Journal of Dispute Resolution

Volume 2003 | Issue 2 Article 1

2003

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JOURNAL OF
DISPUTE RESOLUTION

VOLUME 2003 NUMBER 2

SYMPOSIUM

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I. INTRODUCTION: IS GENERAL THEORY POSSIBLE?

Does the field of conflict resolution have any broadly applicable theories that "work" across the different domains of international and domestic conflict? Or, are contexts, participants, and resources so "domain" specific and variable that only "thick descriptions" of particular contexts will do? These are important questions which have been plaguing me in this depressing time for conflict resolution professionals, from September 11, 2001 (9/11), to the war against Iraq. Have we learned anything about conflict resolution that really does improve our ability to describe, predict, and act to reduce unnecessary and harmful conflict? These are the questions I want to explore in this essay, all the while knowing that I will ask more questions than I have answers to. My hope is to spark more rigorous

* Professor of Law, Georgetown University, and Director, Georgetown-Hewlett Program in Conflict Resolution and Legal Problem Solving. Thanks especially to my colleague and friend Jean Sternlight for her invitation, hospitality, and intellectual stimulation. Thanks to the remarkable program of Dispute Resolution at the University of Missouri-Columbia for its interest, faculty, students, and on-going production of new knowledge and practice. Some of these thoughts were sparked by my participation in the 2002 Hewlett Conference on "Practice to Theory" in New York in March 2002, which focused on conflict theory and practice in hostage settings, international disputes and conflicts, community and church conflicts and approaches to conflict resolution, and the events of September 11, 2001. For some of the thoughts that stimulated me there, see the special issue of NEGOTIATION JOURNAL devoted to the conference, vol. 18, No. 4 2002, edited by Sandra Cheldelin, Melanie Greenberg, Christopher Honeyman, and Maria R. Volpe. Thanks to my wonderful colleagues in the Culture and Conflict Resolution Group in Washington D.C. (Kevin Avruch, Carol Izumi, Melanie Greenberg, Howard Gadlin, Christopher Honeyman, Homer LaRue, Donna Stienstra, and Wally Warfield) whose conversations on these and other topics in the last few years has deeply enlightened and engaged me. And finally, thanks to a variety of my international and comparative law colleagues at Georgetown who have permitted my "transboundary" (and somewhat amateur) incursion into their field as I travel the actual globe with intellectual and practical exports, with, I hope, the right amount of wonder and humility.

attention to the possibility of "comparative dispute resolution" study and practice, using key concepts, theories, empirical studies, practical wisdom, and experiential insights to spark and encourage more "multi-level" and multi-unit analysis of some of our "shared" propositions.

I begin with some skepticism that our efforts to create a "general" theory of conflict resolution across widely different domains is in fact possible, although I have tried to define it and explain it myself.[1] Perhaps it is the condition of the world at the present moment, teetering at the edge of a fragility unknown to even the survivors of the Cold War and World War II, due to the unpredictable, non-nation state possibilities of "viral" conflicts and "wars." Or, perhaps it is my sociological bent to see the "varieties" in human behavior and the "conditions" of human situations, rather than the "grand meta-theories" of some forms of social theory and science, but I think that at present, our field of conflict resolution has little in the way of generalizable propositions that work (explain, describe, predict, and prescribe) across all domains.

I do not mean that we have no accumulated learning or "mid-level" theories or organizing frameworks to structure our knowledge bases and facilitate our "practical reasoning" (for those of us who are practitioners, as well as theorists, researchers, and teachers). I will review some of that "propositional knowledge" here (and others have also done creditable syntheses of what we know already),[2]

1. *See* Carrie Menkel-Meadow, *Alternative Dispute Resolution*, *in* ENCYCLOPEDIA OF THE BEHAVIORAL AND SOCIAL SCIENCES (2001); Carrie Menkel-Meadow, *Alternative Dispute Resolution*, *in* LEGAL SYSTEMS OF THE WORLD (Herbert Kritzer ed., 2002); Carrie Menkel-Meadow, *Alternative Dispute Resolution*, *in* OXFORD COMPANION TO AMERICAN LAW (Kermit Hall ed., 2002); Carrie Menkel-Meadow, *Conflict Resolution*, *in* ENCYCLOPEDIA OF COMMUNITY (2003); Carrie Menkel-Meadow, *Conflict Theory*, *in* ENCYCLOPEDIA OF COMMUNITY (2003).

2. *See* KEVIN AVRUCH, CULTURE AND CONFLICT RESOLUTION (1998) [hereinafter AVRUCH, CULTURE]; BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995); Morton Deutsch, *Cooperation and Conflict: A Personal Perspective on the History of the Social Psychological Study of Conflict*, *in* INTERNATIONAL HANDBOOK OF ORGANIZATIONAL TEAMWORK AND COOPERATIVE THINKING (M.A. West et al. eds., 2003) [hereinafter Deutsch, *Cooperation and Conflict*]; THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch & Peter T. Coleman eds. 2000) [hereinafter THE HANDBOOK]; MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973); ROGER FISHER, ET AL., COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION (1997); FRED. C. IKLE, HOW NATIONS NEGOTIATE (1964); INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES (Victor A. Kremnyuk ed., 2d ed. 2002) [hereinafter INTERNATIONAL NEGOTIATION]; LOUIS KRIESBERG, CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTIONS, (2d ed. 2002); HUGH MIALL ET AL., CONTEMPORARY CONFLICT RESOLUTION: THE PREVENTION, MANAGEMENT AND TRANSFORMATION OF DEADLY CONFLICTS (1999); DEAN PRUITT ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT (1986); HOWARD RAIFFA ET AL., NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING (2002); JEFFREY Z. RUBIN & BERTRAM BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION (1975); STUDIES IN INTERNATIONAL MEDIATION: ESSAYS IN HONOR OF JEFFREY Z. RUBIN (Jacob Bercovitch ed., 2002) [hereinafter STUDIES IN INTERNATIONAL MEDIATION]; MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATIONS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS (2001); Kevin Avruch, *Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice*, 20 CONFLICT RESOL. Q. 351 (2003). This is a very partial bibliography of some of the scholarly works which have attempted field synthesis. Any reader will be struck with the relative lack of inter-penetration of fields, that is mutual citations from domestic (United States) negotiation and conflict resolution, and international relations treatments of conflict resolution. Some of this is changing with funding (Hewlett Foundation and other initiatives), practice (Search for Common Ground's new domestic initiatives, *at* http//:www. sfcg.org (last visited Nov. 20, 2003), and a newer generation of scholars who are working

but I want to explore some of the divergences of domestic conflict resolution from international conflict resolution studies and suggest that we might profitably learn by studying contrasts, exposing level or unit errors of generalization and analysis, rather than hoping we will uncover or describe "deep structures" that will inform our work at all levels of conflict. While there are some very interesting analogies, metaphors, classifications, taxonomies, and occasionally, even a "concept"[3] that work across levels and domains, I suggest here that those occasions may be rarer than we think and often may be misleading. I prefer the "thick description"[4] of sociology and anthropology that tells us that context may matter a great deal, as does the history, culture, personality, situations, geography, economics, and politics that construct those contexts.[5] While we in the field of conflict resolution have been pushing hard to learn lessons from our case studies so that we can ask "how is the Mideast crisis like Northern Ireland?" or "what do disputes between different ethnic and racial groups in the United States teach us about possible peaceful co-existence in other multi-ethnic nation-states?," I have come to think that we may be better off asking "how is Northern Ireland different from the Mideast crisis?" and "what makes each multi-ethnic nation-state different in its

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in both fields. How many younger students of our field know that the book ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 2d ed., Penguin Books 1991) (1981) was inspired by Fisher's earlier work in international conflict, ROGER FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS (1969), not by domestic legal disputes? This failure to read, learn, and cite outside the boundaries of our limited fields has been lamented in the "theory-practice" divide, in the "legal" vs. "other professions" division in domestic conflict resolution (or "ADR") and in the division between trade (private) negotiations and diplomatic and human rights (public) negotiations in the international field.

3. As explored more fully in the text, notions of "ripeness," "deadlines," and "shape of the table" (participating parties), "dual-track negotiations" (public and private, caucus and no-caucus or "shuttle diplomacy"), and "relationship building" (from familial to international relations) have transcended domains and have served useful explanatory and prescriptive functions across domains.

4. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983).

5. There is a growing literature, both in anthologies and book-length treatments, of richly described case studies of conflict resolution "stories," told both to "thickly describe" those contexts and to attempt to elucidate "patterns" or teachings for generalizable descriptions, predictions, and prescriptions for the field. I like to call these "peace stories." *See* PETER ACKERMAN & JACK DUVALL, A FORCE MORE POWERFUL: A CENTURY OF NON-VIOLENT CONFLICT (2000); LAWRENCE BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986); THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) [hereinafter THE CONSENSUS BUILDING HANDBOOK]; THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (Laura Nader & Harry F. Todd. eds., 1978); FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY AND CONFLICT TRANSFORMATION (Raymond G. Helmick et al. eds., 2001); HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester Crocker et al. eds., 1999); MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM (1993); SUSAN COLLIN MARKS, WATCHING THE WIND: CONFLICT RESOLUTION DURING SOUTH AFRICA'S TRANSITION TO DEMOCRACY (2000); MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT (Jacob Berkovitch & Jeffrey Z. Rubin eds., 1992); GEORGE J. MITCHELL, MAKING PEACE (1999); RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION (Jacob Bercovitch ed., 1996); CARMEN SIRIANI & LEWIS FRIEDLAND, CIVIC INNOVATION IN AMERICA: COMMUNITY EMPOWERMENT, PUBLIC POLICY AND THE MOVEMENT FOR CIVIC RENEWAL (2001); TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT (Chester Crocker et al. eds., 2001) [hereinafter TURBULENT PEACE]; WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT (Melanie Greenberg et al. eds., 2000) [hereinafter WORDS OVER WAR]; *see also* Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, 48 NEW YORK REV. BOOKS 59 (2001).

approaches to 'dealing with diversity?'" What is the significance of "difference" that may illuminate what we can know about conflict resolution across different domains? To explore that question in a reasonable time and space here, I will limit myself to a few propositional examples of conflict resolution "knowledge":

1. Structures of conflicts and conflict resolution;

2. Processes of conflicts and conflict resolution;

3. Concepts in conflict resolution (such as "deadlines," "ripeness," "needs and interests," and "relationships");

4. People in conflict (their motivations, choices, socialization, and variability); and finally,

5. Alternatives to conflict or conflict resolution.

My hope is to set an agenda for a richer exploration of "comparative dispute resolution." Like the questioning academic and practitioner that I am, I remain somewhat skeptical, or at least agnostic, about whether those of us who are "conflict resolution professionals" can ply our trades, whether theoretical, empirical, or practical, across all domains simultaneously.

I focus here on three aspects of conflict resolution across domains:

1. The development of a relatively well-developed, if contested, body of knowledge about the theory and practice of conflict resolution in the American "domestic" sphere, notably, negotiation,[6] mediation,[7] and other forms of "ADR" interventions in legal, community, environmental, commercial, family, public policy, and other kinds of disputes or conflicts;[8]

6. *See* MAX BAZERMAN & MARGARET NEALE, NEGOTIATING RATIONALLY (1992); FISHER & URY, *supra* note 2; DAVID LAX & JAMES SEBENIUS, THE MANAGER AS NEGOTIATOR (1986); ROBERT MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); RAIFFA, *supra* note 2; WILLIAM ZARTMAN & MARGARET BERMAN, THE PRACTICAL NEGOTIATOR (1982); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter Menkel-Meadow, *Toward Another View*].

7. *See* ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION (1994); KIMBERLEE KOVACH, MEDIATION (2003); CHRISTOPHER MOORE, THE MEDIATION PROCESS (3d ed. 2003); Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques*, 1 HARV. NEG. REV. 7 (1996).

8. CARRIE MENKEL-MEADOW, LELA LOVE, ANDREA KUPFER SCHNEIDER & JEAN STERNLIGHT, APPROPRIATE DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL FOR DISPUTE PROCESSING, LEGAL PROBLEM SOLVING AND CONFLICT RESOLUTION (forthcoming 2004); CARRIE MENKEL-MEADOW, DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY (2003); JACQUELINE NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL (2d ed. 2002).

2. The relationship of international relations theory[9] and conflict resolution theory, research and practice in diplomatic, nation-state, human rights, and other "public" conflicts,[10] and trade,[11] business, and "private" conflict resolution;[12] and,

3. The highly contested "exportation" of American-style dispute resolution to both the international arena and to national or "domestic" nations, systems, or cultures outside of the United States.[13]

II. THREE TRUE STORIES

A. Culture Matters

Like many dispute resolution professionals, I began to be asked in the mid-1980s to "go abroad" and teach "negotiation," "mediation," or "conflict resolution" in a wide variety of other countries, with widely different "needs and interests." In some cases the invitations came from lawyers who just wanted some of the new American "skills training" in negotiation in traditional legal matters; in other cases, innovative legal educators were interested in developing experiential learning and clinical programs; in other cases, the focus was on developing institutions alternative to governmental structures (because of corruption or distrust in the conventional institutions, or for desires to develop innovative and alternative

9. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES (1991); TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY (2000); DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES (1969); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); NEOREALISM AND ITS CRITICS (Robert O. Keohane ed., 1986); STEPHEN M. WALT, THE ORIGINS OF ALLIANCES (1987); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

10. *See* ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT (1994). *See also* Fen Osler Hampson, *Parent, Midwife or Accidental Executioner? The Role of Third Parties in Ending Violent Conflict*, *in* TURBULENT PEACE, *supra* note 5; Louis Kriesberg, "The Growth of the Conflict Resolution Field," *in* TURBULENT PEACE, *supra* note 5; Saadia Touval & I. William Zartman, "International Mediation in the Post-Cold War Era," *in* TURBULENT PEACE, *supra* note 5; *see* sources cited *supra* note 5.

11. *See* JOHN JACKSON, THE JURISPRUDENCE OF GATT AND WTO (2001); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999).

12. *See* JEANNE M. BRETT, NEGOTIATING GLOBALLY (2001); DEAN ALLEN FOSTER, BARGAINING ACROSS BORDERS (1992); JESWALD SALACUSE, MAKING GLOBAL DEALS (1991).

13. *See* THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD (1999); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE (1996); JOHN PAUL LEDERACH, PREPARING FOR PEACE (1995); Raymond Cohen, *Negotiating Across Cultures*, *in* TURBULENT PEACE, *supra* note 5; Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management – In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573 (2002) [hereinafter Nader, *Current Illusions and Delusions*]; Elizabeth Mertz, *Introduction* to *From the Trenches and Towers: Current Illusions and Delusions About Conflict Management in Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 567 (2002). *See also* Staff Reporters, *State Department Seeks Proposals to Promote ADR Overseas*, ADRWORLD.COM, July 18, 2002, *at* http://adrworld.com (suggesting different uses of arbitration, mediation, and negotiation in different regions of the world, and requesting proposals for training and exchange programs); Symposium, *Export/Import: American Civil Justice in a Global Context*, 52 DEPAUL L. REV. 253-675 (2002); Department of State Notice 4064, 67 Fed. Reg. 46008 (July 11, 2002) (requesting grant proposals for "cooperative international projects to introduce American and Foreign participants to each other's social, economic, and political structures).

structures, even where there was no caseload delay problem); in yet other cases, the needs were more urgent, seeking effective ways to solve intractable problems (of human co-existence, of environmental harm, or scarce resource allocation). I resisted many of these invitations to interesting and exotic places, not because I don't like to travel (I do), but because as a sociologically trained lawyer, I was exquisitely sensitive to what I thought were the cultural determinants and variants of how and why particular processes might work in particular places and institutions and I was reluctant to assume that American-style "problem-solving negotiation" or the ethnocentric "mediative talking cure"[14] would work in other places. After some years of giving academic papers and talks, but not doing "trainings," I was persuaded to do some negotiation and mediation training in two places I thought "closest" to American culture, a Scandinavian country[15] and the United Kingdom. Training programs in negotiation and mediation are participatory, experiential, and call for role-playing and demonstrations of activities—in short, active and "public" learning. In the late 1980s and early 1990s, just before much of this material we study and the practices we use actually caught on, I found both sets of lawyers quite traditional, reticent, and fearful of American-style "informality." Everyone was very polite, and while both nations have, in fact, heartedly endorsed many of these processes,[16] there was a definite and formal chill in the air (different from the loud and brash hostility of American lawyers who would resist negotiation, mediation, and ADR training because they thought I wanted to "kill the lawyers").[17] European lawyers liked their formality, notarized documents, and expertise which hierarchically separated them from clients needing their help. As strange as our practices of formal discovery might be, openly "sharing," not only facts, but "feelings," "interests," and "needs" did not go over well in those earlier days in traditional legal settings.

Fast forward a decade or more, when after some forays into "informal" Australia, mediation-experienced Japan (in a different way, of course),[18] and our imitative sister up north (Canada),[19] all with greater success, I began to teach negotia-

14. *See* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Practices and Paradigms*, 11 NEGOTIATION J. 217 (1995).

15. Which shall go nameless here–you should hear the nationalist jokes the Scans tell on each other . . . even Garrison Keillor might be offended. *See* GARRISON KEILLOR, A PRAIRIE HOME COMPANION PRETTY GOOD JOKE BOOK at 140-52 (2000). Do we need some conflict resolution jokes to get us through these trying times?

16. I was quite active in England during the drafting of the Woolf Report on Civil Justice Reform which requires some forms of dispute resolution and gives management control of cases to judges in a mixture of American and European styles of adjudication. *See* Lord Woolf, *Access to Justice-Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (June 1995), *at* http://www.lcd.gov.uk/civil/interfr.htm; *see also* Carrie Menkel-Meadow, *The Future(s) of Civil Litigation: Dream or Nightmare: Lessons from the American Experience*, *in* SHAPING THE FUTURE: NEW DIRECTIONS IN LEGAL SERVICES (Roger Smith ed., 1995); Carrie Menkel-Meadow, *Will Managed Care Give Us Access to Justice?*, *in* ACHIEVING CIVIL JUSTICE (Roger Smith ed., 1996).

17. A complaint I actually received in a mediation training program for family lawyers in Los Angeles in the mid-1980s.

18. *See* Taimie L. Bryant, *Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1 (1995).

19. I have taught in Canada a great deal, at the University of Toronto, Osgoode Hall, University of British Columbia, Victoria, etc. I am formally on the faculty of Osgoode's LL.M. program in ADR, which actually pre-dated any formal graduate law programs in ADR in the United States. So, some-

tion, mediation, and ADR in South America (in among other places, the land where there are more psychiatrists per capita than here–Argentina!). Instead of reticence, I was met with great enthusiasm as lawyers, clients, government officials, diplomats, and others more willingly embraced both informality (even in highly bureaucratic cultures and legal systems) and the "talking cure." Indeed, everyone was talking so fast, my weak Spanish skills were soon left behind as the skilled simultaneous translators I worked with tried to find appropriate words for our American concepts.[20]

I don't want to be what I have come here to criticize, a cultural stereotyper who oversimplifies or homogenizes cultures, whether national, governmental, or professional, but some "cultures" do assimilate and use this "conflict resolution technology" better than others. Time, of course, had moved on, bringing with it, regional trading groups like NAFTA, the EU, and Mercosur (forcing some interpenetration of legal cultures just to do business), but my experience in South America was different from that in Europe and is quite different from that of the early pioneers who went to Russia and Eastern Europe after the fall of the Berlin Wall,[21] or to some other countries with totally corrupt legal systems (some places I won't name here, in our own hemisphere).

What lessons have we learned? Culture matters. "Talking" cultures like Argentina, Paraguay, and other Latin American cultures, closer to us culturally and demographically, as well as geographically and geologically, than our own so-called "motherland," the UK, may, in some circumstances, be more amenable to "exportation" and assimilation of our forms of dispute resolution than some other places, including those whose legal systems appear closer to our own (common law vs. civil law). Of course, different cultures and legal systems will adapt and use our structures and processes to meet their own needs, so there may be both adaptation and "deformation" of our exports, a subject I'll return to below. But, it is wrong, in my view, to say that we can easily export American-style ADR anywhere, and equally wrong to say that it is always wrong and imperialistic to do so.[22] Exportation of ADR techniques and theories must be culturally and politically sensitive to the host nations or cultures and recognize that ADR, like American-style democracy,[23] Constitutionalism, or litigation can be abused,[24] corrupted,

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times we have to imitate too. There are now several LL.M. programs in the United States, including at the University of Missouri-Columbia and Georgetown University.

20. Nothing dramatizes "intercultural work" more than working with translators (in my case from several different Spanish-speaking countries) as they try to capture the nuances and colloquial expressions of concepts slightly different from or "alien" to their own varied cultures. For example, in translating some of the standard video tapes I use (CPR's business mediation tape, *Prosando vs. High Tech* or the Center for Mediation in Law's *Saving the Last Dance: Mediation through Understanding* (intellectual property and employment)), highly technical and "emotional" terms of art, like "caucusing," "looping," and "reframing" may be difficult to capture, even with (or perhaps especially with) translators who are certified "legal or diplomatic translators."

21. *See* Emily Stewart Haynes, *Mediation as an Alternative to Emerging Post-Socialist Legal Institutions in Central and Eastern Europe*, 14 OHIO ST. J. ON DISP. RESOL. 257 (1997); Kathryn Hendley, *The Spillover Effects of Privatization in Russian Legal Culture*, 5 TRANSNAT'L. L. & CONT. POLS. 39 (1995); Raymond Shonholtz, *Conflict Management Training: A Transformative Vehicle for Transitional Democracies*, 2 INT'L NEG. J. 21 (1997).

22. *See* Nader, *Current Illusions and Delusions*, *supra* note 13.

23. *See* CAROTHERS, *supra* note 13 (evaluating the success of our "democratization" projects abroad). *See also* Cynthia Alkon, *"The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327; Christopher Honeyman &

or transformed when it is "transplanted." On a more optimistic note, it may also be that totally new or unfamiliar systems, like some forms of American mediation or arbitration, may actually turn out to be the *lingua franca* or new "common denominator" in regional systems of trade or diplomacy when there is distrust or lack of knowledge of differing legal traditions, just as international arbitration has been used to avoid or transcend the complexities of international litigation.[25]

B. "When Will They Ever Learn?": Does Theory Inform or Explain the Modern World?

Now that I teach, practice, and study abroad, I have joined the international cadre of conflict resolution professionals teaching, training, and even mediating and arbitrating in many other locations. As the international scholar, teacher, and practitioner that I have somewhat reluctantly become, I have immersed myself in international relations theory and its own intellectual disputes as well as read countless case studies of the work of our brothers and sisters who have always been international conflict resolution professionals (whether by formal training or governmental authority, such as Henry Kissinger, Jimmy Carter, George Mitchell, and Dennis Ross—all skilled conflict resolution interveners with little or no formal training in the mediation and negotiation skills we rigorously teach our students). To read from recently published reports of the "successes" of Camp David, the Oslo channel, the Dayton Accords, and, most depressingly, the "successful" North Korean nuclear proliferation negotiations of 1993-1995,[26] is to realize how unstable and how resistant to generalizations these "successes" have been. Even with the full power and insights of academic and diplomatic "intelligence," as well as our decades of experience in complex bi-lateral and multilateral situations, so many of our "trouble spots" are ready to explode again–perhaps with far more deadly force or animosity than ever before. And of course, there is 9/11 and the "clash of civilizations"[27] that has replaced the schism of the Cold War with a more insidious and largely undefined polarity of the "axis of evil" versus an unidentified whom—us, the good Allies? And just who are our allies now anyway? Clearly, even with all of the teaching and learning of conflict resolution, negotiation theory, structural vs. "international society" schools, and

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Sandra Cheldelin, "*Have Gavel, Will Travel: Dispute Resolution's Innocents Abroad*," CONVENOR NEWSLETTER, (Convenor Conflict Resolution, Madison, Wis.), *available at*, http://www.convenor.com/madison/gavel.htm (last visited Nov. 22, 2003); Symposium, *The Americanization of International Dispute Resolution*, OHIO ST. J. ON DISP. RESOL. (forthcoming 2003).

24. In systems where there are corrupt judicial systems, ADR, or the use of mediation or arbitration, is not likely to be a corrective. If judges can be bribed (or killed, as in Colombia), then private arbitrators or mediators are much easier to "control," both by those with power, whether legitimate or not, and money. *Cf.* Thomas J. Moyer & Emily Stewart Haynes, *Mediation As a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RES. 619 (2003).

25. *See, e.g.*, ANDREAS F. LOWENFIELD, INTERNATIONAL LITIGATION AND ARBITRATION (2d ed. 2002).

26. *See* Rock Tang, "*The North Korea Nuclear Proliferation Crisis*," *in* WORDS OVER WAR, *supra* note 5; WATKINS & ROSEGRANT, *supra* note 2.

27. *See* AMY CHUA, WORLD ON FIRE (2003); CULTURE MATTERS: HOW HUMAN VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (1999); SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS (1996).

post-Cold War cosmopolitanism[28] or "the end of history,"[29] we are no closer to world peace than we ever were, and perhaps we are a good deal more distant from it. It is a depressing time to be in conflict resolution. How ephemeral are our "successes"; how quickly scuttled are decades worth of detente and understanding only to be undermined by "networks" of "crazies, crusaders, or criminals"[30] or more predictably, "regime changes," whether by election or by force!

What lessons have we learned? None, I fear. To quote from two of my favorite songs of the Sixties: "Yes, and how many deaths will it take/ till he knows/ that too many people have died?"[31] "When will they ever learn,/ when will they ever learn?"[32] I do wonder if we have "learned" anything in international diplomatic activity, derived from all of the "flowering" of theory and practice in conflict resolution in the last two or three decades. How do leaders, policy makers, and diplomats learn and use, if at all, the teachings of our field?[33] And, more depressingly and dramatically, what assumptions of rationality, world views, and desired ends—"peaceful co-existence," survival, democracy, and capitalism[34]—do our theories make? Can we have a theory to use when dealing with those who do not share the assumptions on which our theories are constructed?[35]

C. Context is Everything: We Cannot Over-Generalize

Last spring, I moderated a session at a conference on "'Practice to Theory' in Conflict Resolution"[36] involving several skilled law enforcement experts in negotiating with hostages, in primarily domestic-urban settings. The theory of the conference planners was that we would learn from the practitioners in extreme negotiation situations about what theory informed their practice and what lessons from negotiation "in extremis" might serve us in more "ordinary" settings (like simple and complex lawsuits). I learned several things from that interaction: first,

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28. IGNATIEFF, *supra* note 5; MICHEAL WALZER, ON TOLERATION (1997).

29. Francis Fukuyama, "The End of History," THE NAT'L INT., 1989, *at* http://www.marxists.org/reference/subject/philosophy/works/us/fukuyama.htm (last visited Nov. 22, 2003).

30. *See* Jack Cambria et al., *Negotiation Under Extreme Pressure: The "Mouth Marines" and the Hostage Takers*, 18 NEGOTIATION J. 331 (2002).

31. BOB DYLAN, *Blowin in the Wind*, *on* THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

32. PETER, PAUL & MARY, *Where Have All The Flowers Gone?*, *on* PETER, PAUL & MARY (Sanga Music Inc.-BMI 1962).

33. Like many of us, as a student of conflict resolution, I start each day by scanning the news for any evidence that our current lead "negotiators" and global strategists are demonstrating any knowledge of negotiation or conflict resolution theory. We may "win" the war, but in my view Saddam Hussein is the only one who has mastered the techniques of negotiation–holding his "concessions" to the end and embarrassing the bravura of our unilateral actions–let's see where we are when this is published. Military might might dominate over negotiation, but that is short-term victory, the longer term will certainly be more complicated.

34. We are not, alas, at "the end of history" with democratic capitalism regnant. *See* Fukuyama, *supra* note 29.

35. This is the global or "cross-cultural" version of what I used to call the $64,000 question (now $1 million?) in "domestic" legal negotiation. How can you be a problem-solver when the other side doesn't share your goals or ends, or want to play your game? *See*, FISHER & URY, *supra* note 2, at 107-43, 153-54.

36. The conference was sponsored by the Hewlett Foundation, George Mason University's Institute for Conflict Analysis and Resolution, and the City University of New York's Dispute Resolution Consortium, and it was held at John Jay College of Criminal Justice and at the United Nations.

there was little theory that was useful "in the moment" to these skilled negotiators. They developed that "je ne sais quoi" we call "judgment" from years of experience[37] and could make terrible mistakes if their "calls" were wrong (often based on rather primitive taxonomies like "crazies, crusaders, and criminals").[38] Second, their taxonomies or classifications were developed post hoc, because they needed to transmit their learning to new recruits, juniors in the field who were now "educated" in classrooms, as well as in the field of experience – a form of field "inductive" method of hypothesis generation.[39] It sounded pretty crude – three categories of hostage takers with appropriately adapted techniques and approaches for negotiation.[40] Where would the 9/11 terrorists be in that taxonomy? Third, and most interestingly, the experienced hostage negotiators articulated a very clear negotiation plan–"just keep them talking" (which is where they got their nickname, "the mouth marines"), keep people safe, and "end the interaction. We are not problem-solvers."[41]

So, this kind of negotiation is radically different from the kind of "deep problem-solving" that negotiators seeking Pareto-optimal,[42] pie expanding, or creative solutions would be engaged in. Context matters. Hostage negotiators are fascinating and necessary to our survival, but ultimately, may have very little to tell us about negotiations that are not about hostages. The ability to generalize both their theory and practice may, in fact, be quite limited. Negotiations with hostages may have their own goals and ends ("end it safely and as quickly as possible," don't take on solving the underlying problems), techniques (keep talking and "never say no"), and categories ("crazies, crusaders, and criminals"), which produce "stock" responses or scripts, and role divisions (separate the talkers-negotiators from the tactical forces who may have to shoot if negotiations fail).

Experienced hostage negotiators have now accumulated enough knowledge from hundreds of situations that they think they have developed structures, processes, techniques, and theories. And then there was Waco.[43] Even within similar "contexts," people who don't fit the categories, or changes in personnel or leadership or failure to coordinate action, or any number of things can make even the most context-specific theories fail. As hostage negotiators define their roles to act in relatively "short-term" settings (usually no more than twenty-four hours), when a "situation" goes longer, as in Waco, the structures, processes, and interventions may have to change. Just taking care of the "short-term" safety may not be enough.

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37. *See* GARY KLEIN, SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS (1998) (describing the "pattern recognition" form of learning that characterizes those who make decisions in emergent situations (such as firefighters)).

38. *See* Cambria, *supra* note 30.

39. *See* ROBERT EMERSON, CONTEMPORARY FIELD RESEARCH (1998); CAROL H. WEISS, EVALUATION (2d ed. 1997); SOCIAL SCIENCE RESEARCH AND DECISION–MAKING (1980).

40. One of these skilled negotiators has turned his "theory in use" (see DONALD SCHON, THE REFLECTIVE PRACTITIONER (1983)) into more "c's"–context, conversation, containment. Cambria, *supra* note 30, at 334.

41. *Id.* at 335.

42. *See* RAIFFA, *supra* note 2.

43. JAYNE SEMINARE DOCHERTY, LEARNING LESSONS FROM WACO: WHEN THE PARTIES BRING THEIR GODS TO THE NEGOTIATION TABLE (2001).

What lessons have we learned? Even seemingly tightly circumscribed contextual domains may be difficult to generalize about and certainly some contexts are so specific they do not lend themselves to any further generalization. Will 9/11 happen again? Waco? What can we or should we learn in this situation that is useful for other "similar" situations? What can we define as "similar"? Is hostage taking of ones' own community (Waco) the same as taking hostages in a 7-Eleven store, in a foreign embassy (Iran, Peru), on American property abroad, or of a part of one's own "nation" (Palestinians, Tutsis)? And how can we avoid the opposite bias, of seeing too much "similarity" when there is none—the distortions of recentness and vividness causing us to "over-generalize" from our most recent experience and see causal patterns from after the fact, otherwise known as the "hindsight bias."[44]

Let us explore what lessons we have, and can, learn more systematically from attempts to generalize conflict resolution theories across domains. My argument here is that I think we may actually learn more from exploring "differences" or "contradictions" in the application of general theories to more discrete conflict resolution domains, than attempting to build grand, general theories across dissimilar contexts. I will use a few illustrative examples here, from attempts to generalize theory about structure, process, common "concepts," personnel involved in and alternatives to conflict and conflict resolution.

III. STRUCTURES OF CONFLICT AND CONFLICT RESOLUTION

Negotiation and conflict resolution theory, like international relations theory in political science, have developed "models" or "structures" of explanatory frameworks. These are schemas (often with accompanying pictures, charts, and graphs) plotting the structure of conflict and cooperation that expand, deflate, escalate and then resolve, settle, or exhaust a dispute or conflict. There has been some convergence and coordination of theoretical structures in both domestic and international conflict.[45] From anthropologist P.H. Gulliver's mapping of alternating processes of conflict, contention, concession, and conciliation, derived from negotiations in African moots and other "foreign" locales[46] (or the alternation of "virtuous and vicious cycles" in negotiations), to the adaptation of such models to the stages and phases of negotiation in litigation (orientation-opening, agenda setting, demands-conflicts, bargaining-brainstorming, concessions-problem-

44. *See* BAZERMAN & NEALE, *supra* note 6; Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, *in* THE HANDBOOK, *supra* note 2.

45. Of course each field has its own internal debates and disputes about which pictures, charts, and graphs are most accurate, even with widely disparate and contested approaches. In conflict resolution, we continue to debate whether disputes are more likely to be distributive (zero-sum), requiring competitive behaviors, or integrative (using problem-solving and coordination behaviors). *See* P. Terrence Hopmann, *Bargaining and Problem Solving: Two Perspectives on International Negotiation*, *in* TURBULENT PEACE, *supra* note 5, at 445; James J. White, *The Pros and Cons of Getting to Yes*, 34 J. LEGAL. EDUC. 115 (1984); Roger Fisher, *Comment to James J. White's article "The Pros and Cons of Getting to Yes,"* 34 J. LEGAL EDUC. 120 (1984). In international relations, theorists and empiricists argue about "realism" vs. "liberalism" and "power structural" vs. "international society" conceptions of inter-state conflicts and interventionism. *See, e.g.*, Jack S. Levy, *Theories of Interstate and Intrastate War: A Levels-of-Analysis Approach*, *in* TURBULENT PEACE, *supra* note 5, at 3.

46. P.H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS CULTURAL PERSPECTIVE (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979).

solving, agreement, execution)[47] and in mediation[48] (opening statements, ground rules, narratives-statement of issues, needs, interests, facilitated negotiation and problem solving, dealing with conflict, agreement, reality testing and execution)[49], conflict resolution has "structures."[50] These structures, or theoretical frameworks, organized in the minds of both theorists and empirical students of conflict resolution revolve around some seemingly "universal" or generalized patterns—the dilemmas of competition and cooperation,[51] the strategic sharing of information to either reveal or hide one's "true bottom line or reservation price," the dilemmas of trust and strategy, depending on whether goals are self-interest maximization or some form of joint problem solving,[52] the assumptions of tacit, but operational, social norms[53] such as reciprocity and fairness,[54] the difficulties of acting in situations of uncertainty[55] and when a host of identified social, cognitive, and other "biases" hinder accurate information processing,[56] and motivations and goal satisfaction are hard to measure. These identified patterns have in turn given shape to something that often looks like a football or soccer field: two polarized sides competing for "ground" on a scale, usually, of monetary values (but this easily becomes land and power in international settings).

In turn, we have identified a variety of transdisciplinary "concepts," such as the ZOPA or zone of possible agreement,[57] bottom lines or reservation prices, Pareto optimality-efficiency frontiers (when we move to a two axis, multi-issue negotiation that looks remarkably like a supply and demand curve from economics)[58] and now BATNAs[59] (best alternative to a negotiated agreement), WATNAs (worst alternative to a negotiated agreement), and ATNA's (all or any alternatives

47. *See* Carrie Menkel-Meadow, *The Stages and Phases of Negotiation*, *in* David Binder & Carrie Menkel-Meadow, ABA LAWYERING SKILLS PROGRAM, INSTRUCTORS' MANUAL (1983) [hereinafter Menkel-Meadow, *Stages*]; GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

48. MOORE, *supra* note 7; KOVACH, *supra* note 7.

49. *See* Center for Mediation in Law, Mediation Training Materials, The Five Stages of Mediation, at 2 (2002).

50. I. William Zartman, *The Structure of Negotiation*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, at 71. Note this article is titled "the" structure of negotiation, not "a" structure of negotiation or "the structures" of negotiation.

51. See works of Morton Deutsch in social psychology, *supra* note 2.

52. Denominated the "creating and claiming" negotiation dilemma by two scholars who have worked in many domains. *See* LAX & SEBENIUS, *supra* note 6.

53. Legal scholar Mel Eisenberg argued long ago that negotiations, both within the litigation and transaction settings, were characterized by attention to "norms," including both behavioral norms and substantive or "legal norms." Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). The newer version of this argument is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

54. BAZERMAN & NEALE, *supra* note 6.

55. JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCES: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

56. BARRIERS TO CONFLICT RESOLUTION, *supra* note 2; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

57. RAIFFA, *supra* note 2, at 108.

58. *See id.* at 263.

59. FISHER & URY, *supra* note 2.

to a negotiated agreement)[60] for purposes of measuring and deciding accurately between and among "best, worst and most likely" scenarios in litigation decision trees[61] or strategic military or diplomatic negotiations.

We have also derived something close to a few "scientific propositions" such as:

1. High demands and aspirations generally do better in distributive negotiation games unless there is stalemate or walk-out because the high demand is so unreasonable it terminates the negotiation;[62]

2. The predicted outcome of a two-party, single issue (pricing) negotiation will very often be the mid-point between the first two demands (a "split the difference" outcome);[63]

3. Matters will often "settle" for values that are closer to the transaction costs ("nuisance value") than any rational economic or other merit value in the matter;[64] and,

4. Reciprocated cooperation may be more robust and gain-producing than competitive defection (in repeated or iterated interactions).[65]

Similarly, virtually all negotiation texts, treatises, and analyses develop some version of the three or four choices of "strategies," "styles," or "behavioral repertoires" that must be chosen: competition (contending, dominating, claiming), yielding (cooperating, compromising), problem-solving (collaborating, integrating, creating),[66] or "mixed"[67] strategies.

More formal international relations models of global negotiation and conflict resolution theory have the same ideational "base," even if more elaborately explained. "Structural" analysis focuses on the dynamics of bi-polar systems (the Cold War) versus more multi-lateral and "international systems" approaches to strategic conflict strategies and management. As in legal conflict resolution, there are issues of representation problems, such as agent-principal, constituency man-

60. These are my terms, in use for years, but many negotiation analysts have used their own versions of this recognition that many kinds of alternatives have to be weighed in making choices during a negotiation or other conflict resolution process.

61. *See* Marjorie Corman Aaron & David P. Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, *in* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS (1996).

62. RAIFFA, *supra* note 2, at 109-28. *See also* Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go A Long Way,* 10 OHIO ST. J. ON DISP. RESOL. 1 (1994).

63. RAIFFA, *supra* note 2, at 109-28.

64. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

65. ROBERT AXELROD, THE COMPLEXITY OF COOPERATION (1997); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

66. *See* I. WILLIAM ZARTMAN, RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA (updated ed. 1989); FISHER & URY, *supra* note 2; Menkel-Meadow, *Stages*, *supra* note 47; Mary Parker Follett, *Constructive Conflict*, *in* PROPHET OF MANAGEMENT (Pauline Graham ed., 1996).

67. LAX & SEBENIUS, *supra* note 6.

agement, and power analysis. But international relations must deal with multiple actors and focus on "unit" analysis, identifying the negotiators as states, leaders, individual diplomats, regional coalitions, or international bodies. The structure is made more complex and can't be played entirely on a bi-lateral soccer field.

It is no accident that there are seemingly many "correspondences" in structural analyses of conflict resolution across domestic and international domains. The theories of these structures emanate from essentially the same source–post World War II and Cold War "game theory,"[68] which elaborated a number of "games" or "hypothetical" strategic and mathematical simulations, most notably, but not exclusively, "the Prisoner's Dilemma"[69] game. This game in particular models how two parties, and then more than two parties, choose to act under conditions of variable communication rules and with variable pay-off schemes. Proliferating studies (in various laboratory and other "simulated" settings, including recently developed computer tournaments) were designed to elaborate "optimal strategies" for specified conditions, based on Cold War (and mostly bi-lateral) scenarios. The template which has emerged from this rich vein of research has been "mined" and applied to so many forms of negotiated and strategic interactions, it is often difficult to remember that they are still "games," and games with many assumptions built into the "rules."

Without denying the usefulness of game theoretic insights for elucidating structures and "moves" in elaborated hypothetical situations, it is also useful to consider the assumptions on which these maps and structures have been built. Until relatively recently, conflict resolution in law and related areas focused almost exclusively on two-party games, assuming plaintiffs and defendants in a litigation structure, with specified information rules (discovery in litigation, modified by more "disclosing" negotiation customs). More recently, work in domestic negotiation has recognized that in domestic legal disputes, as in the international arena, most conflicts and disputes are multi-party,[70] requiring new maps and theories. Coalition theory and group process theory,[71] long used in international relations, are making their way into domestic and legal conflict resolution theory, with borrowed learning from sociology and social psychology,[72] but the theoretical power may be limited in different contexts.

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68. *See* AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY (1999); R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS (1957); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1967).

69. *See* WILLIAM POUNDSTONE, PRISONER'S DILEMMA 11-64 (1992). *See also* DOUGLAS BAIRD ET AL., GAME THEORY AND THE LAW (1998).

70. *See* Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

71. *See* LEIGH L. THOMPSON, MIND AND HEART OF THE NEGOTIATOR 188-219 (2d ed. 2000); Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. ON DISP. RESOL. 243 (1994); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71 (2000).

72. *See* Solomon Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUP LEADERSHIP AND MEN (H. Guetzkow ed., 1951); ROBERT B. CALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (1993); Deutsch, *Cooperation and Conflict, supra* note 2; IRVING L. JANIS, GROUPTHINK (1983); JOSEPH LUFT, GROUP PROCESSES (3d ed. Mayfield Publishing Co. 1984) (1963); STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: EXPERIMENTAL VIEW (1983); Stanley Milgram, *Behavorial Study of Obedience*, 67 J. ABNORMAL PSYCHOL. & SOC. PSYCHOL. 371 (1963).

Game theory and strategy in conflict resolution all too often assume rationality, individual gain maximization, whether from an economic or power perspective and externally manipulated information endowments. This assumption of rational gain or rational choice has been increasingly questioned by anthropologists who challenge its "cultural" assumptions,[73] political scientists and social psychologists who question its empirical reality,[74] and feminist theorists who question its epistemological origins.[75] What if most disputes are not two-party? What if maximizing "gain," however measured, is not the only goal? What if communication is not binary (on or off), but a combination of revelations, guarded sharing, reciprocal messages, misleading statements, and outright deceptions, which are themselves "negotiated"? What if the players in the game are not all playing with the same pay-off structure (goals or ends) or resources with which to play the game? What if new games are introduced, such as "Truth and Reconciliation Commissions" which are neither punishment ("prisoner's dilemma") nor restorative (mediation) but some new mixture of confession, accountability, and forgiveness?[76] How do the new "games" get written into the canon that creates the structures and maps of our theory?[77]

In a provocative book, political scientist Benjamin Miller has recently argued that polarized opponents, such as in the Cold War, were actually able to engage in a variety of cooperative activities because of the "balance" produced by nuclear deterrence. This in turn introduced more predictability into world conflicts than the current unstable multi-national post-Cold War alignments.[78] Two hegemons, the Soviet Union and the United States, could restrain more "minor disputes" within their spheres of influence, as well as "contain" each other. With unilateral action (of one hegemon) or diffusion of power with many multiple actors, some forms of restraint and control of conflict are removed, and alliance and regional influence declines with an increase in local conflicts. How prescient Miller was—his work was written long before our recent failures to develop a "coalition" within our own NATO alignment on disarming and warring with Iraq. Diffusion of power may actually make some forms of cooperation less likely in international relations. Miller's structures, which divide intended and unintended conflicts and

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73. *See* AVRUCH, CULTURE, *supra* note 2; Kevin Avruch, *Culture and Negotiation Pedagogy*, 16 NEGOTIATION J. 339 (2000).

74. *See* BEYOND SELF-INTEREST (Jane Mansbridge ed., 1990); DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994); JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1994).

75. *See* CONFLICT AND GENDER (Anita Taylor & Judi Beinstein Miller eds., 1994); GENDER, PEACE AND CONFLICT (Inger Skjelsboek & Dan Smith eds., 2001); Deborah M. Kolb, *More than Just a Footnote: Constructing a Theoretical Framework for Teaching about Gender in Negotiation*, 16 NEGOTIATION J. 347 (2000); Carrie Menkel-Meadow, *Negotiating with Lawyers, Men and Things: The Contextual Approach Still Matters*, 17 NEGOTIATION J. 257 (2001); Carrie Menkel-Meadow, *Teaching about Gender and Negotiation: Sex, Truths and Videotape*, 16 NEGOTIATION J. 357 (2000).

76. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

77. In a classic example of sociological "labeling" theory, the very name of the game can alter behaviors in the game. *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION, *supra* note 2 (showing that the games, although identical in content, called "Wall Street" or "Social Work" produced different behaviors in the players). *See also* Robert H. Frank et al., *Do Economists Make Bad Citizens?*, 10 J. ECON. PERSP. 187 (1996); Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993).

78. BENJAMIN MILLER, WHEN OPPONENTS COOPERATE (2002).

cooperative acts among conflicting and cooperating nation-states and regional coalitions, is an example of the kind of rigorous and far more complex "modeling" we need to understand the varieties of contexts in which conflict resolution is practiced.[79] Note, however, that for all the criticism of bi-polarism in modern dispute resolution theory, Miller's thesis suggests that a powerful "two-party" game may actually have led to more stability or "equilibria" points, in game theoretic terms.

Miller suggests that with the demise of the two-party power "balance," new models might be necessary, such as a return to a nineteenth century notion of a "concert" of nations, which produced more "peace" in part of the nineteenth century than we had in the twentieth.[80] His models may turn out to be too rigid as well as too dependent, in my view, on the interesting results that come from aggregating data on world conflicts, a quantitative "game" that social scientists play to look for Durkheimian "social facts"[81] and patterns that may not be visible to the "naked eye." In my view, this fascinating effort at knowledge acquisition makes many errors of "unit analysis." It is virtually impossible to "code" all the variables that go into each global conflict (such as the measures of intra-national and international "incidents" of violence, economic factors, political party structures, ethnic-religious demographics, weapons, and other resource measures) though some have argued we should begin to develop such data bases for domestic, as well as international, conflicts and disputes.[82] Miller also demarcates "crisis management" (e.g. Cuban missile crisis) from more "normal" efforts at international conflict management and cooperation (resource sharing, war prevention, peaceful interventions, etc.), suggesting that, as with domestic hostage negotiations, we may need to have separate models and structures for "short-term" emergent situations and longer-term, iterated negotiations and conflict prevention interventions.

Sadly, however, Miller, like the reporters of "successes" in North Korea and the Mideast in the mid-1990s, cannot do much to explain a post-9/11 world. With multi-national loyalties (Al Qaeda and other militant and fundamentalist Arab organizations) and new technologies for communication and sabotage, some have

79. *Id.*

80. *Id.*

81. *See* EMILE DURKHEIM, SUICIDE (John A. Spaulding & George Simpson trans., reissue ed. 1997); Carrie Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. L. REV. 91 (1990).

82. There has been a very active debate on the possibilities of developing metrics for measuring conflict and dispute resolution successes at the domestic level, well behind the work already conducted by quantitative international relations scholars. *See* Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policy Making*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION (Rosemary O'Leary & Lisa A. Bingham eds., 2003); JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? (2000) (featuring the debate around the issuance of the RAND study of court management devices and ADR in federal courts); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, (The Federal Judicial Center 1997); LAWRENCE SUSSKIND ET AL., MEDIATING LAND DISPUTES: PROS AND CONS (Lincoln Land Institute April 2000); Cary Coglianese, *Empirical and Experimental Methods of Law: Empirical Analysis and Administrative Law*, 2002 ILL. L. REV. 1111 (2002); Craig A. McEwen & Elizabeth Plapinger, *Rand Report Points Way to Next Generation of ADR Research*, DISP. RESOL. MAG., Summer 1997, at 10; Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997).

called our current conditions a "viral war," where the stateless "enemies" move easily through porous boundaries of both physical and computer space, issuing decentralized, non-state, non-"party" orders or "authority" for actions to be taken, not "negotiated."

Other analysts have noted that not only *who* we have conflicts with, but *what* we have disputes about may further particularize and change our theoretical structures–whether we consider current international conflicts as driven by ideology (democracy vs. fundamentalism) or resources (oil, labor, water etc.). Fault lines of conflict and regional and global cooperation and competition may change the "neighborhoods" of disputing and alter both geographical lines of demarcation, as well as geo-political lines of negotiation, alignments, and potential zones of violence.[83] What happens when a neighborhood or community dispute escalates to a global dispute? Is there any useful analogy from our major urban conflagrations and search for national peace? Here, the structural component is a strong national government, with multiple layers of social control, whether by law enforcement or multiple political entities. The power and legitimacy of our "international government," while always contested, seems increasingly divided and weak, not to mention without its own legitimate legal enforcement mechanisms.[84] The structures and theories of conflict resolution must also take into account "maps" of the regime (or absences) of law and legal institutions standing as "back-ups" to the negotiation and mediative processes currently being described.

It is not clear what the ZOPAs, BATNAs, and "bottom lines" are in some of these modern international conflicts. It is quite clear, however, that we are not playing on a soccer field—our "turf" has been "invaded" and so we planned an unauthorized incursion onto a whole other field. The globe, by the way, is round, not flat, and it is time, I think, to have the pictures of our theories conform to spatial reality. Efforts to create multi-lateral coalitions are failing as I write (things will likely be different by the time this is published) and Miller's hopes for a conflict preventing "concert" of democratic nations to act as a sort of self-appointed third party neutral (more in the med-arb model than the "pure mediator") does not appear to be taking shape. Our opponents, whomever they currently are (Saddam Hussein, Kim Il Sung, Osama Bin Laden and Al Qaeda), may be playing a "prisoner's dilemma game," but maximizing their own well being does not appear to be a major goal. "Freedom's just another word for nothing left to lose," as Janis Joplin would say.[85]

The assumptions of the pictures and structures we have developed for domestic negotiation and conflict resolution models do not translate well when we are dealing with non-rational actors. Perhaps negotiating with hostage takers will have more relevance, but I doubt it, because we are likely to damage many innocent people when the tactical forces come in and we have not been very successful at the "keep them talking" strategy. Negotiation and conflict resolution models and structures assume that we want to keep playing games together (the great

83. Michael T. Klare, *The New Geography of Conflict*, 80 FOREIGN AFF. 49 (2001).

84. When the superpower refuses to acknowledge the international court, it is hard to know how enforcement will be achieved. Behind the pictures of football fields and prisoners' cells lies a court, a state, a referee, or some third party, with ultimate ability to "force" a solution if a consensual one is not reached.

85. JANIS JOPLIN, *Me and Bobby McGee*, *on* PEARL (Columbia 1971).

relief of the resolution of the Cuban missile crisis was that the Soviets did want to keep playing, not dying) and that we can "map" moves on a two-dimensional space. While expanding our models and pictures to include multi-lateralism (internationally) and multi-partyism (in American domestic disputes) has begun to change the structures slightly, I think we are prisoners of our own game. These structures (of two-party mini-max games) are so strongly imbedded in our learning, and our leaders' consciousnesses, that I know even I still process and analyze all negotiations through these lenses. Increasingly, I think there is something wrong with these pictures. While it would be nice to have the scientific rigor of a negotiation structure that worked across domains, I don't think we currently have one. It might behoove us to start imagining, creating, thinking about, and drawing some "structures" that more accurately describe the particularity of the situations, both internationally and domestically. How about photography with its specificity, rather than abstract graphs?

IV. PROCESSES OF CONFLICT AND CONFLICT RESOLUTION

In many ways the study and practice of conflict and conflict resolution originated in international dispute resolution. International relations, peace studies, and anthropological studies of disputing outside of the United States all predate the "modern" ADR movement.[86] Nevertheless, the techniques, technology, and apparatus of conflict resolution "processes" are much more professionalized and developed in domestic dispute resolution. From the proliferation of texts and training programs in negotiation, mediation, facilitation, consensus building, and now dialoging, the domestic dispute resolution field has professionalized, if not fully credentialed, its practical knowledge base. Techniques are offered for problem-solving, integrative and principled bargaining, interest-based bargaining in labor negotiations,[87] mediation as a general process, and mediation tailored to environmental, intellectual property, community, family, and commercial disputes. The technology of dispute resolution is a growing import-export business. Almost anyone who has been trained as a mediator can turn around and train others—a slavish adherence to the medical model of clinical education—"see one, do one, teach one." Some professionals in the field were trained domestically and now work internationally (I am one of those); others began working internationally (perhaps at high levels of diplomacy, with or without training) and now work domestically (many former politicians, Cabinet officers, and state department officials); others are experts in particular geographical areas of the world, or in particular subject matters of disputes, and a whole cadre of diplomats, retired judges, and other "elder statesmen" become mediators, arbitrators, and negotiators

86. For a well-told history of mediation, arbitration, and conciliation in the United States, see JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983). However, the modern dispute resolution movement, in law, is usually dated from the 1976 Pound Conference where Frank Sander delivered his "Varieties of Dispute Processing" paper, subsequently to be termed the "Multi-Door Courthouse." Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

87. *See* RICHARD E. WALTON ET AL., STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS (1994) (specifying propositions derived from a "strategic" approach to negotiations in the changed labor-management context, distinguishing the "social contract" (on-going goals) from the "substantive outcomes" (particularities in the final agreements)).

by virtue of their status or prior achievements in the world, without any formal training at all.

With the increased sensitivity to different process technologies and differentiation of processes, it is easy to see some of the correspondences of techniques and also some of the dangers of moving from one level to another. In mediation, for example, the separate "caucus" sessions at which parties reveal their real "underlying interests" can be likened to the "back channels" or "dual-track" negotiations of diplomatic disputes. The same tensions between public and transparent proceedings and more secretive and confidential meetings exist in both realms, though the role of the press, democratic government processes, and the sheer numbers of people involved may make disclosure slightly more likely in international settings. At the same time, the likely fact of multiple layers of negotiators makes it more possible to actually have totally secret negotiations take place (including the "fictionalized" "Walk in the Woods")[88] in the international arena.

There are also some correspondences in the role of representatives and the internal negotiations of constituencies, like clients with lawyers, union members with union negotiators, governments with diplomats, and the larger polity and the formal state, but these analogies should not be taken too far.[89] Internal negotiations in international matters are often as complex as any "across the table" negotiations and because international negotiations are often binding on a full polity with generational effects, ratification by those actually affected by a negotiation is quite different from other agent-led negotiations, if it exists at all.

The role of third parties varies in different contexts, though again, there has been some borrowing (mostly one-way in my view and mostly not for the better) from the international sphere to the domestic. The notion of the embedded and interested "wise elder" as mediator cum shuttle diplomat has been growing since Henry Kissinger's many efforts in the Mideast. Senior diplomats and government officials from the United States, with clear geo-political interests of their own, have been intervening in disputes as mediators, arbitrators, and "judges" for several decades now, and sadly, in my view, this idea of the enmeshed mediator (or mediator with "muscle" or "expertise") has now infiltrated public policy, legal, and even family disputes, returning to some of the ancient inspirations for the mediator in rural cultures where "wise elders" were the only acceptable authority.[90]

In the domestic context, mediators often prefer to think of themselves as "third party neutrals" engaged in a detached and unbiased "facilitative" process. Of course, in reality, all of these characteristics (neutrality, detachment and lack of bias,[91] as well as "facilitative"[92]) are contested. But, increasingly, retired judges,

88. LEE BLESSING, A WALK IN THE WOODS: A PLAY IN TWO ACTS (1988) (giving a fictionalized account of the private relations of two top-level diplomats, which is said to reflect the process by which the Gorbachev regime negotiated itself into a new world order).

89. For an effort to explore the issues in agent-principal negotiations across domains, see NEGOTIATING ON BEHALF OF OTHERS (Robert H. Mnookin & Lawrence E. Susskind eds., 1999).

90. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 6 (1986).

91. *See* Howard Gadlin & Elizabeth Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEGOTIATION. J. 17 (1997). *See generally* Carrie Menkel-Meadow, *Introduction* to MEDIATION: THEORY, PRACTICE AND POLICY (Carrie Menkel-Meadow ed., 2001).

92. *See, e.g.*, Lela Love, *The Top 10 Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939 (1997).

elder statesmen, and other "notables" engage in shuttle diplomacy to settle major class action lawsuits, community disputes, and in the case of some politicians, like Jesse Jackson or Jimmy Carter, may intervene in international disputes without formal portfolio, authority, or training.

Often the dynamics of domestic and international conflicts might seem similar.[93] For example, when asked how the United States was attempting to get allies for its proposed resolution in the UN to authorize war against Iraq, one major senior official in Washington said, "this is just like lobbying for legislation in Congress—threats and promises, sticks and carrots, money for pet projects, threats to take aid away,"[94] a "standard" log-rolling negotiation process. On the other hand, even with all the turn-over in Congress, lobbying for legislation usually focuses around two relatively stable parties and "opponents." These days we appear to change our allies for international strategic reasons almost yearly. Consider the U.S. "friendships" with Iraq, Iran, Colombia, Pakistan, India, Russia, and others. Consider what this does to notions of trust building and reputation markets[95] as they are conceptualized in domestic negotiation theory.

Most significantly, some modern international conflicts, both interstate and intra-state (South Africa, Rwanda, Argentina, Israel and its Arab neighbors) can demonstrate some of the fallacy of blind application of domestic conflict resolution processes, such as mediation. Mediation's ideology as a problem solving device, asks people to focus on the future, contrasted to adjudication, arbitration, and litigation, which seeks to find the facts and judge the truth of what happened before, in order to provide some remedial relief in the present. This model of future orientation will not often be effective in inter-ethnic, race-based, or genocidal conflicts, or conflicts following or during mass violence or "unjust" regimes and wars. While the disadvantages of "ignoring" the past have also been noted domestically, primarily by feminists[96] and race theorists, who seek a focus on the past for accountability and "justice" in mediation, for the most part, mediation has kept its eye on the "on-going" or future relationship.[97] Attempts to avoid the conflicts and disagreeable arguments about "what happened" before in the standard forms of mediation will not work as peace seekers attempt to mediate long-standing ethnic conflicts, especially when marked by bloodshed, violence, long-standing economic inequalities, or other historical unfairness. So overuse or misappropriated use of domestic mediation models will not work to achieve "truth and reconciliation" in such climates. Fortunately, new processes have come out of

93. For one effort to describe "the" negotiation process, as a universalized set of issues, see Christopher Dupont & Guy-Olivier Faure, *The Negotiation Process*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2.

94. National Public Radio, *All Things Considered*, Feb. 25, 2003 (notes on file with author).

95. *See* Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. REV. 493 (1989).

96. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

97. Most descriptions of mediation quote Lon Fuller's famous sentence about the ability of mediation to "re-orient the parties to each other," assuming a continuing "future" relationship. *See* Lon Fuller, *Mediation–Its Forms and Its Functions*, 44 S. CAL. L. REV. 305 (1971).

such conflicts (such as Truth and Reconciliation Commissions)[98] and these might, in turn, have some influence in some of our domestic disputes.[99]

Similarly, feminists, race theorists, and other critics have focused on the recurring issues of power imbalances (whether economic, political, temporal, social, class, racial, ethnic, religious, or gendered)[100] in the assumptions that most conflict resolution processes make about party participation. This is one process issue that has actually lent itself to devising process strategies that have been effective or at least suggestive, across domains. Alliances with other "weak" parties, demands for representation, refusal to participate, funding of resources to participate, and strategic "irrationality" (think Saddam Hussein or North Korea), have enabled the less powerful in a number of contexts to enhance their power in various processes, whether through rational "game-playing" strategies or efforts to break or change the game. This is an area that clearly merits "comparative" and multiple-level study.

Wholesale or thoughtless transfer of Americanized "talking cures" of "talking it out" in mediation are less likely to work in reticent cultures or in cultures where social unequals cannot meet and discuss to consensually negotiate their problems. Negotiation and mediation processes, however staged or structured, involve strategies of communication and speech. With the wide variety of difficult communication issues in domestic mediation and negotiation (information sharing, trust, empowerment, problem solving, active listening, reframing,[101] etc.), adding the complexities of "culture," whether intercultural or mixed-cultural,[102] in other contexts, suggests that conflict resolution processes will be more variable than uniform, and therefore making export of American models likely to be somewhat problematic. Even with our own focus on "multi-cultural" mediation and increased sensitivity to the communication and teleological issues involved in such processes domestically, our commitments to equality, democracy, and "multiculturalism," however deeply held within our own nation, are deeply ideologically, culturally, and legally based in the U.S. political culture. Our "process imperialism" is one of the complaints of such critics as Laura Nader[103] who suggests, at the least, that these are acts of cultural imperialism and, at the worst, that international and U.S. bodies, like USAID, the State Department, the World Bank, and the International Monetary Fund are imposing U.S. styles of dispute resolution (in mediation and commercial and investment arbitration) in nations that have neither

98. *See* Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUSTICE: ANTHROPOLOGY, PEACE AND HUMAN RIGHTS 47 (2001).

99. There is some evidence of this in a recent settlement of the Cincinnati civil rights class action against the police department. *See* In re Cincinnati Policing, Collaborative Agreement, No. C-1-99-317, *at* http://www.ariagroup.com/FINAL_document.html (last visited Nov. 22, 2003); *see also* JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICTS (1997).

100. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999); Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670 (2001).

101. *See* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS (1999).

102. THE CONFLICT AND CULTURE READER (Pat Chew ed., 2001).

103. *See* Nader, *Current Illusions and Delusions*, *supra* note 13.

the resources, nor the legal system, to support such "exogenously" created institutions.[104]

With increasing attempts to conceptualize the differences between bi-lateral and multi-lateral negotiation and dispute resolution processes, some have argued that bi-lateral negotiations permit greater informality and situation-specific "rules" or norms of procedure, where multi-lateral negotiations are more likely to lead to formalism and the need for formal "rules of process" and "rules of decision," such as those producing majority votes and compromise or lowest common denominator solutions.[105] While international negotiations may be characterized by greater formality, such as the need for translators, trans-system rules of procedure, customs of diplomacy, etc., domestic multi-party negotiations have, in fact, been the occasion for relatively great innovation, with Lawrence Susskind's "Rules of Consensus Building"[106] substituting for "Robert's Rules of Order"[107] and permitting "consensus" rules of process and decision that actually "improve" outcomes away from compromises and lowest common denominators to searches for "better outcomes" that attempt to hear and take account of multiple party needs and interests.[108] Here the interesting question is whether less formal Non-Governmental Organizations (NGOs) in the international arena will more successfully introduce less formal and different kinds of processes to the more "formal" and "official" channels of negotiation. Again, I suspect, context (which issues, which groups, which nations or other demarcations) will have greater effects on process innovation than any "universal" process intervention.

In the commercial realm, many commentators have noted that American litigation processes are transforming European and civil law traditions in international arbitrations, choking them with discovery, motions, and other adversarial practices, like cross-examination and other proceedings that are said to be displacing European actors (both lawyers and arbitrators) with Americans, in the competition for legal and occupational control of this process.[109] Similarly, although

104. *Id.* In the "import-export" business of ADR some argue that absence of a legitimate and trusted legal system prevents full assimilation and acceptance of a supplementary set of institutions to offer different forms of conflict resolution (I am one of these), while others suggest that ADR institutions may be developed to substitute for underdeveloped or corrupt legal systems. *See* Alkon, *supra* note 23.

105. Franz Cede, *The Legal Perspective on International Negotiations*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, at 151.

106. THE CONSENSUS BUILDING HANDBOOK, *supra* note 5, at 99-136. *See also* SUSAN CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES (2d. ed. 2001); E. FRANKLIN DUKES ET AL., REACHING FOR HIGHER GROUND (2000).

107. HENRY M. ROBERT, ROBERT'S RULES OF ORDER (10th ed. Perseus Pub. 2000) (1876).

108. I do not want to overdraw the domestic and international claims here. Consensus building processes have been used in many international disputes and policy settings, such as the Kyoto Accords, other environmental causes, human rights treaties, etc. Furthermore, the domestic use of such processes as consensus building and negotiated rule-making remain controversial. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rule-Making*, 46 DUKE L. J. 1255 (1997); Jody Freeman, *Collaborative Government in the Administrative State*, 45 UCLA L. REV. 1 (1997); Philip J. Harter, *Negotiating Regulations*, 71 GEO. L. J. 1 (1982).

109. *See* DEZALAY & GARTH, *supra* note 13; Bryant G. Garth & Yves Dezalay, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW & SOC. INQUIRY 285 (1996); *see also* Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUDIES L. POL. & SOC'Y 367 (1992) (focusing on the domestic side of "competitions" of different processes within the justice system).

intended to be "alternative" international bodies for dispute settlement, the ICSID and WTO are also said to be looking more and more like American-style adjudicative fora, rather than international arbitral or even mediative bodies. In the commercial arena, private business ventures, utilizing aspects of both bi-lateral and multi-lateral negotiations are probably more likely to develop process innovations and opportunities for flexible and informal conflict resolution possibilities, including the use of some mediation processes in transactional (joint venture capital) settings.[110]

So, does it matter that none of the processes of conflict resolution are "pure" anymore, or that they travel, either well or not, but get transformed in the process of trans-border movement? As I have noted elsewhere,[111] Lon Fuller, the "founding" jurisprude of ADR, warned us of the "moral integrity" of each process we might use to resolve disputes or create legislation or other social norms for human interaction.[112] While I am a firm believer that the primary forms can be combined to provide flexible hybrids and adaptation to particular settings, I worry that thoughtless transposition of different processes to different cultures is not good, either for the processes themselves or the people affected by them. U.S.-style ADR was a reaction to the rigidity, slowness, expense, and adversarial structure of U.S. courts, as well as a claim for increased participation in a highly developed democratic, if grid-locked, polity.[113] Transfer of our ADR processes to other places without those "back-up" traditional institutions may be doomed to fail, such as when arbitration is offered or "crammed down" by the State Department or World Bank as a condition of financial aid, where the arbitration system and administering agency is no less corrupt than the corrupt courts it was designed to replace or supplement.

Traditions of disputing, whether in private matters or public, may vary in terms of when only the main "parties" are brought in and when other "stakeholders," interested parties, or the larger community will be engaged. Thus, students of process will have to expand and broaden the theories derived from bilateral negotiations, adversarial litigation models, and even the triadic threesome of mediation or arbitration. More sophisticated theory development is proceeding in multi-party processes in such domestic settings as consensus building, multiparty and class-action litigation, as well as community and environmental disputes. International disputes have more often been multi-party and conceptualized as such (even with the binarism of Cold War analysis). Whether coalition formation, third party intervention, representative and constituent participation, ratification, process rules, and decision rules (the "conceptual tools" of multi-party dis-

110. *See* Christophe Dupont, *International Business Negotiations*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2.

111. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 13-22 (2000).

112. LON FULLER, THE PRINCIPLES OF SOCIAL ORDERING (Kenneth I. Winston ed., 2001).

113. Debates about whether the founding impulses for ADR were "quantitatively" based on caseload reduction and efficiency or "qualitatively" based on more party participation and better outcomes for the parties continue apace. *See, e.g.*, Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR*, 19 FLA. ST. U. L. REV. 1 (1991).

pute resolution) can be generalized to many different contexts and levels of action remains an open research question.[114]

Though I am an avid student of general conflict resolution theories and am particularly interested in research questions about the role (and ethics) of third party intervention,[115] as well as dyadic and multi-party negotiations, even when not "facilitated," I think studies of the processes of direct, as well as facilitated, negotiation and the role of third party intervention need to be contextually sensitive. Intervention in family disputes, though also about relationships, is not the same as intervention in international disputes, where cultural "sensitivity," history, expertise, and other factors may distinguish the types of processes and interventions to be used.

V. CONCEPTS IN CONFLICT RESOLUTION

In addition to our "construction" of universalized models of structure and process, the field of conflict resolution has isolated a number of "concepts" of inquiry. As legal and social anthropologists like Laura Nader and Richard Abel attempted to redefine "disputes" as a more universal and capacious concept for comparative study, away from the legalized forms of "cases,"[116] we have identified a number of concepts in our field, with expectations of multi-level explanatory purchase. I will simply mention a few here, as illustrations of efforts we need to make to be careful while studying these concepts rigorously and critically across domains.

One of the most important contributions of modern conflict resolution theory has been the move from "positions," "offers," or "demands" to "underlying interests."[117] While this important conceptual and terminological "move" has assisted our ability to develop problem-solving processes in both domestic and international contexts,[118] by focusing on the underlying "causes" or larger context of the conflicts that cause "disputes," this terminology has itself been criticized for its instrumental, preference-seeking, and utility-based rationalistic or economic conception of what motivates people in conflict. In the international arena, John Burton made an early claim for a theory of "human needs,"[119] as I have done (with a feminist and social welfare impulse) in the domestic sphere.[120] These terms are important. The "needs" theory asks us to look "behind" the stated "interests," just as the re-conceptualization of "interests" asked us to look "behind" the stated demands or "positions." A focus on "needs" asks us to consider not just what

114. For some attempts to specify general principles here, see RAIFFA, *supra* note 2; James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, *in* WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS (Richard J. Zeckhauser et al. eds., 1996).

115. *See* Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for A New Practice*, 70 TENN. L. REV. 63 (2002).

116. *See* Richard Abel, *A Comparative Study of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973); Nader, *Current Illusions and Delusions*, *supra* note 13.

117. *See* FISHER & URY, *supra* note 2; Menkel-Meadow, *Toward Another* View, *supra* note 6.

118. JOHN W. BURTON, CONFLICT & COMMUNICATION (1969); JOHN W. BURTON, CONFLICT: RESOLUTION AND PREVENTION (1990); JOHN BURTON, RESOLVING DEEP-ROOTED CONFLICT: A HANDBOOK (1987).

119. JOHN W. BURTON, CONFLICT: HUMAN NEEDS THEORY (1990).

120. Menkel-Meadow, *Toward Another View*, *supra* note 6.

parties in negotiations or conflicts can demand or articulate for themselves, but asks us to focus on basic human needs, whether Maslovian[121] or some other framework, to go beyond what parties claim and to focus on social justice issues. "Needs" may include such intangibles as respect, dignity, care, sympathy, empathy, apology, and recognition, or such material items as economic aid, income stability, land, food, shelter or "ownership," and control. Asking questions about "needs" may help us develop models of conflict resolution and negotiation that go beyond the "rational" into what some, like Jon Elster[122] and I,[123] have called the emotional, passionate, or spiritual (or religious) realms, which are not captured in game theoretic pictures of conflict resolution, and which seem ever more relevant to current conflicts. At the same time that "needs" appear "underneath" interests and other expressions of what parties desire in a negotiation or conflict setting, there may be other, newer ways to describe these concerns, when contexts are more varied. Whether "needs" or "interests" operate similarly in domestic and international settings (whether in individual or collective settings) also requires more study. Those who facilitate multi-party or constituent based negotiations know how difficult it is to develop, articulate, and negotiate with group-negotiated "goals." Note that "goals" itself has an instrumental ending point; more astute negotiators and conflict professionals have long noted how party desires, needs, and interests are more dynamic than many "negotiation plans" would suggest. What we want and why we want it is not just a product of our own "utilities," but also a function of comparative assessments–the concept of "relative deprivation" should be as important to us conceptually as "reactive devaluation." When one party learns what another "has," "wants," or "needs," those stated desiderata may well change in the comparison dynamics that is the fuel of many conflict processes.

The focus on "relationships" in negotiation and conflict resolution has long been with us. Indeed, one of the most robust analytical concepts has been the consideration of whether those engaged in negotiation or conflict resolution are having a "one-shot" interaction or a "repeated" interaction. Much of negotiation and conflict resolution theory turns on these notions of "one-off" or "continuing relations." Recently, those in the international field have even come to adopt the full psychological terms of family therapy and mediation to note the importance of creating, sustaining, and working on "relationships."[124] It is important to note, however, that relationships come in many forms—the relationships of states to each other (mediated and affected by who are the leaders, diplomats, and official spokespeople of a state over time) are different than the relationships of citizens or inhabitants of different states (tourists, refugees, and abstracted "others"); litigants may be former partners, lovers, continuing business dealers, or total strangers. Just as in personal relationships, in the international realm, there are complex

121. ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY (2d ed. 1970).

122. JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS (1999); JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY (1989).

123. Carrie Menkel-Meadow, *Introduction* to DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY (2003); Carrie Menkel-Meadow, *The Lawyers' Role(s) in Deliberative Democracy* (2000) (unpublished manuscript, on file with the author).

124. HAROLD H. SAUNDERS, A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS 31-46 (1999).

blood and affinity ties. The point here is that while I truly welcome the "turn" toward the human element in all negotiations, we must develop more sophisticated theories about relationships. If the pop psychology market continues to sell endless copies of books on how to improve one's personal relationships, then certainly the kinds of relationships that exist in legal, community, national, and international disputes must be more variable than the bi-modal "one-shot vs. continuing." It is clear that some relationships are "coerced" when we share a family, living quarters, or geographic boundary; others are chosen—ties of love and marriage (in some cultures) and organizational participation; others are "strategic alliances" in business or global politics and most importantly, all of these relationships shift and change themselves over time, as conditions, including affective, economic, political, and strategic, change themselves. Consider the amazing transformation of relations in Europe from World War II to the present and our own relations with Japan, Germany, Russia, and China, just to mention a few that have changed radically in a matter of decades. Our relations with other "strategic partners" may be more "promiscuous." Our conceptualizations of relationships in conflict resolution and negotiation need more variability than they currently have to be of much use in description, prescription, and prediction.

Finally, as a third example, let me focus on the concepts of "ripeness" and "deadlines" or the temporal theories of conflict management. As my great negotiation mentor has said, "You gotta know when to hold 'em, know when to fold them."[125] Timing in conflict resolution is a matter of "judgment." In international relations, William Zartman developed the notion of "ripeness" for resolution or intervention when the parties are in a "hurting stalemate."[126] A version of this concept informs much legal dispute resolution as well, such as when judges intervene in settlement conferences or cases are settled on the courthouse steps. But, more recently, in both domestic litigation and international affairs, we have begun to think about creating more positive approaches to "ripeness" with interveners and others acting more actively to "prevent" conflict or to bring the parties together before they hurt each other so deeply that they are no longer able to communicate with each other. "Ripeness," in other words, can be created and manipulated by skilled negotiators or interveners. At the same time, we have also learned that intervention too early may not work, as in the case of court-annexed mediation programs that ask the parties to mediate or arbitrate without enough discovery to have information to know what is at stake or to make accurate assessments of the value or strength of the legal claims.[127] Just as with "fruit" from where the ripeness metaphor[128] is derived, conflicts may be "unripe" or "overripe." Unlike fruit, "ripeness" in dispute resolution can occur at many points along the way.[129]

125. KENNY ROGERS, *The Gambler*, *on* THE GAMBLER (United Artists 1978).

126. ZARTMAN, *supra* note 66.

127. *See* Elizabeth Plapinger & Donna Stienstra, *Eastern District of Pennsylvania Mediation Program*, *in* ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 241-42 (1996).

128. Though I don't have time or space to pursue it here, it is interesting to explore the language and "metaphors" of conflict resolution across domains to track their sources and etymology, as well as their robustness across domains. *See, e.g.*, Victor M. Sergeev, *Metaphors for Understanding International Negotiation*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, (describing "bargaining," "joint choice," and "joint construction of the future" as metaphors that have informed modern international negotiations).

129. *See* WORDS OVER WAR, *supra* note 5, at 9-10.

Timing may be everything, but there may also be many entry points, and opportunities to "re-enter" after some failures. What can we learn about "ripeness," across domains, to determine when we can nudge the process along and "construct" opportunities for effective resolution and when do we have to wait for the parties to force themselves into "hurting stalemates?" Should we be allowed to be inactive and guilty bystanders as people kill or hurt each other? When should we intrude?[130]

At the other end of the temporal spectrum, the use of "deadlines" is often theorized or used descriptively to promote, force, or encourage conflict resolution. Whether in the setting of firm trial deadlines,[131] or in artificially created deadlines, such as George Mitchell's "Easter deadline" in the Northern Ireland peace talks,[132] critical deadlines or fixed end-dates are often considered a useful way to promote final "ripeness." Ironically, I find this one of the most interesting and contradictory concepts in conflict resolution studies. While George Mitchell credits the Easter deadline (agreed to by all the parties, he says, because they wanted agreement) as facilitating an end to a multi-year negotiation process, and a multi-decade (if not multi-century) dispute, President Clinton's efforts a few years later to create deadlines with the expiration of his own term in office (and the Israeli election that cost Barak his job) failed to bring a peace agreement to the Mideast, even though, allegedly both parties wanted to make an agreement there too.[133]

So, it is not that deadlines or ripeness always have predicted or desirable effects. The more interesting questions for study are under what conditions can deadlines or other limiting events produce agreements and under what conditions can speeding a process along actually hurt a negotiation process? Have we learned anything generalizable about the timing and life-course of disputes or is this one of those areas, as I suspect it is, that is deeply contextual and dependent on histories and personalities of the parties, as well as of the interveners. Unlike most lawsuits and most domestic disputes, international disputes, especially long ones, will have many changes of personnel, whether through elective processes, other succession processes, or changes of regimes and leadership. The issues of "timing" are not severable from the people involved. Unlike propositions of physical science, I doubt whether we will ever have generalizable principles about the timing of disputes. It is not "chaos theory" or "relativity," but neither is it "gravity." As I turn next to some issues of personnel in conflict resolution, you might pick your own favorite "concepts" of conflict resolution and ask how well the theory behind those "concepts" has been developed across domains.

130. This of course implicates both the domestic ethical problems explored in the aftermath of the Kitty Genovese killing and the study of "prosocial" psychology, as well as the now active field of humanitarian intervention in the international relations field. *See* ACCOUNTABILITY FOR ATROCITIES (Jane Stromseth ed., 2003); HUMANITARIAN INTERVENTION (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

131. *See* MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

132. *See* MITCHELL, *supra* note 5, at 143-46.

133. Of course, insiders in that negotiation now say both parties were not really serious about reaching agreement, with blame being placed on both sides. *See* Malley & Agha, *supra* note 5; DENNIS ROSS, THE MIDDLE EAST PEACE (forthcoming).

VI. PEOPLE IN CONFLICTS

Whatever one thinks about the conceptual maps elaborated above to describe conflict resolution processes, dispute resolution and negotiation are enacted by people who execute behaviors, whether systematically "framed" by schemas or models or not.[134] Actors in negotiation and conflict resolution activities can be individuals, agents, or representatives for others, groups, organizations, diplomats, leaders, or "ad hoc" negotiators (e.g. hostage takers and terrorists). For those of us who study conflict resolution, we are likely to at least try to employ one model or other. Others, particularly those not exposed to conflict resolution theory, may act from "default" perspectives set by role (assumptions of competition for lawyers and economists; helping or altruistic behavior for social workers, nurses, or clergy) or "culture"[135] (the set of rules, expectations, and solutions to problems so deeply ingrained, it may feel like water to a fish, or air to humans). The people who enact conflict resolution are the ones who "mess up" the theory, failing to conform to the structures and pictures of our "rational" selves, or selves needing categories. Thus, in addition to considering how the actors differ in different contexts, such as direct negotiations, bilateral dispute resolution, representative or multi-lateral negotiations, family disputes, complex international diplomatic disputes, or international business investment or ventures, we must consider whether the great variety of human behavior can in fact be boxed in by theories of behavior that may be "culturally" specific. By "cultural" I do not mean only the crass and "monolithic" descriptions of national, ethnic, or religious culture ("do as the Romans, Chinese, Japanese, Americans, Arabs, or Israelis do," though the studies of such "national character" variations continue to proliferate, in business schools, as well as in practical "how to negotiate" guides), but the "professional cultures" that develop as well ("cosmopolitan," "international diplomatic," "legal professional," and even "negotiation" culture).[136] How do the people in conflict processes affect what is possible?

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134. Remember that so much of the work of modern cognitive and social psychology is to demonstrate departures from "rational" behavior. I have always thought that with most people who act, from many different motives, the more interesting question to explain is when people conform to "rational" modeling behavior. I prefer the question which asks, "How do people behave?" (descriptively), rather than assuming deviation from some social scientist's assumption of "rationality."

135. For a more useful exposition of "post-modern" understandings of culture, see AVRUCH, CULTURE, *supra* note 2. For a more stilted and somewhat discredited view of "cultural" determinants of negotiation behavior, see BRETT, *supra* note 12; Stephen E. Weiss, *Negotiating with "Romans" - Part 1*, SLOAN MGM'T REV., Winter 1994, at 51; Stephen E. Weiss, *Negotiating with "Romans" - Part 2*, SLOAN MGM'T REV., Spring 1994, at 85. *See also* Jeswald W. Salacuse, *Intercultural Negotiation in International Business*, 8 GROUP DECISION & NEGOTIATION 217 (1999).

136. With the growing numbers of foreign students in American business, law, and public policy schools, exposed to "our" modern negotiation theory, an international class of "problem-solving negotiators" is being created. Thus, Jeff Rubin, among others, who has trained such students has suggested that when we ask about the cultural inputs into conflict resolution behaviors we need to ask, "what culture" is affecting behavior and "under what conditions does what culture become salient?". *See* GUY-OLIVIER FAURE & JEFFREY Z. RUBIN, CULTURE AND NEGOTIATION (1993); Jeffrey Z. Rubin & Frank E.A. Sander, *Culture, Negotiation and the Eye of the Beholder*, 7 NEGOTIATION J. 249 (1991). *See also* Guy-Olivier Faure, *International Negotiation: The Cultural Dimension*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, at 392. Contrast this work to efforts to describe issues of "culture" and "diversity" or "racism" in more domestic treatments of conflict resolution. *See, e.g.*, Howard Gadlin, *Conflict Resolution, Cultural Differences and the Culture of Racism*, 10 NEGOTIATION J. 33 (1994);

As indicated above, although focus on third party interventions in disputes began in international relations (consider our study of all the great diplomatic treaties and the roles of Machiavelli, Metternich, Talleyrand, Nicolson, Chamberlain, Kissinger, Carter, George Mitchell, Kofi Annen, Ralph Bunch as international interveners), study of and classifications of third party activity seems far more advanced in domestic conflict resolution theory. With the sophisticated debates about "evaluative" vs. "facilitative" mediation[137] and whether "neutrality," "embedded expertise," or legal training is required of third party neutrals (whether mediators, arbitrators, facilitators or leaders of public policy consensus processes), the "professionalization" of the role of the third party has led to a robust set of issues for consideration in the practice of third party intervention. In the international arena, by contrast, although there are many sophisticated practitioners with diplomatic portfolios, other qualifications such as education, training on issues of neutrality, practice protocols, and ethics, seem relatively newer and underdeveloped.[138]

Indeed, for all of the successes or "failures" of modern international diplomatic negotiation (peace, trade agreements, the European Union, NAFTA, Mercosur, the Mideast, South and Latin America), the action appears to be with the NGOs, or creative academic theorists or practitioners, developing new approaches to conflict resolution, outside the formal models of international relations and diplomacy, such as "problem solving workshops," "public peace processes," and reconciliation conferences, etc. (consider Harold Saunders, John Paul Lederach,[139] John Burton, Kenneth and Elise Boulding, and Johan Galtung, just to name a few).[140]

Thus, systematic study of successful conflict resolution processes requires us to examine the individual sources of innovation, which for a newly developing field, may occur outside of the formal channels of both theory building (universities) and practice (formal state institutions in both the international and national contexts). In my view, we have yet to capture useful and generalizable principles

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THE CONFLICT AND CULTURE READER, *supra* note 102; Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55.

137. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24-50 (1996).

138. I do not mean to minimize the work of Jimmy Carter in Haiti, Camp David, or North Korea, or George Mitchell in Northern Ireland or any of the other distinguished "helpers" in the Mideast, but whenever I read reports or memoirs of these events (including the now emerging reports of the Clinton administration efforts in the Mideast), I am always startled by how little attention is paid or thought given to all of the theories, models, structures, and concepts of conflict resolution discussed above. Just what are they studying in the State Department? International relations and diplomatic schools, like Tufts University, have been teaching these principles, but the era of the "amateur" diplomat (*see* KAZUO ISHIGURO, THE REMAINS OF THE DAY 123 (1989)) seems far from being over. I have been struck by listening to reports of the "Great Negotiators" (an award now given by the Harvard Program on Negotiation each year) how devoid of references to "our" theory their reports are. Good academic synthesizers, like James Sebenius, Howard Raiffa, Roger Fisher, or Robert Mnookin, can draw out theoretical generalizations, but often practitioners do not speak the language of theory. Gatherings of domestic mediators, on the other hand, are noted for their debates about models, theories, frameworks, and competing techniques. Is there a difference in domestic and international conceptualization of the third party role? And if so, why?

139. JOHN PAUL LEDERACH, BUILDING PEACE (1997).

140. *See* Louis Kriesberg, *Varieties of Mediating Activities and Mediators in International Relations*, *in* STUDIES IN INTERNATIONAL MEDIATION, *supra* note 2, at 219-34.

from the "peace stories" told in the case studies and memoirs of participants, whether as negotiators, activists, victims, participants, or third party interveners.[141]

Useful points of comparison here are the obvious differences in the use of "interested" neutrals with "muscle" or power in international matters and the ideology, and in some cases, requirements of "neutrality" in domestic settings.[142]

VII. ALTERNATIVES TO CONFLICT AND CONFLICT RESOLUTION?

Perhaps the most salient factor distinguishing domestic from international conflict resolution is the backdrop of the "rule of law" or "violence" as "alternatives" to consensual settlements of disputes. As negotiation theory now asks us to map BATNAs, WATNAs, and ATNAs, it is particularly important to explore how the influence of courts and enforcement institutions—or the lack thereof—affect the conduct of consensual bargaining and conflict resolution. While legal enforcement is not available to all domestic disputants because of economics or access to justice and lawyers, the question of the importance of the "role of law" as a measure of fairness in litigation disputes, policy formation, resource allocation, and transactional matters is now raised in a variety of both practice and theory contexts.[143]

International relations scholars, both political scientists and lawyers, have focused on the growing diversity of enforcement mechanisms in the international arena such as trade sanctions, economic sanctions, broadening standing for private enforcement of both trade and human rights violations, censorship, peacekeeping forces, humanitarian interventions, and all-out war.[144] Whether this growing menu of sanctioning possibilities has further "legalized" the international order without a global court or effective enforcement mechanism (especially in light of recent "non-state" and "unsanctioned" U.S. unilateral actions) remains to be seen, but here some important studies of comparison to domestic settings might be appropriate. Who participates in conflicts? Those given formal "standing" by a legal authority, stakeholders, or those who threaten physical or economic security

141. In my view the most elaborated field is that of domestic consensus building in public policy and environmental disputes. *See* BACOW & WHEELER, *supra* note 5; BINGHAM, *supra* note 5; THE CONSENSUS BUILDING HANDBOOK, *supra* note 5. We are just beginning to have some reports of mediation and settlements of major litigation class actions. *See also* STUART EIZENSTAT, IMPERFECT JUSTICE (2003) (discussing Holocaust litigation against Swiss and German banks and companies); PETER SCHUCK, AGENT ORANGE ON TRIAL (1986).

142. *See* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949 (2002) (reviewing increasing regulation of neutrality and conflicts of interests issues in domestic and international arbitration); *see also* MODEL RULE FOR THE LAWYER AS THIRD PARTY NEUTRAL (developed by CPR-Georgetown Commission on Ethics and Standards in ADR 2002), *available at* http://www.cpradr.org (last visited Nov. 22, 2003).

143. *See* Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992); Robert Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U.L.Q. 47 (1996); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

144. *See* ACCOUNTABILITY FOR ATROCITIES, *supra* note 130; HUMANITARIAN INTERVENTION, *supra* note 130; Schneider, *supra* note 11.

or well-being from inside or from outside? Who intervenes? Self-appointed mediators, formally authorized actors (e.g. UN mediators, peacekeeping forces, weapons inspectors, court-appointed mediators or arbitrators, privately chosen third party neutrals)? What are the criteria used to intervene to try to settle or resolve disputes? What is the role of formal law? Is it custom? Is it power (military, economic, or political)? On what basis are agreements crafted (partial, comprehensive, contingent, permanent, trades, compromises)? What monitoring, enforcement is established?[145] Who is affected by outcomes or agreements reached (or not)? How do third parties affect the consequent or resulting situation (e.g. refugees, "ethnic cleansing," minorities, etc.)? How are non-formal enforcement mechanisms created (e.g. coalitions, multi-lateral actions, reconciliation or redistributive proceedings)? How do changing actors (new leaders, whether elected or otherwise) change the environment? How "interdependent" are parties on each other? How do multiple issues impact particular negotiations? What "linkages" are made or forced, (e.g., what "trades" occur on such issues as nuclear proliferation, economic aid, democratization)? While there are many problems of unit and level analysis here, it seems particularly useful to examine how different kinds of "alternatives" to conflict resolution mechanisms operate in different spheres.

Does the ultimate sanction of "the rule of law" or court decision affect domestic dispute resolution differently than "violence" or economic sanctions affect international disputes? What role does compliance or reputation play in both domains? Has the relative increase of formal international organizations (the International Criminal Court, the War Crimes Courts, or the WTO) affected compliance with both formal rules, norms, and less formal customs? Does a proliferation of dispute resolution mechanisms help bring order, peace, and justice, or, does it permit more strategic "gaming" or movement from one forum to another?

VIII. SOME CONCLUDING THOUGHTS: ARE THERE MORE CORRESPONDENCES OR MORE CONTRADICTIONS?

I am an optimistic person, committed to both justice and peace, to equality and democracy, and most importantly to human survival and flourishing.[146] The last few decades of the development of the field of conflict resolution, in law, business, policy, and other schools, in its interdisciplinary nature and in its practice, have been particularly exciting for all of us who have contributed ideas and hard work. I am a great admirer of grand theory and the hopes for "systematic"[147] approaches to conflict study which aim for some universal "acontextuality" across a variety of domains. Yet, I know that even from the beginning of my own work in legal negotiations, I saw the differences in litigation and transactional negotiations. I even suggested a list of "contextual" factors early on that I thought would affect how negotiations were conducted and which of several negotiation "orient-

145. *See* Arild Underdal, *The Outcomes of Negotiation*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, at 110.

146. *See* Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761 (2002).

147. *See* Howard Raiffa, *Contributions of Applied Systems Analysis to International Negotiation*, *in* INTERNATIONAL NEGOTIATION, *supra* note 2, at 5.

ing frameworks" would have to be chosen in those different contexts.[148] Perhaps I am a product of my mid-to-late twentieth century education, influenced by sociology, feminism, epistemology, post-modernism (and modernism before it), and common law legal reasoning, but to me facts matter, conditions differ, and very few "grand" and "meta-theories" in the social sciences and law have fully stood the test of time,[149] especially as we have come to ask who are the creators of theory and what are their purposes?[150] While I continue to admire those who attempt to create "acontextual" theory in our field (now focused on elaborating the differences between bi-lateral and multi-lateral negotiation),[151] applying economic, mathematical, or even psychological models to human decision making, I can't help but think, especially in light of current events (and many actors, including terrorists committed to fundamentally different belief systems, as well as our own leaders, who seem equally insensitive to global well-being), that human conflict makers and conflict resolvers will not easily be "contained" in universal boxes or categories. Because I think these things, I offer the following suggestions for future "contextualized" studies for moving our field productively along, in theory and in practice, with the hope that even without universal theories we can learn more about how to prevent deadly and dangerous conflict and violence:

1. Under what social, political, cultural, and economic conditions do particular forms of conflict resolution (adversarial, competitive, violent or collaborative, cooperative, and problem solving) emerge?

2. What kinds of interventions/actors/circumstances change the course, scope, or method of conflict resolution?

3. What kinds of circumstances require different forms of conflict resolution activities? (e.g., how does "short-term" violence prevention or amelioration differ from longer term reconciliation and relationship-developing action)?

4. What roles can "insiders" (stakeholder participants) to a conflict play?

5. What roles can "outsiders" ("interested parties," "affected parties," or "neutral parties") to a conflict play?

6. How does the locus (familial, local, national, cultural, intercultural, international) of the conflict affect the possible processes and outcomes that are available (a form of "level" or unit of analysis "reality testing")?

148. *See* Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905-37.

149. Indeed, our Constitution, flawed from the beginning with its toleration of slavery, has "lasted" only because of a Civil War (violence), many amendments (legislative and constitutional "dispute resolution and negotiation") and always changing interpretation ("post-modernism" and hermeneutics).

150. *See* SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? (1991).

151. *See* Howard Raiffa, LECTURES ON NEGOTIATION ANALYSIS (1997).

7. How much commitment to similar goals, "world views," values, or processes,[152] is required to create a "conflict resolution" process?

8. How can we develop structures, concepts, and languages that are protean enough to have explanatory purchase across domains, but "open" enough to be studied and examined across levels of disputing and conflicts?

9. What varieties of interventions and dispute processing are possible and how are they related to each other (sequencing, series, continuing, multiple or parallel tracks)? [153]

10. How can dispute processes be "elicited" from those in dispute[154] (rather than "laid down" by those outside or "on top" of a dispute)?

11. What kinds of dispute or conflict resolution processes can be "institutionalized"? Which work better when maintained in "ad hoc," flexible forms?

12. What is the relation of formal "international relations" or "civil or criminal litigation" (state-based processes) theory and practices to more informal, flexible, and ad hoc processes or institutions (NGOs, "problem-solving workshops," etc.)? How much multiple level action is beneficial/tolerable and how much leads to difficulties of coordination?

I want to end by suggesting that although I am skeptical that we will develop a fully universal theory of conflict resolution, I am optimistic to think that we will actually learn something useful by examining our concepts across levels, and accumulating more "incremental knowledge,"[155] perhaps by rigorously exploring differences in contexts, rather than assumptions of sameness, uniformity, homogeneity of, or translatability across units of analysis.

If "third party intervention" and "deadline" setting or "ripeness" look different in different contexts we will have learned something. Lawsuits, even the

152. *Compare* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000) (opining that since we will never have agreement on substantive human goods and goals, the most we can hope for is some agreement on procedural fairness for resolving conflict) *with* Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J. L. & POL'Y 37 (2002) (giving author's commentary on JUSTICE IS CONFLICT). I am no longer sure whether we are any more likely to agree to procedural goals than substantive ones. Even Hampshire, whose work I admire, "universalizes" a belief in Anglo-American "adversary argument" (audi alteram partem–"hear the other side") as the best procedure by which to resolve human conflicts.

153. *See* Harold H. Saunders, *Prenegoiation and Circum-negotiation: Arenas of the Multilevel Peace Process*, *in* TURBULENT PEACE, *supra* note 5, at 483.

154. *See* LEDERACH, *supra* note 13.

155. From my own experience, I can attest that my mediation retainer agreement has expanded over the years to more than fifteen single-spaced pages because I learn something from each new case I take and add refinements to the explanations, promises, representations, and covenants I make with parties in mediation. My resistance to a single "form" retainer agreement is similar to my distaste for grand theory, boilerplate clauses, and "off the shelf" training programs. Like my retainer agreements, every training in dispute resolution I do is tailor-made for the clients in each particular setting.

longest ones, usually settle more quickly than centuries of inter-racial or inter-ethnic conflict. The threat of an authoritative decision maker may hasten voluntary settlement over situations where there is no enforcing authority, but agreements reached consensually when there is no outside threat of decision may be longer-lasting and more easily complied with. Learning to live with differences within national boundaries or regional trade zones may provide a variety of "exemplars" for different modes of co-existence. If we are truly looking for "solutions" to domestic and international conflicts, disputes, and problems, than we should be open to as many different and contextually specific ideas as it will take. Though I doubt that there is a single theory to fit all human problems for decision, I think we can get better at it by "comparing and contrasting" specifics, rather than assuming uniformity or generality. I urge you to find your favorite conflict resolution idea, model, or concept and try it out in a few different places. Our theory and our practice will be all the richer and deeper for it.