negotiation Strategies and Techniques* ("Settling for More")¹ can be applied in analyzing mediatory interventions and provide a better understanding of (a) how such interventions can be utilized most effectively, (b) when they are useful, (c) when they are superfluous, and (d) when they are unduly intrusive.

The term "mediation" does not carry the same meaning in all industrial relations systems. In this Essay, "mediation" is intended to encompass the full range of methods by which a party whose interests are not directly involved attempts to aid negotiating parties in reaching a settlement. Thus, as used here, "mediation" includes all third-party interventions, regardless of the distinctions made in some countries between "conciliation" and "mediation."² Similarly, as used in this Essay,

* Dorothy Salmon Professor of Law University of Kentucky College of Law. A.B. 1959, Columbia University; LL.B. 1962, New York University.

¹ See ALVIN L. GOLDMAN, *SETTLING FOR MORE: MASTERING NEGOTIATION STRATEGIES AND TECHNIQUES* 3-26 (1991) (discussing the bargaining strength model).

² Alvin L. Goldman, *Settlement of Disputes Over Interests*, *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 481, 483 n.1 (Roger Blainpain & Chris Engels eds., 5th ed. 1993). See, e.g., KAZUO SUGENO, *JAPANESE LABOR LAW* at 612-14 (Leo Kanowitz trans., 1992) (discussing the distinction

"mediation" describes mandatory as well as voluntary procedures,³ leveraged as well as nonleveraged interventions,⁴ and settlement assistance by wholly impartial as well as by partially interested persons.⁵

American literature regarding mediation (and all methods of third-party intervention subsumed in this Essay's use of the word) most often is descriptive or prescriptive and predominantly focuses on portraying tactics and procedural protocols.⁶ Little that has been published in English can be accurately characterized as analytical; that which can be labeled as analytical either (a) largely relates to the psychodynamics or ethics of particular tactics or protocols, (b) consists of empirical observations regarding skill levels in applying specific techniques, or (c) establishes empirically based correlations between particular techniques and bargaining outcomes.⁷ Efforts have been made to compare the

between mediation and conciliation under Japanese law).

³ Goldman, *supra* note 2, at 498.

⁴ *Id.*; see also Alvin L. Goldman, *Third Party Intervention in Resolving Interests Disputes*, 10 COMP. LAB. L.J. 271, 272-73 (1989) (discussing leveraged mediation). Leveraged mediation is where the third-party intervenor has the potential to impose terms of settlement or impose special burdens or procedures if proposals are rejected. In some societies, the effectiveness of social pressure may result in published third-party recommendations having the impact of leveraged mediation. See, e.g., SUGENO, *supra* note 2, at 613 (discussing the conditions in which mediations are carried out by the Labor Commission in Japan).

⁵ Political mediators, for example, often are partially interested intervenors in labor disputes either because an alliance with one of the parties exists or because the settlement might affect the success of a program or election. See Tiziano Treu, *The Role of Neutrals in the Resolution of Interest Disputes in Italy*, 10 COMP. LAB. L.J. 374, 379-80 (1989) (discussing how regional governments in Italy sometimes intervene on the basis of the "integrative" powers they possess in labor matters).

⁶ Deborah M. Kolb, *How Existing Procedures Shape Alternatives: The Case of Grievance Mediation*, 1989 J. OF DISP. RESOL. 59, 65 ("In sum, much scholarship in mediation . . . is based, for the most part, on a concept of process that is defined either as a set of procedural characteristics or as clusters of tactics."); see also NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION LAW, POLICY, PRACTICE*, *passim* (1989) (discussing statutes and court opinions related to mediation and conciliation); SUSAN M. LEESON & BRYAN M. JOHNSTON, *ENDING IT, DISPUTE RESOLUTION IN AMERICA* 105, 133-39 (1988) (discussing the background and the process of mediation); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING*, *passim* (2d ed. 1986) (discussing mediation as a major element in dispute resolution); WALTER A. MAGGIOLO, *TECHNIQUES OF MEDIATION*, *passim* (1985) (discussing mediation techniques and the use of mediation in other dispute resolution procedures).

⁷ See DEBORAH M. KOLB, *THE MEDIATORS* 134-49 (1983) (discussing the connection between the mediator's strategic activities and the outcomes of his efforts); Janette Webb, *Behavioral Studies of Third-Party Intervention*, in *INDUSTRIAL RELATIONS:*

efficiency and outcomes of mediation in relation to similar nonmediated negotiations,⁸ but these comparisons have not been couched in terms of how mediation affects the determinants of negotiated outcomes. Accordingly, existing scholarship respecting mediation contains a significant void: Current scholarship lacks a model or models for analyzing, in terms of the parties' bargaining power, strategic choices available to mediators and for assessing, in terms of the effect upon the parties' bargaining power, legal standards and regulations of mediation. This Essay addresses that void.

Since the target of mediation most often is defined as helping the parties achieve a negotiated settlement,⁹ proper analysis of the mediator's role involves understanding the forces that drive bargainers to settlement or impasse. Achieving this understanding requires the identification of the elements of bargaining strength and of the relationship between those elements and the conditions under which both sides are prepared to settle. Therefore, in order to gain a cohesive and coherent understanding of how mediation affects bargaining, a model to describe bargaining power and explain its impact upon negotiated settlements is necessary. The task of developing and presenting a comprehensive model of bargaining strength was undertaken in *Settling for More*. Hence, this Essay's analysis of mediation begins with the bargaining strength model described and explained in that book.

The starting proposition in understanding bargaining is that bargaining power is wholly dependent upon each party's perceptions of the elements of bargaining strength. In other words, negotiation is driven not by reality, but by the participants' perceptions of reality. Thus, the most pervasive element of bargaining strength is each side's perceptions. The analytical significance of this principle is heightened by the fact that it separates the model presented in *Settling for More* and similar perception-based models from market-based microeconomic paradigms.¹⁰ The market-based approach ultimately operates

A SOCIAL PSYCHOLOGICAL APPROACH 309 (Geoffrey M. Stephenson & Christopher J. Brotherton eds., 1979) (discussing the extent of the research concerning the psychological aspects of third-party intervention).

⁸ See Webb, *supra* note 7, at 312-21 (discussing the experimental study of mediation).

⁹ MAGGIOLO, *supra* note 6, at 3-4 ("[T]he professional mediator facilitates the meeting-of-minds process and by voluntary means and methods re-emphasizes the prime responsibility of the disputant parties to seek their own solution compatible with the public interest.").

¹⁰ GOLDMAN, *supra* note 1, at 5. In contrast to the weight given to individual perception in perception-based models, market-based microeconomic paradigms merely plot "an abstract notion of what variables would influence a price if all potential buyers and sellers were solely profit motivated." *Id.* For a more detailed explanation of market-

on the assumption that market decisions are made by wholly rational people who base their decisions on accurate, complete knowledge—that is, the decision-making process is controlled not by perception, but by reality. The perception-based model, in contrast, assumes that negotiating decisions are made by people who are driven by emotion and by reasoning based on their perceptions, even if those perceptions are the product of imagination, deception, ignorance, irrationality, or the like.

Perceptions are neither fixed nor uniform. Rather, perceptions are shaped by a person's capacity to observe, collate, store, and recall information that has been altered by the inevitable distractions and limitations upon that person's ability to hear, see, taste, smell, and feel. Perception is additionally influenced by the way in which a source of information has intentionally or unintentionally distorted that information when presenting it to the observer. Equally important, perceptions are absorbed and ordered by more than just logic. Indeed, logic often plays a minor role. Personal and cultural biases, personality, and emotional states such as fear, exuberance, or fatigue provide the mental framework through which we filter, distort, and restructure our perceptions of events, transactions, information, and people. Some modern social scientists thus explain that perceptions are formed by the right side as well as the left side of the brain, so that the emotive as well as the data processing dimensions of the learning, thinking and remembering processes are involved. That bargaining tactics and mediation techniques are largely concerned with the psychodynamics involved in altering perceptions is, therefore, not surprising.

What, however, are the subjects of the parties' bargaining strength perceptions? Since bargaining is a decisional process, it is reasonable to use a cost-benefit model of decision making in order to examine this question. Therefore, in mapping the elements of bargaining decisions, one should ask a series of questions: (a) What are the process costs?; (b) What are the lost opportunity costs?; (c) What are the potential benefits (or gains)?; (d) What are the risks of error in assessing the costs and benefits?; and (e) What is the structure of the relationship that links these factors with each other? *Settling for More* identifies two sets of bargaining costs: Accrued Costs ("AC"), with its risk of assessment error referred to as Data Accuracy ("DA"), and Cost of Impending Negotiations ("COIN"), with its risk of assessment error identified as Predictive Accuracy ("PA"). The potential for bargaining benefits is designated as the Offer to Meet One's Needs ("OMON"), with its assessment

based microeconomic paradigms, see generally WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS (1985) (discussing paradigms, such as indifference curve analysis, that microeconomists apply to market theory).

risk of promised action failing to meet those needs being referred to as Probability of Performance ("POP"). Finally, the lost opportunity costs are the Best Alternative to the Proposed Agreement ("BAPA"), with its risk of assessment error being referred to as Predictive Accuracy ("PA").

The bargaining strength model¹¹ can be presented both graphically and in algebraic form. In both presentations, each party's bargaining strength is separately measured by the other side's perception.¹² That is, Party *A*'s bargaining strength is not dependent on what *A* thinks; rather, it is dependent on what Party *B* thinks because an agreement between *A* and *B* can be reached only if *B* decides that what *A* is prepared to do is acceptable. Put another way, if *A* thinks that what *A* seeks from *B* is much more attractive than *A*'s alternatives, then *A* is prepared to make concessions in order to reach agreement. Conversely, if *A* thinks that *B*'s offering is less attractive than *A*'s alternatives, then *A* not only will refuse to make concessions but will also have to get concessions from *B* in order to reach agreement. Accordingly, if *A*'s perceptions are favorable to *B*'s position, *B* will deal with *A* from a position of bargaining strength. (For example, *A* thinks that the automobile *B* is offering for sale is mechanically sound.) If *A*'s perceptions are unfavorable to *B*'s position, *B* is in a position of bargaining weakness in dealing with *A*. (For example, *A* thinks that the automobile *B* is offering for sale is mechanically defective.) Thus, if *B* can alter *A*'s perceptions so that they are favorable to *B*'s position (and *A* then decides that what *B* offers is more attractive than *A*'s alternatives), *B* will increase *B*'s bargaining strength. In that sense, *B*'s bargaining strength is increased or diminished based on changes in *A*'s perceptions.

Settling for More describes four paradigms of bargaining strength analysis. The first two demonstrate the relationship of the elements of bargaining strength in determining the bargaining power of each side in a bargaining transaction. The third paradigm combines the first two in order to illustrate the parties' relative bargaining strength. Finally, the fourth paradigm shows the conditions under which reasonable negotiators should be able to reach a settlement. This fourth paradigm, the conditions conducive to settlement, is the one of most immediate concern in studying mediation.¹³

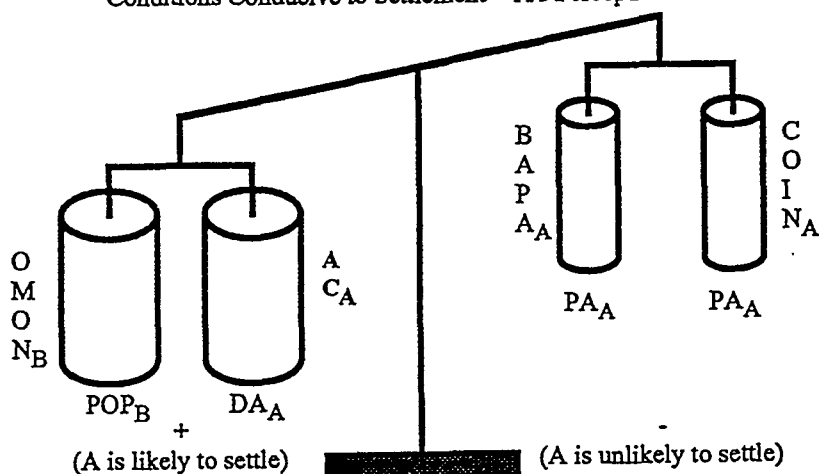
¹¹ A full explanation of the bargaining strength elements is left to *Settling for More*, in which the bargaining strength model is developed. GOLDMAN, *supra* note 1, at 6-52. However, in order to understand the relationship between the bargaining strength model and mediation, it is necessary to describe the bargaining strength conditions that are conducive to achieving a negotiated settlement.

¹² See generally *id.* at 33-52, 233-36 (detailing the bargaining strength model in both diagram and algebraic forms).

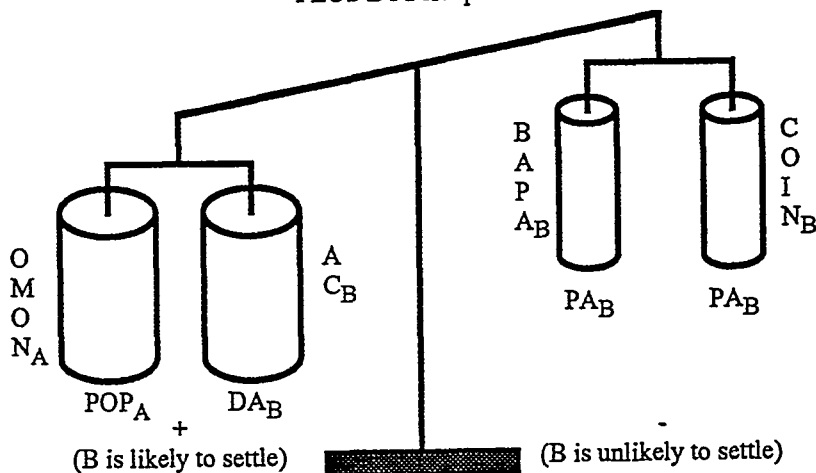
¹³ "Mediators . . . are concerned not with what they personally may deem to be a just settlement but rather what is acceptable to the parties." MAGGIOLO, *supra* note 6, at 5.

Diagram 1 represents the fourth paradigm, the conditions conducive to settlement. This diagram shows that agreement should be attainable as long as each side perceives that what it expects the other side will do to meet its needs (OMON and POP), combined with its current investment in bargaining with the other side (AC and DA), outweighs what it thinks it will get by bargaining with someone else (or pursuing an alternative dispute resolution mechanism—BAPA and PA), combined with what it anticipates it will cost to continue the current bargaining effort (COIN and PA).

Conditions Conducive to Settlement = A's Perception Of:



PLUS B's Perception Of:



OMON = Offer to Meet Other's Needs

POP = Probability of Performance

AC = Accrued Costs

PA = Predictive Accuracy

BAPA = Best Alternative to the Proposed Agreement

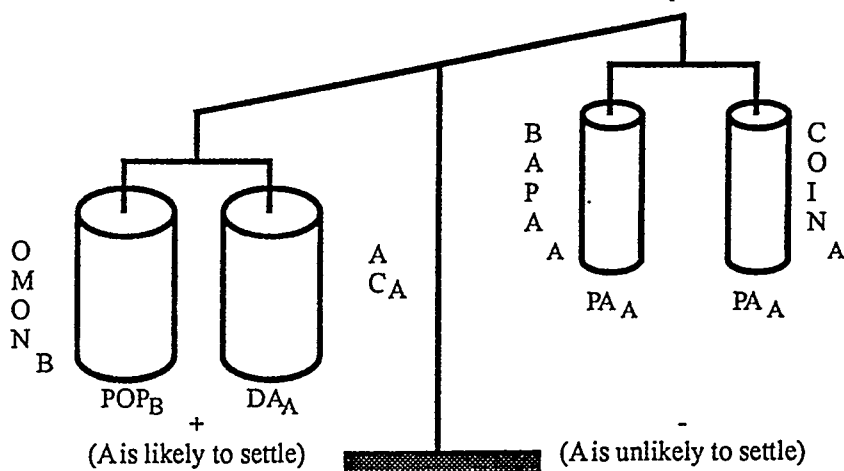
Diagram 1 illustrates a situation in which both sides are inclined to reach the proposed settlement. Either side would become less willing to settle, however, if it reduced its perception of the size of one or both bargaining strength weights on the left side of the diagram or increased its perception of the size of one or both weights on the right side. This situation is demonstrated by Diagram 2, which shows that Party *B* has become resistant to settlement. One possible explanation for this resistance is *B*'s perceptions that further bargaining is going to be prolonged and involve considerable expense (an increase in the weight given to COIN in the diagram) and that Party *A* is unlikely to deliver on what it offers to do if agreement is reached (a decrease to the weight given to POP in the diagram). For example, assume that *B* wants to buy *A*'s house and that *A* has offered to sell it. *A* initially asks \$150,000 and *B* counters with an offer of \$130,000. At this point, one might expect that with a bit of negotiating the parties would have a good prospect of reaching agreement. Assume further, however, that *B* learns that *A* has inherited the house together with three relatives, one of whom has expressed a strong desire to keep the house within the family. This information should alter *B*'s perception so as to reduce the weight that *B* will give to the element of *A*'s probability of performance (POP) and increase the weight *B* will give to the costs of impending negotiations (COIN). The effect of these changes will be to reduce the prospects for settlement. In order to restore the conditions conducive to settlement, *A* will have to do something to reestablish *B*'s original perception of these bargaining strength elements—such as obtain a signed letter from all of *A*'s co-owner relatives that authorizes him to sell the house.

The full significance of the above model and its utility in analyzing the bargaining process, including the role of mediation in that process, cannot be fully appreciated without careful examination of the special characteristics of each bargaining strength element. The needs that each side seeks to have met by reaching agreement bear an important relationship with each other. These needs can be common (as is likely when, for example, an employer and union both want to be able to predict future wage rates), compatible¹⁴ (as is likely when, for example, an employer and union are arranging employee vacation schedules), conflicting (as is likely when, for example, an employer and union are setting employee wage rates), or incompatible¹⁵ (as is likely when, for

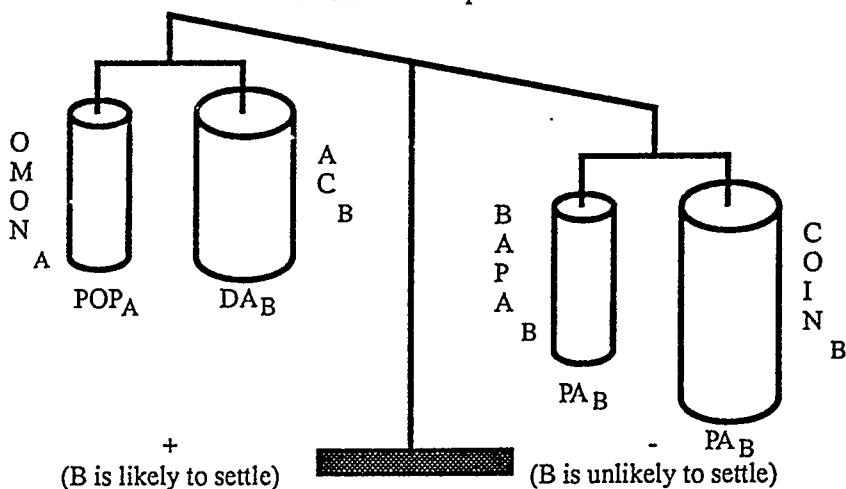
¹⁴ Common or compatible needs are involved in what is termed "integrative" negotiations or bargaining. GOLDMAN, *supra* note 1, at 10-11, 46, 50-51.

¹⁵ Conflicting or incompatible needs are involved in what is termed "exchange" negotiations or bargaining. *Id.* at 46-50.

Conditions Not Conducive to Settlement = A's Perception Of:



PLUS B's Perception Of:



OMON = Offer to Meet Other's Needs
 POP = Probability of Performance
 AC = Accrued Costs
 DA = Data Accuracy

PA = Predictive Accuracy
 BAPA = Best Alternative to the
 Proposed Agreement
 COIN = Cost of Impending Negotiations

example, a union seeks to control the selection of shop floor supervisors). In addition to the varying needs that each side may have, different sources of needs motivate each side's bargaining conduct.¹⁶ Collective

¹⁶ For example, a person may be motivated by "personal idiosyncrasies and

bargaining concerning employment interests typically involves collective representation of owners (either by an employers' association or merely by the directors serving as agents for shareholders) as well as collective representation of employees, and divergent interests can be present within each group. Thus, bargaining strength in the labor relations context cannot be fully understood without exploring the component interests of each collective group and any competing interests between the group's representatives and the constituents, or even among different groups within the constituency.

Moreover, needs can be multidimensional—fiscal, physical, or emotional. Similarly, full understanding of each of the other bargaining strength elements (probability of performance, accrued and impending costs, data and predictive accuracy) requires more intensive analysis of that element's unique characteristics. This Essay examines only a few of these bargaining strength elements as a means of better understanding the mediator's role.¹⁷

Assuming that the primary goal of mediation is to help negotiating parties reach agreement, one can observe from the bargaining strength paradigm of the conditions conducive to settlement that the mediator's responsibility is to aid the parties in finding ways to place greater weight on the elements on the left side of the diagram than on the elements shown on the right side. Mediation, however, need not be defined solely in terms of enabling the parties to reach agreement. Is it not equally legitimate and useful for a mediator to aid the negotiating parties in realizing that a mutually beneficial agreement is not attainable?¹⁸ In the labor relations context, the best alternative to the proposed agreement may be an adjudicated resolution, as is the case both in grievance disputes in North America and in situations in which the parties are subject to contractual or statutory interests arbitration, as they are in a number of countries.¹⁹ Where parties who enter into negotiations are

emotional needs." *Id.* at 114.

¹⁷ For a full exploration of the characteristics of the specific bargaining strength elements, see *Settling for More* at 6-25.

¹⁸ "Mediation is defined most simply as facilitated negotiation. An impartial third party (the mediator) facilitates negotiations between disputants or the disputants' representatives in their search for a resolution of their dispute." LEESON & JOHNSTON, *supra* note 6, at 133.

¹⁹ Grievance procedures established under a collective agreement in the United States and Canada provide an example of the first category-grievance negotiation. Alan Gladstone, *Settlement of Disputes Over Rights*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 455, 470-74 (Roger Blainpain & Chris Engels eds., 5th ed. 1993). The traditional Australian system of

unaware of their alternatives to a proposed settlement (BAPA) or have unrealistic perceptions regarding the prospects of achieving those alternatives (PA), a mediator may have to choose between (a) promoting settlement by perpetuating or even expanding the misperceptions or (b) educating one of the parties as to why a seemingly attractive offer is not in that party's best interest.

Accordingly, Hugh Collins argues in a recent book²⁰ that British conciliation officers subvert the public importance of ensuring procedural fairness in industrial relations and undermine the substantive interests of natural justice.²¹ He asserts that the conciliation officers press for settlements because they place more emphasis on the efficient administration of the Industrial Tribunals system than on their responsibility to help the employee who appears without counsel develop his or her case in the best light and weigh any settlement proposals against a realistic assessment of the award that would be likely to result from an adjudicated resolution.²² Therefore, according to Collins, many workers accept

collective bargaining offers a classic example of a system in which adjudication rather than work stoppages serves as the alternative to a negotiated resolution. J.E. Isaac & R.C. McCallum, *The Role of Neutral in the Resolution of Interest Disputes in Australia*, 10 COMP. LAB. L.J. 300 (1989) (discussing the role of neutral third parties in the Australian labor dispute resolution system). A variation of this model is found in the German system for resolving disputes between a works council and management. Manfred Weiss, *The Role of Neutrals in the Resolution of Interest Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L.J. 339, 348-54 (1989) (discussing the system of bargaining between employee councils and employers).

²⁰ HUGH COLLINS, *JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT* (1992) (discussing the distribution of power between employer and employees, especially as related to management's power of dismissal).

²¹ *Id.* at 137-39.

²² *Id.* For a review that takes issue with Collins' overall analytical topology and recommendations for reform, see Gwyneth Pitt, *Justice in Dismissal: A Reply to Hugh Collins*, 22 INDUS. L.J. 251 (1993) (arguing that Collins' thesis, which purports to provide a justificatory framework for existing data or dismissal law, is inadequate as an interpretation of the principles underlying the existing law of termination). See also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (discussing the dangers that may accompany alternatives to traditional litigation).

In the United States, a similar question is hotly debated concerning the role of mediation as a means of resolving disputes in such areas as divorce and child custody, discrimination, consumer and environmental affairs, and similar situations in which noncommercial public interests or individual rights or liberties may be at stake. See JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 272 (1989) (discussing the issues of power imbalances and fairness as related to the mediation

settlements that are less favorable than the adjudicated awards would be, and some issues of substantive importance in the development of sound labor relations policies are not presented for resolution by the Industrial Tribunal.²³

Although it is not the purpose of this Essay to explore the accuracy of Collins' description or the important policy issue raised by his critique, an examination of his thesis in terms of the bargaining strength model is appropriate. Accordingly, looking again at Diagram 1, one can see that the issue that Collins raises concerns the extent to which the mediator should focus upon bringing the parties' perceptions in line with reality (or at least, the mediator's understanding of reality). Collins argues, in effect, that British conciliation officers have adopted the strategy of calling attention to the realities only when doing so will enhance the prospects of settlement.²⁴ Thus, if the seemingly impartial intervener, without regard to the Tribunal's patterns of case decisions, assures a worker that the proposed settlement is "fair," that assurance likely will increase the weight that the worker places on the OMON element and thereby improve the prospects for settlement. Similarly, if that same "impartial" intervener assures the worker that the Tribunal award will be less than the worker expected, that will reduce the weight that the worker gives to the BAPA element and further shift the balance toward the acceptability of a proposed settlement. An alternative strategy, one that arguably is more appropriate to the responsibilities of an impartial intervener, is to provide such focus on reality regardless of its impact on the likelihood of settlement.

Another possibility for parties who are unable to find mutually satisfactory terms of agreement is to terminate the existing contract, as occurs when a party resorts to a strike, lockout, or unilateral modification of the terms of employment; when employees seek work elsewhere; or

process); Penelope E. Bryan, *Killing Us Softly*, 40 BUFF. L. REV. 441 (1992) (discussing how mediation in the context of divorce favors the husband over the wife); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?*, 41 FLA. L. REV. 253 (1989) (discussing the importance of a clear conception of the mediator's role, as related to the formation of guidelines for mediation practice); Kendric Menzel, *Judging the Fairness of Mediation*, 9 MEDIATION Q. 3 (1991); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991) (discussing how mediation is generally helpful to both men and women). For a scathing criticism of one state's experience with judicially mandated mediation and arbitration of pre-trial discovery and commercial and personal injury disputes, see Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53.

²³ COLLINS, *supra* note 20, at 137-38.

²⁴ *Id.* at 138-39.

when an employer transfers work or hires replacement employees.²⁵ Regardless of whether some or all of these alternatives may be socially or politically undesirable,²⁶ a mediator may be able to reduce the transaction costs of resorting to such impasse actions, to the extent that they are legally permitted, by helping the parties realize that they have reached a deadlock. Moreover, if the reallocation of resources resulting from such responses to impasse is more satisfying and efficient in the long run, as sometimes is the case, then the mediator who serves best may be the one who quickly helps the parties understand that there is no purpose in prolonging fruitless efforts to bring about a negotiated solution. Therefore, the analysis that follows accepts the proposition that mediation can fulfill its role by either aiding the parties in reaching agreement or in recognizing that they are unable to achieve a mutually satisfactory settlement.

To illustrate how the bargaining strength model can help improve one's understanding of the mediator's role and the strategic choices available to a mediator, one should consider the element identified as the offer to meet the other's needs (OMON). A party's needs, as previously observed, can be physical, fiscal, or emotional. It is easier to shape and discuss collective bargaining and grievance resolution proposals in terms of physical and fiscal needs than in terms of emotional needs because the former needs are more susceptible to measurement, description, and comparison than are emotional needs. But the added difficulty in analyzing the emotional aspects does not lessen their importance in helping the parties settle their differences.²⁷ For example, well-paid workers employed in a safe, healthy environment may nevertheless be discontented if they have no sense of voice in determining their employment destiny. Even when formal structures exist for providing worker participation in decisions affecting the workers' wellbeing, the workers may feel that their voices are not heard.

A mediator who is guided by the bargaining strength model should recognize that one way to increase the weight placed upon the other's

²⁵ A comparative examination of the law regulating this alternative to accepting a proposed negotiated settlement is presented in a forthcoming issue of the *Bulletin of Comparative Labour Relations* (R. Ben-Israel, guest ed.).

²⁶ In the United States, at least, it has been noted that the political impetus behind establishing government labor mediation agencies is the goal of preventing work stoppages and terminating those that get started. SIMKIN & FIDANDIS, *supra* note 6, at 32-33.

²⁷ See, e.g., Webb, *supra* note 7, at 312 (discussing various studies which have measured the effects of mediation on the parties involved).

offer to meet needs, and thereby increase the attractiveness of settlement, is to ensure that the party who is assessing the other's offer feels that the offer is responsive to its emotional as well as its physical and fiscal needs. This observation should be no great revelation to successful labor mediators. Nevertheless, it is noteworthy that two of the leading American texts used to train labor mediators, though giving considerable attention to the importance of helping parties understand the fiscal implications of their bargaining positions, at best make only marginal reference to the emotional needs of the negotiators or their constituents.²⁸

Recognition of the role that emotional needs play in bargaining decisions is also noteworthy in that it illustrates another point of distinction between the microeconomic approach to analysis and the bargaining strength model. Emotional needs are individual, malleable, susceptible to sudden unpredictable changes, often interactive, and not subject to any current technology for measurement.²⁹ Thus, despite the theoretical efforts of some economists to convert all interests into market utilities, emotional needs lack the characteristics necessary to subject them to market exchanges or market model predictions. Therefore, their role in bargaining represents a reason why market-based microeconomic models do not go far to aid understanding of negotiated decisions.³⁰

²⁸ See SIMKIN & FIDANDIS, *supra* note 6, at 28 (stating that "[r]epeated exposure to sour-yes, occasionally rotten-apples in the collective bargaining barrel requires a strong stomach"); MAGGIOLO, *supra* note 6, at 73 ("[A] potential mediator ought to possess: ... 'the personality-probing skills of a good psychiatrist.'" (quoting WILLIAM E. SMITH, *MEDIATOR AND THE DYNAMICS OF COLLECTIVE BARGAINING*, BUREAU OF NATIONAL AFFAIRS (1971)). Some works devoted to broader applications of mediation pay greater attention to such matters. *E.g.*, Albie Davis, *The Logic Behind the Magic of Mediation*, in *EXPANDING HORIZONS: THEORY AND RESEARCH IN DISPUTE RESOLUTION* 23 (Thomas F. Christian et al. eds., 1989) (discussing the humanistic role that the mediator plays).

²⁹ For a description of the emotional dimensions, see GOLDMAN, *supra* note 1, at 13 and 94-99. Sometimes mediators are also able to modify the values by which parties measure their needs. Instead of just allowing egocentric values to provide the benchmark for assessment, the mediator can focus on larger values such as community, decency, integrity, and honor. President Lyndon Johnson's mediation efforts, for example, apparently involved walking the parties to the American flag in his office, unfurling it, and proclaiming that the nation needed the parties' cooperation and willingness to compromise.

³⁰ Microeconomists applying market theory use indifference curve analysis in an effort to account for variations respecting the priorities assigned by different people to the same sets of interests that are affected by market choices. WALTER NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 82-85 (3d ed. 1985). Indifference curve analysis examines an individual's choices and motivations by weighing

One way to increase a party's perception of the weight (or value) to be given to the other side's offer to meet its needs is to enhance the offer. A mediator who is impartial and lacks bargaining leverage can nevertheless serve as a verifier of facts in order to increase a party's perception of the value of the offer or as a conduit for communication so as to solicit an increased offer from the other side.

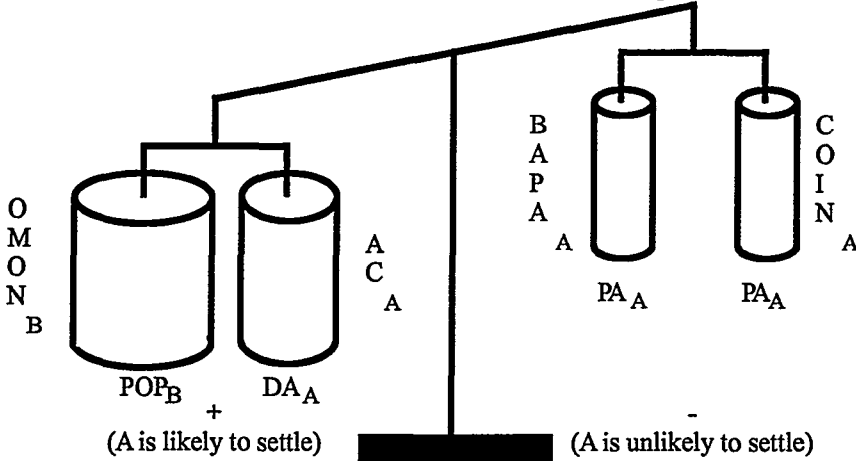
Application of the bargaining strength model in Diagram 3 illustrates the impact when, all other factors being equal, mediation successfully increases the parties' perception of the extent that their respective proposals meet the other's needs. The model confirms the intuitive expectation that a successful mediation effort of this sort will increase the prospects for agreement.

In addition to the above discussed techniques, a mediator sometimes has the ability to alter not merely the perception but also the reality of the extent to which needs are met. In such a situation, the mediator can change the prospects of settlement by exercising that ability to modify directly the value of the offer. The very suggestion that a mediator might play such a role is contrary to many doctrinal accounts seen in the United States respecting the proper role of mediation.³¹ Yet, an examination of

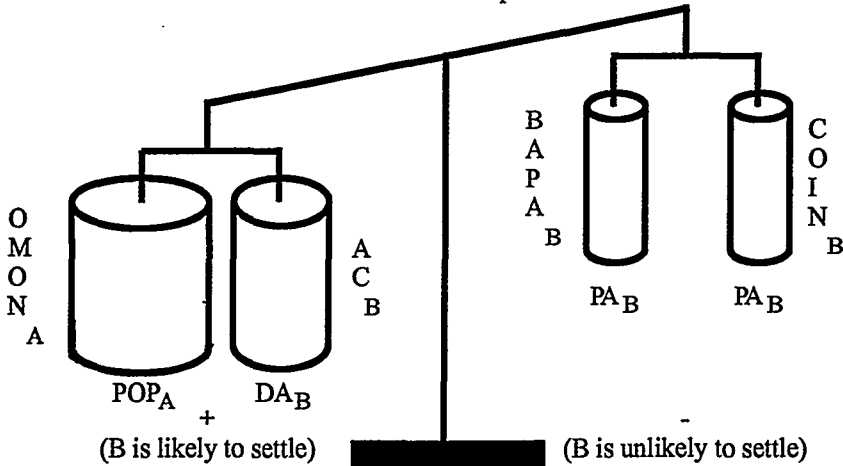
what level of one benefit they will give up if compensated with more of another. Although indifference curve analysis may be an effective way to model and predict certain types of economic decisions, such as the impact of changes in interest or tax rates, it is unsuited for dealing with complex negotiated transactions in which the decisional process involves efforts to modify the participants' priorities. Indifference curve analysis assumes stable preference ordering and rational choices to maximize satisfaction when substitutions are made. Behavioral studies show, however, that human choice often is not rational; it is influenced by such things as the language and context in which the choices are presented and invalid perceptions of statistical probability. See, e.g., GOLDMAN, *supra* note 1, at 148-58, 168-70. Nor are all decision makers seeking to maximize satisfaction. Various types of neurotic behavior cause some people to make choices that reduce rather than increase their satisfaction, perhaps when transacting with particular categories of people. See *id.* at 101-04, 111-15. Moreover, decisional preferences can be interactive. For example, if *A* anticipates that *B* will offer a small wage increase in exchange for *A*'s offering to reduce the number of seniority classifications, but *B* responds with a larger-than-expected wage increase offer, *A* may start to suspect that *B* anticipates laying off a large number of workers and may then reassess the relative priority that *A* gives to job security demands. Similarly, indifference curve analysis would appear to assume that if $AB > CD$, $AB > DF$, and $AB > EF$ but $AB < CF$, then $AB > DE$. It would reject the proposition that if $AB > CD$, $AB > DF$, and $AB > EF$ but $AB < CF$, then $AB < DE$. Yet, if *A*=pickles, *B*=bologna, *C*=onions, *D*=bananas, *E*=ice cream, and *F*=fried potatoes, one might rationally prefer the second "irrational" preference ordering. Such a result would not be predicted by the abstract logic that is at the core of indifference curve analysis.

³¹ See MAGGIOLO, *supra* note 6, at 12 (writing of the intercession of an uninterested

Conditions Conducive to Settlement = A's Perception Of:



PLUS B's Perception Of:



OMON = Offer to Meet Other's Needs
 POP = Probability of Performance
 AC = Accrued Costs
 DA = Data Accuracy

PA = Predictive Accuracy
 BAPA = Best Alternative to the Proposed Agreement
 COIN = Cost of Impending Negotiations

mediation from the perspective of the bargaining strength model's paradigm for the conditions conducive to settlement does not indicate

anything inherently inappropriate about a mediator modifying bargaining strength, and thereby increasing the prospect for settlement, by directly increasing the extent to which an offer meets a party's needs.

Indeed, in some industrial relations systems, settlement is accomplished by mediators who are armed with the authority to alter the extent to which physical and fiscal needs are met. For example, in Italy, political authorities often engage in mediatory efforts separate from the official public mediator's activity.³² The intervention by such political mediators, which is reported to be "quite appreciated by the parties,"³³ often succeeds because the intervener is able to offer concrete benefits in exchange for the parties' acceptance of a proposed agreement.³⁴ Similar interventions are reported to be encountered in Israel³⁵ and occasionally in Sweden.³⁶

A number of labor law systems also give mediators the power to influence or control the resolution that will be imposed upon the parties if a negotiated settlement is not reached.³⁷ In terms of the bargaining strength model, the mediator's influence over the best alternative to the proposed agreement (BAPA) in such a situation enables him to modify the parties' perception of the weight to be given to that bargaining strength element. Thus, where, as in the Australian conciliation-arbitration model for resolving labor relations disputes, failure to reach agreement normally results in arbitration by the same official who acted as conciliator, that official's persuasive efforts as a bargaining intervener will carry special weight.³⁸ Analyzing this situation using the bargaining strength model, one finds that the weight of the predictive ability (PA) to determine the best alternative to the proposed agreement (BAPA) would be considerably increased for both sides if the conciliator were to announce the anticipated terms of an arbitrated award. In theory, at least,

³² Treu, *supra* note 5, at 356, 374, 380.

³³ *Id.* at 380.

³⁴ *Id.*

³⁵ Ruth Ben-Israel & Mordehai Mironi, *The Role of Neutrals in the Resolution of Interest Disputes in Israel*, 10 COMP. LAB. L.J. 356, 363 (1989) (discussing mediation in Israel by third parties who possess an influence that they use as leverage over the disputants).

³⁶ Reinhold Fahlbeck, *The Role of Neutrals in the Resolution of Interest Disputes in Sweden*, 10 COMP. LAB. L.J. 391, 399, 404-05 (1989).

³⁷ See Isaac & McCallum, *supra* note 19, at 304 ("If conciliation does not resolve all the issues in dispute, the conciliator puts on the arbitrator's hat, and arbitration proceedings commence.").

³⁸ *Id.* ("Having two hats allows the third party this element of flexibility between conciliation and arbitration.").

such an announcement should leave the parties with little incentive to continue to seek a negotiated award. Accordingly, an interesting field test of the bargaining strength model would be available if such revelation were the practice of some but not all Australian conciliators. Any correlation between the two practices and the relative frequency of settlement agreements could then be examined. In reality, however, Australian labor conciliators generally appear to avoid making such predictions, and when they do, the party disfavored by the prediction typically requests that another conciliator be substituted for the arbitral stage of the conflict resolution.³⁹ Thus, this potential field test of the bargaining strength model is not currently possible.

Another variation in labor mediation systems is where the mediator has the authority to forestall resort to unilateral changes or work stoppages. This variation occurs, for example, in the rail and airline industries in the United States, where the National Mediation Board must declare a bargaining impasse before the parties can resort to self-help.⁴⁰ No matter how long it has been since any negotiating progress has been made, the parties may not lawfully make unilateral changes or resort to work stoppages or related activities until an official declaration of impasse has been issued.⁴¹ Under such circumstances, the mediation agency has the power effectively to freeze the *status quo*,⁴² thereby depriving the parties of the opportunity to resort to what they consider to be their best alternative to the proposed agreement (BAPA). Of course, whether the mediation agency's authority strengthens or weakens a particular party's bargaining position depends upon which side prefers the *status quo* to the proposed changes. Applying the bargaining strength model in Diagram 4, one can see that if a party that has been holding out at the bargaining table is persuaded that the mediation agency will not declare an impasse, then that party loses much of its incentive to resist settlement. Once a party is convinced that the agency will not declare an impasse (Party B reaches that conclusion in Diagram 4), the weight to be placed on the best alternative to the proposed agreement (BAPA)

³⁹ Interview with R. J. Meiklejohn, Industrial Officer, Australasian Meat Industry Employees' Union (Queensland Branch), Aug. 23, 1992.

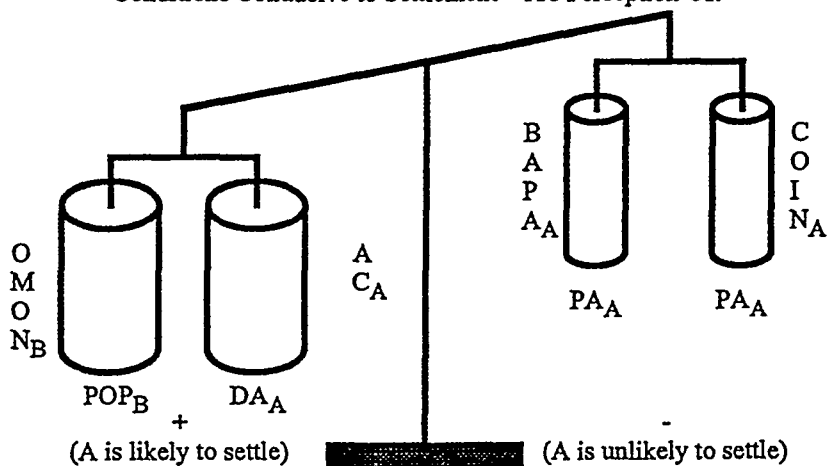
⁴⁰ *E.g.*, *International Association of Machinists v. National Mediation Bd.*, 930 F.2d 45 (D.C. Cir.), *cert. denied*, 112 S. Ct. 173 (1991) (holding that the Board's failure to issue a declaration of impasse prohibited resort to unilateral changes or work stoppages even though the agency chairman had observed that mediation had failed after a year's effort that had followed ten months of unsuccessful bargaining without mediation).

⁴¹ For a discussion of the National Mediation Board, see MAGGIOLO, *supra* note 6, at 68-70.

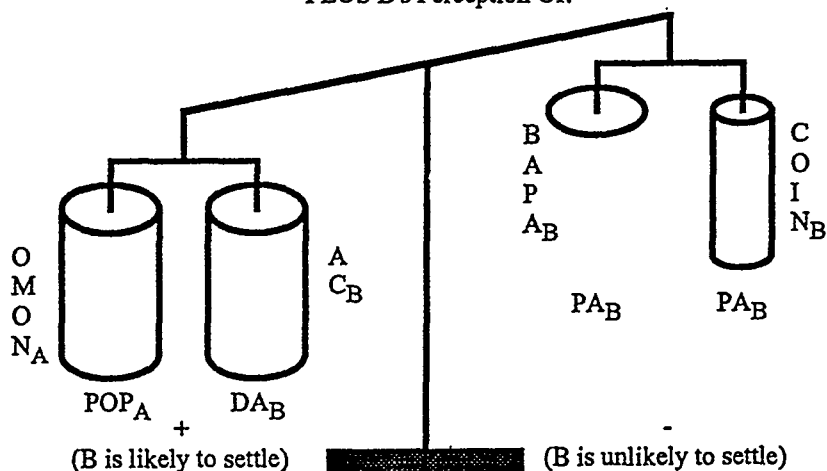
⁴² *Id.* at 69-70.

becomes zero. Even though the value of the linked element of predictive ability to determine the nature of that alternative may as a result become rather large, the combined effect is to eliminate these factors in weighing bargaining strength. Hence, no reason to further resist the proposed settlement may remain.

Conditions Conducive to Settlement = A's Perception Of:



PLUS B's Perception Of:



OMON = Offer to Meet Other's Needs
 POP = Probability of Performance
 AC = Accrued Costs
 DA = Data Accuracy

PA = Predictive Accuracy
 BAPA = Best Alternative to the
 Proposed Agreement
 COIN = Cost of Impending Negotiations

Another illustration of how the bargaining strength model can be used to gain a more precise understanding of the dynamics of labor mediation involves using a different paradigm of analysis—the paradigm showing the parties' relative bargaining strength.

The highly skilled negotiator is one who utilizes the full potential of his or her bargaining strength. Most negotiators (in reality, probably all negotiators) lack the skill consistently to discover the full extent of that potential or how to use it. Often mediators can help a negotiator discover areas of potential bargaining power that have been overlooked or can suggest or even assist in finding ways to utilize that potential. Such assistance alters the parties' relative bargaining strengths. At times, such intervention can have the appearance or be the product of partiality and can thus violate any expectations or representations of the third party's impartiality. Yet, both sides are sometimes served by such mediatory efforts because the efforts result in a mutually satisfactory settlement.

As a demonstration of the foregoing observation, assume that a British manager of a recently purchased plant located in the United States is renegotiating a collective agreement and that the British manager, though familiar with labor-management relations in his own country, is only vaguely familiar with the American system. Due to the level of verbal harshness, aggressiveness, and discourtesy on the part of the American union representatives, the manager feels that the relationship is totally adversary and thus warrants a very cautious approach. The union offers a concession to eliminate some work rule provisions in exchange for an improved benefit. The manager asks: "How do I know that in two months you will not turn around and come forward with a grievance seeking to reinstate the work rule?" A union representative responds: "If we put it in writing, then that ends the matter—there can be no changes." Thinking this statement to be mere rhetoric and not being aware of the fact that, unlike the British system, collective agreements are legally binding and enforceable in the United States, the British manager resists the proposal. A mediator is called, learns of this exchange, and, sensing the source of the manager's resistance, explains the legal mechanisms for enforcing collective agreements in the United States. The credibility of hearing this explanation from an impartial officer persuades the manager to accept the proposal, and soon the parties reach settlement.

As Diagram 1 indicates, what the mediator has done in the above illustration is modify the manager's perception of the union's probability of performance (POP) and, consequently, increase the weight that the manager gives to that element. This change in perception, in turn, swings the balance for the employer further in the direction of settlement. Similarly, if the union perceives that the improved benefit that it sought

better serves its members' needs than the sacrificed work rule, then the effect of management's acceptance of the proposal is to increase the weight that the union assigns to management's offer to meet the union's needs (OMON). This change, of course, moves the balance for the union further in the direction of settlement, which is a result that is consistent with the mediator's role.

In addition to the mediator's influence on the parties' perceptions, what the mediator has done in terms of modifying the parties' bargaining strength is significant. The diagram on the next page demonstrates that the immediate effect of providing the legal information to the manager was to increase the employer's perception of the union's probability of performance which, in turn, increased the union's bargaining strength. That is, the impartial party's conduct improved one side's bargaining strength. This change then helped management improve its own bargaining strength by agreeing to terms that the union found more attractive. Thus, one of the lessons to be learned from the bargaining strength analysis of mediation is that effective mediation, no matter how impartial, inevitably must have an impact on bargaining power.

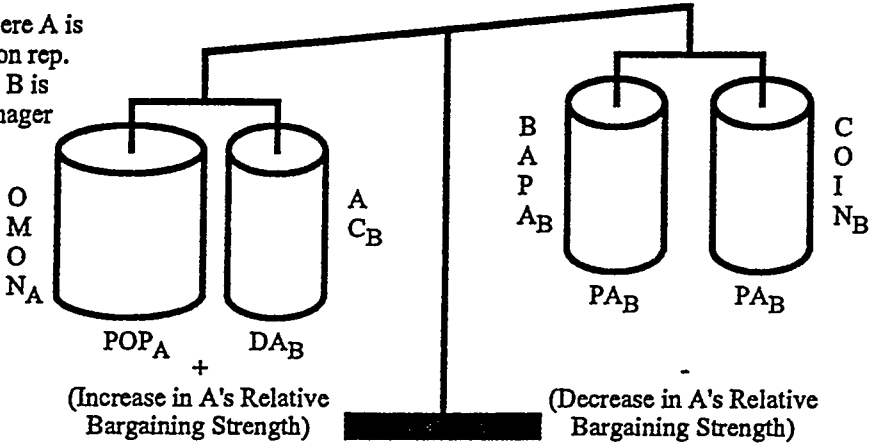
Settling for More presents and examines the paradigms of bargaining strength for the purpose of improving practical understanding of the strategic choices and styles encountered in negotiating. For this reason, the book's discussion stops short of exploring the theoretical implications respecting the optimal point for accepting an offer. Another reason for avoiding analysis of the optimal point for accepting an offer is that such an approach assumes that there is a set of proposals which clearly provides greater benefits to one party or all parties. The danger of such analysis is that it carries the false implication that negotiating parties and mediators should direct their efforts toward discovering that optimal solution. Although understanding the theoretical point of optimal solution offers some insights into the bargaining process, it is important to not confuse that benefit with the realities of bargaining. While an optimal solution may be available in theory, such a solution rarely exists or can be identified in reality. Therefore, before examining the theoretical optimal point of settlement, one should review the reasons why too often a search for that solution will be a futile exercise.

Settling for More observes that needs can be physical, fiscal, or emotional.⁴³ Generally, the first two categories are susceptible to measurement, though situations clearly exist in which reliable measurement, or even any measurement, is not possible. For example, people

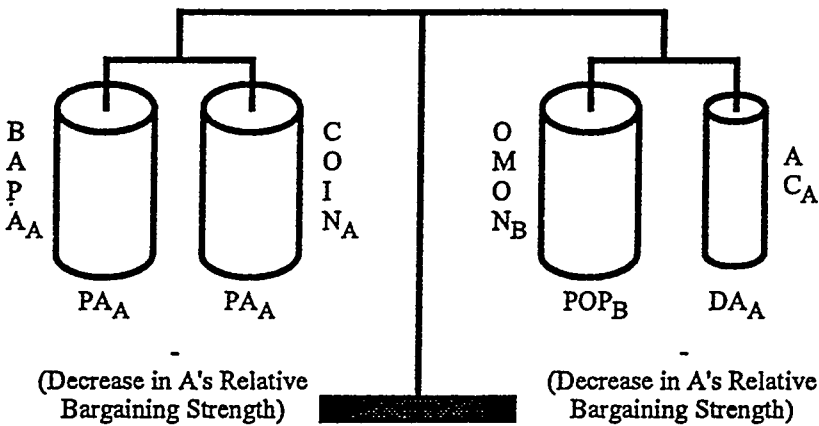
⁴³ GOLDMAN, *supra* note 1, at 13.

A's Relative Bargaining Strength = B's Perception Of:

Where A is
union rep.
and B is
manager



PLUS A's Perception Of:



OMON = Offer to Meet Other's Needs
POP = Probability of Performance
AC = Accrued Costs
DA = Data Accuracy

PA = Predictive Accuracy
BAPA = Best Alternative to the
Proposed Agreement
COIN = Cost of Impending Negotiations

have different perceptions at different times respecting their caloric needs. How much food one thinks is necessary to satiate hunger varies with such factors as whether one has begun to eat or is waiting to begin, whether one is eating vegetables or meat, and whether one is consuming liquids or solids. Similarly, the time of day, prior activities, the surrounding setting, and the activities that are scheduled to follow the meal, all influence the perception of one's physical need for food. Moreover, no common unit exists for measuring such needs. Hence, because of the lack of a fixed means for calculating impact, logic is unable to dictate a "correct" solution when weighing choices affecting physical needs.

Even though a fixed unit of measurement exists for calculating the impact of different choices affecting fiscal needs, logic is often incapable of dictating a correct solution in this situation as well. One reason is that the "value" of money is itself a matter of perception. The opportunity to earn five hundred dollars carries very different weight for a homeless person than for a wealthy person. Moreover, in business transactions it is often difficult to measure costs and values because available information is not, and cannot be, perfect. Thus, the seller of real estate does not know whether a buyer will call two minutes later in order to make a more generous offer. Nor can the cost accountant for the retailer, manufacturer, finance company, or almost any type of business say with certainty how to allocate properly overhead expenses among the enterprise's various activities.

Logic is even less capable of dictating solutions to negotiating choices when emotional needs are involved, since the parties themselves are often incapable of consistently ranking their preferences, let alone recognizing the degree of difference among available choices. Hence, it is not uncommon for people to speak of being "torn between" the desire for (or repulsion toward) choice "A" and choice "B." Accordingly, in constructing and presenting the theoretical model demonstrating the point of optimal solution to a negotiated transaction, it is stressed that this is done not for the purpose of describing how negotiators act or should act, but rather to better understand how the process may be affected when impartial intervention becomes part of the bargaining structure. With that caution in mind, a fifth paradigm can be extrapolated from the bargaining strength model. This fifth paradigm, which is summarized below in symbolic logic, describes the theoretical point at which an offer should be accepted.

In representing the Optimal Point for A 's acceptance of B 's offer, the following symbols are used:

- P = Perception
 $OMON$ = Offer to Meet the Other's Needs
 $OMON'$ = Prospective Offer to Meet Other's Needs
 POP = Probability of Performance
 DA = Data Accuracy
 AC = Accrued Costs
 $BAPA$ = Best Alternative to the Proposed Agreement
 $COIN$ = Cost of Implementing Negotiations
 PA = Predictive Accuracy

Thus, the Optimal Point for A 's Acceptance of B 's Offer is when:

$$P_A = OMON_B (POP_B) > BAPA_A (PA_A) - [AC_A (DA_A) + COIN_A (PA_A)]$$

and

$$[OMON_B (POP_B) - AC_A (DA_A)] > OMON'_B (POP_B) - [COIN_A (PA_A) + AC_A (DA_A)]$$

Further analysis of the above paradigm, using the tools of algebraic logic, reveals that it can be more simply stated as:

$$P_A = OMON_B (POP_B) > BAPA_A (PA_A)$$

and

$$OMON_B (POP_B) > OMON'_B (POP_B) - COIN_A (PA_A)$$

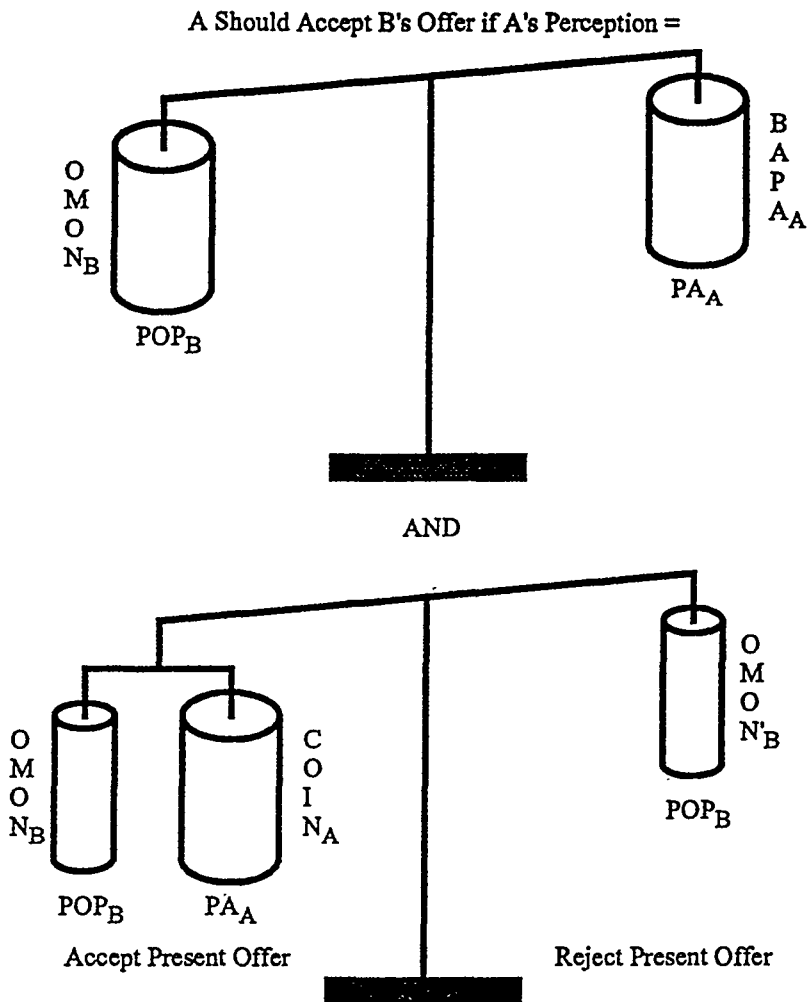
which can also be stated as:

$$P_A = OMON_B (POP_B) > BAPA_A (PA_A)$$

and

$$OMON_B (POP_B) + COIN_A (PA_A) > OMON'_B (POP_B)$$

This last version of the paradigm statement has the advantage of ready transformation into the same type of graphic representation used in describing the other paradigms offered in *Settling for More*. This graphic representation is shown in the following diagram.



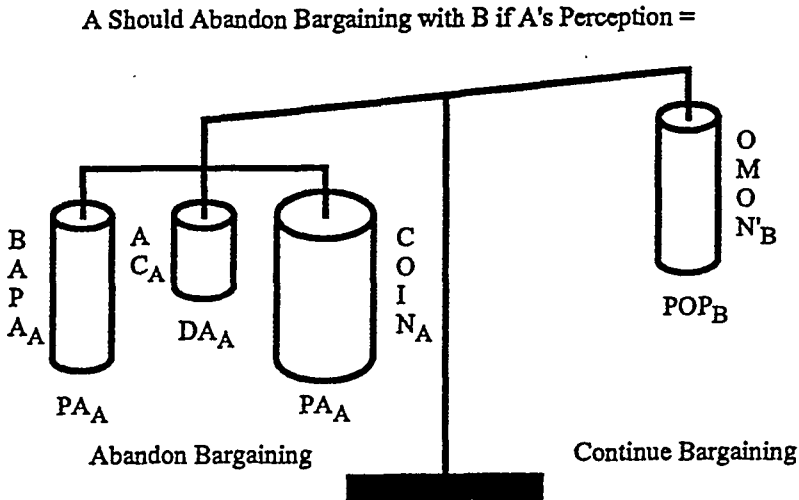
The process of simplifying the statement of the optimal point for accepting the other side's offer involved disregarding the weight of the joint Accrued Costs/Data Accuracy bargaining strength elements. Those joined bargaining strength elements should not affect the decision to accept an offer instead of attempting to elicit other more attractive offers because what has already been expended in the negotiating effort is no longer within the negotiator's control. However, the joint Accrued Costs/Data Accuracy elements should play a role in one other strategic

negotiating decision that can be guided by the bargaining strength model. That decision is whether to abandon negotiating efforts with the other side. A final paradigm describes that situation as follows:

A Should Abandon Negotiating with B if:

$$P_A = BAPA_A (PA_A) + AC_A (DA_A) + COIN_A (PA_A) > OMON'_B (POP_B)$$

This symbolic statement can be graphically presented as:



This final paradigm is particularly useful in understanding why the way to assess benefits of mediation, if any, is to examine the impact of mediation upon bargaining costs in relation to the mediator's ability to alter the parties' perceptions of the extent to which current or impending offers meet their needs.

The above added paradigms demonstrate that the costs of bargaining (AC and COIN) affect not only bargaining power, but also the net benefit of the ultimate resolution reached, whether that resolution is a negotiated settlement (acceptance of OMON) or resort to an alternative to the proposed agreement (BAPA). Thus, the costs of negotiating reduce the net benefit of a negotiated agreement unless the bargaining activity produces a settlement the perceived increased attractiveness of which (increase in the value placed on OMON, POP, or both) exceeds the cost

of bargaining. For example, suppose it costs Party *A* \$1,000 per day to negotiate with Party *B*, and the first day of bargaining results in *B* modifying his proposal so as to increase its perceived value to *A* by \$5,000. Suppose, too, that the second day of bargaining results in *B* modifying his proposal so as to increase *A*'s perception of its value to *A* by \$3,000, but the third day of bargaining results in modifications that only enhance the value in *A*'s eyes by \$500. Finally, suppose that after the third day, *A* is convinced that *B* has reached his limit and will offer no further modifications favorable to *A*. *A*'s net benefit from the first day of bargaining was \$4,000 (\$5,000 - \$1,000). At the end of the second day, *A*'s net negotiating benefit was \$6,000 (\$8,000 - \$2,000), and at the end of the third day, it was \$5,500 (\$8,500 - \$3,000). Assuming that *A* has perfect knowledge and foresight, *A* should have obviously either accepted what was offered at the end of the second day or resorted to her best alternative to the proposed agreement.

Similarly, the net benefit from resorting to one's best alternative to a proposed agreement is reduced by all of the bargaining costs incurred prior to turning to that alternative. Of course, those costs will occasionally result in an increase in the perceived value of the alternative (increase in the value placed on BAPA, PA, or both) and that increase will exceed the bargaining costs. An example of this situation would be where the best alternative is an adjudicated resolution and in the course of bargaining a party learns information that significantly increases its perception that adjudication will provide an attractive result.

Sometimes mediation prolongs the negotiating process; other times, it shortens the process.⁴⁴ Prolonging negotiations is almost certain to be accompanied by increased bargaining costs. If mediation prolongs bargaining and fails either to increase the parties' perceptions of the value of their proposals or their alternatives, the intervention becomes a burden to them. Moreover, if the costs of prolonging negotiations burden the parties unevenly, then their respective bargaining strengths may be altered and the prospective negotiated outcome may thus be affected.

To illustrate this last point, assume that an employee working in a hypothetical country asserts that he was wrongfully dismissed and that in this country a wrongfully dismissed worker has a claim for judicial relief measured in monetary damages. Assume further that under the law of this hypothetical country, the parties must submit to mediation for up to six months before such a suit can be filed. Finally, assume that the employer

⁴⁴ See generally Webb, *supra* note 7, at 312-21 (discussing the experimental study of mediation).

and worker both estimate that an eighty percent chance exists that the worker will be awarded \$9,000-10,000 in damages if the dispute goes to trial.

Arithmetically, a settlement for \$7,600 in this situation would be reasonable for both sides. This figure results from using the median point of \$9,500 in the estimated damages award and reducing it by the eighty percent prospect that the litigation will succeed. This calculation of a reasonable settlement figure disregards, however, the fact that in any system of fair adjudicative procedures, some delay will occur between the commencement of the suit and the final decision. In addition, experience teaches that often a further delay occurs between the time that the decision is given and the time that the judgment is paid. During the period of delay, the prospective winner does not have the benefit of the funds to be awarded. Accordingly, if the parties estimate that it will take six months to get an adjudicated award, and if one assumes that the employer can borrow money at ten percent interest and the worker at twenty percent interest, then the present value to the employer of a \$7,600 prospect of litigated liability in six months is \$7,238 (\$7,238 plus ten percent of \$7,238 for six months = \$7,600) and the present value to the worker of that award six months hence is \$6,909 (\$6,909 plus twenty percent of \$6,909 for six months = \$7,600). Therefore, if the award does not carry interest equal to the worker's cost of borrowing, any delay in working out a negotiated settlement or in obtaining a litigated award works to the employer's benefit. Thus, if mediation results in a delay of an additional six months before the suit can even be brought and a one-year delay in the prospective receipt of an award, then the present value to the employer of that ultimate liability is \$6,909 and the present value to the worker of that prospective award is \$6,333. Hence, without the delay of mediation, an immediate settlement offer of \$7,000 made by the employer should be attractive to the worker because it exceeds the present value of a reasonable estimate of the prospective recovery by \$81. (Moreover, the employer should be willing to make the offer because it is \$238 less than the present value of its potential liability.) In comparison, because of the prospect of an additional delay of six months if a period of mediation is mandatory, the employer could reduce its offer by \$586 (i.e., offer \$6,414) and still be offering \$81 more than the present value of a reasonable estimate of the prospective recovery to the worker.

Mediation has the potential of aiding the parties and the public by helping disputants resolve their conflicts more quickly and, where appropriate, by ensuring that negotiated resolutions reflect public values of fairness and communal interests, as well as the parties' private concerns. The foregoing analysis warns, however, that one should not

make the mistake of assuming that mediation is without potential drawbacks. Mediation can delay rather than hasten resolution and can alter the parties' relative bargaining strengths in ways that do not serve public interests.

According to the fifth paradigm, if policy makers want to facilitate negotiated settlements while minimizing intrusions upon the parties' relative bargaining strengths, they should weigh the extent to which increased costs of impending negotiations (COIN) may exceed the expected enhancement of one or both sides' perceptions of the value of the other's offer (OMON) or probability of performance (POP). In contrast, if policy makers want to deter resort to certain forms of alternatives to the proposed agreement (BAPA), such as work stoppages or other industrial actions, or want to reshape one or both sides' proposals, then the choice of whether to mandate mediation should compare the impact of the increased cost of bargaining (AC and COIN) in altering the parties' relative bargaining strengths with the mediator's prospects of altering the parties' perceptions of the other bargaining strength elements.

The introductory caution to presenting the paradigms for optimal bargaining decisions emphasized the barriers to rational decision making which result from the reality of having to function with incomplete knowledge and having to weigh competing considerations without an established unit of measurement. Additionally, bargaining transactions do not resemble linear or geometric relationships; rather, they most closely resemble biological processes in which the patterns of change do not always follow predictable paths or fixed time sequences.⁴⁵ Although these characteristics inevitably frustrate the participants' efforts at reliable prediction, an examination of the causes for that frustration suggests appropriate tactics that a mediator, or the parties on their own, might pursue.

For example, although no units of measurement exist for calculating the impact of emotional needs, a mediator can move the parties closer to settlement by attending to those needs. That attention can fall into two categories: finding a way to remove the emotional needs or discovering a way to satisfy those needs at little or no cost. An illustration of a mediator assisting by removing emotional needs arises when the mediator detects that representatives for one or both sides are using the negotiation to meet their own emotional needs (whether, for example, security, love, amusement, personal achievement, or social status) instead of the needs

⁴⁵ GOLDMAN, *supra* note 1, at 229-31.

of their principal(s). One technique that a mediator can use in such circumstances is to remind the representatives of their fiduciary responsibilities (for example, "I understand that you are demanding an apology, but how does that serve the interests of the shareholders whom you represent?"). When the mediator perceives that a party is holding out because emotional needs are not being met, the mediator may be able to remind that person of ways in which his or her emotional needs are met outside the framework of negotiating. An anecdote about the satisfaction that a common acquaintance gets from charitable work, a hobby, or even going to the track can provide a subtle means of reminding the party that the stakes involved in the particular bargaining transaction do not summarize that person's access to status or well being. In some instances, the mediator may be able to demonstrate to the party that an emotional need perceived to be inhibiting settlement has already been met through other means. For example, the mediator's expressed acknowledgement of the party's social status or personal achievements may, on occasion, be adequate to remove those concerns from the bargaining table.

Similarly, sometimes a mediator can move the parties toward settlement by helping to meet emotional needs at little or no additional cost. The strokes given by the mediator through the use of honorifics, compliments, and even attentive listening to their stories, opinions, and complaints can satisfy some emotional needs and thereby remove them as dimensions of the elements of bargaining strength. Often a valuable function of mediation in the settlement of litigation is to bring the parties face to face and give them a chance to express, and thereby to purge, their ill or hurt feelings toward each other. While the attorneys can do this by mutual agreement, many are reluctant to have their clients present during settlement discussions, perhaps out of fear of an admission against interest. Yet, these same lawyers tend to be amenable to a mediation arrangement in which the mediator can bring the disputants together for a mutual opportunity to vent their feelings. Experienced lawyers and mediators report that a catharsis often results from which emerges a settlement on terms that previously would have been unacceptable to one or both sides.⁴⁶ Alternatively, where a party appears to be insecure about accepting a proposed settlement, a mediator may offer suggestions for ways to increase the perception of the probability of performance.⁴⁷

⁴⁶ The author is particularly grateful to Wayne Outten, of Lankenau, Kovner & Jurtz in New York City, who is a very experienced employment law plaintiff's attorney, for impressing upon him this potential value of mediation.

⁴⁷ GOLDMAN, *supra* note 1, at 180-92.

In summary, deciding whether and when mediation will be a constructive force in resolving employment-related disputes requires that the structure and operations of the proposed process be analyzed in terms of the elements of bargaining strength and the impact of mediatory interventions upon those elements and their relationships. In addition, the prospects for successful mediation are improved if the mediator takes guidance from the bargaining strength model in searching for ways to move the parties' perceptions and understanding of the status of their deliberations so as to bring them closer to the theoretical optimal point for settlement.