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## Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding

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## SYMPOSIUM

# Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding

*John Lande\**

### I. INTRODUCTION

Modern negotiation theory is overwhelming. There is a wide range of concepts, issues, perspectives, theories, and applications from different disciplines with little consensus in the field. This large universe of negotiation theory continues to expand. All the while, virtually everyone negotiates and most people, including professional negotiators, do not seem to use negotiation theory very much.

To help clarify negotiation theory and make it more useful for scholars, faculty, students, and practitioners as well as people in their everyday negotiations, the University of Missouri's Center for the Study of Dispute Resolution held a symposium on October 7, 2016, entitled, "Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding."<sup>1</sup> The speakers were invited as a small sample of a diverse population of negotiation scholars and disciplines.<sup>2</sup>

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\*John Lande is Isidor Loeb Professor Emeritus and Senior Fellow of the Center for the Study of Dispute Resolution at the University of Missouri School of Law. Thanks to Rafael Gely, Andrea Schneider, Chris Honeyman, and Noam Ebner for their help in planning the *Tower of Babel* symposium.

1. *Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding*, U. OF MO. SCH. OF LAW (Oct. 7, 2016), <http://law.missouri.edu/faculty/category/csdr/16-symposium-csdr/>.

2. The speakers' disciplines include law, business, communication, urban planning, and labor relations, with speakers from the U.S., Canada, France, and Israel. The list of speakers, with links to their biographies, is available on the symposium website. See *Speakers*, U. OF MO. SCH. OF LAW (Oct. 7, 2016), <http://law.missouri.edu/faculty/event/speakers-3/>. Considering the vast scale of the negotiation field, this collection of speakers inevitably is incomplete but nonetheless provides a valuable sampling of different perspectives. Michelle LeBaron, Roy Lewicki, and Linda Putnam had planned to attend and write articles for this symposium but were unable to do so. However, they contributed their ideas in an annotated reading list and a virtual book club of conversations about these readings. See *Reading List*, U. OF MO. SCH. OF LAW (Oct. 7, 2016), <http://law.missouri.edu/faculty/event/reading-list/>; John Lande, *Negotiation Symposium Virtual Book Club*, INDISPUTABLY BLOG (July 14, 2016), <http://www.indisputably.org/?p=9341>.

There are many variations of the Biblical story of the Tower of Babel including the following:

Everyone on earth spoke the same language. As people migrated east, they settled in the land of Shinar. People there sought to make bricks and build a city and a tower with its top in the sky, to make a name for themselves, so that they not be scattered over the world. God came down to look at the city and tower, and remarked that as one people with one language, nothing that they sought would be out of their reach. God went down and confounded their speech, so that they could not understand each other, and scattered them over the face of the earth, and they stopped building the city.<sup>3</sup>

Noam Ebner offers the following interpretation of the story:

Construed literally, the biblical text relates that, suddenly, previously co-construed language lost all its shared meaning. To suggest a somewhat less literal construction of the text, perhaps their unified ideology was challenged by a plurality of ideas. Divisive diversity, and conflict itself, regained salience, trumping unity and group preservation. The city-and-tower project was abandoned, and humanity fragmented from one co-located group with a shared identity to geographically dispersed pockets of people not adhered to one another.<sup>4</sup>

Negotiation scholars are like the people of Shinar who have been scattered into a wide range of disciplines including “anthropology, business, communication, crisis intervention, economics, labor, law, international relations, organizational behavior, political science, psychology, and sociology, among others.”<sup>5</sup> We speak somewhat different “languages” and focus on different ideas, in part because we focus on different aspects of negotiation, much like the fabled group of blind men who have different images of an elephant depending on the part of the creature that they touch.<sup>6</sup>

This Article synthesizes insights from the contributors to our symposium. Illustrating the Tower of Babel-like confusion, Part II highlights challenges in even defining the nature and scope of negotiation, as well as with the widely (mis)used concepts of integrative and distributive negotiation. Part III summarizes the nature of theories and potential sources of information that might contribute to negotiation theory. Part IV identifies some fundamental challenges in developing and improving negotiation theory, including systematically flawed thinking as well as the fail-

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3. *Tower of Babel*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tower\\_of\\_Babel](https://en.wikipedia.org/wiki/Tower_of_Babel) (last visited Nov. 3, 2016).

4. Noam Ebner, *Negotiation is Changing*, 2017 J. DISP. RESOL. (forthcoming 2017).

5. John Lande, *Taming the Jungle of Negotiation Theory*, in NEGOTIATION DESK REFERENCE (Christopher Honeyman & Andrea Schneider eds., forthcoming 2017). For an excellent review of the development of negotiation theory, see Andrea Kupfer Schneider & Roy J. Lewicki, *The Past and Future Challenges of Negotiation Theory*, 31 OHIO ST. J. ON DISP. RESOL. 1, 2-11 (2016).

6. *Blind Men and Elephant*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Blind\\_men\\_and\\_an\\_elephant](https://en.wikipedia.org/wiki/Blind_men_and_an_elephant) (last visited Dec. 16, 2016).

ure to incorporate insights about fundamental changes in people and our interactions. Part V describes some negotiation frameworks growing out of our symposium that might be used to advance negotiation theory. Part VI contemplates the possibility of developing a grand unified theory of negotiation, recognizing some difficulties in doing so. Part VII is a conclusion, which notes critiques from our discussions that lay the groundwork for progress toward producing greater value and mutual understanding in negotiation theory.

## II. CONFUSING VOCABULARY ABOUT NEGOTIATION

Confusion about negotiation begins with the fact that scholars use widely different definitions of negotiation. Indeed, we even have *different conceptions of what a definition is*. Andrea Kupfer Schneider, Noam Ebner, David Matz, and John Lande intensively considered how to define negotiation and differed about whether to do so in terms of essential elements, prototypical interactions, or factors that would make interactions more or less “negotiation-ish.”<sup>7</sup> Discussing possible essential elements, we considered whether all parties must have some power, there is some effort by parties to persuade each other, there is some “pushback” between parties, there are not excessive or inappropriate persuasion tactics, people discuss their interests, they perceive they are negotiating, they are interdependent, they seek to reach agreement or joint decision, their behavior appears to observers as negotiation, or there is an agreement or changed behavior as a result of the interactions.<sup>8</sup> An alternative approach in creating definitions is by identifying “prototypes” and analyzing how much things resemble the prototypes.<sup>9</sup> Although one might think of settling lawsuits or haggling at a Middle Eastern bazaar as prototypical negotiations, we identified a remarkably wide range of interactions that are generally recognized as negotiations but are quite different from those interactions, suggesting that the prototype approach would not work.<sup>10</sup> We also considered a hybrid approach to definition of interactions that are “negotiation-ish,” i.e., that are more or less negotiation depending on whether they reflect certain characteristics. These characteristics might include whether parties perceive that they are negotiating, whether the

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7. Andrea Kupfer Schneider, Noam Ebner, David Matz & John Lande, *The Definition of Negotiation: A Play in Three Acts*, 2017 J. DISP. RESOL. (forthcoming 2017).

8. *Id.*

I reviewed thirteen general negotiation texts from various disciplines, of which nine included definitions of negotiation (including one text that provided three definitions from different sources). There was nothing even close to a consensus about essential elements of negotiation.

Of these eleven definitions, six indicated that negotiation is interpersonal (i.e., involving two or more people), and six indicated that it involved communication. Five books indicated that negotiators were interdependent as they could not achieve their goals without the others and five books indicated that the negotiators had differing interests. Other definitions stated that negotiation involves matters of common concern, reasoned discussion and problem-solving processes, shared understandings, efforts to reach agreement, goals of coordinating behavior or allocating scarce resources, or changing people’s relationships with others or objects.

Lande, *supra* note 5 (citations omitted). See also John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 12-16 (2014) (elaborating differences in definitions of negotiation in law school negotiation texts).

9. Schneider et al., *supra* note 7 (citing Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Theory-Skills Divide*, 64 J. LEGAL EDUC. 181, 183-84 (2014)).

10. Schneider et al., *supra* note 7.

parties are interdependent and trying to improve their situations through the interaction, whether they communicate with each other, and whether they reached agreement or take action as a result of the interaction.<sup>11</sup> There was no agreement between the four authors about which approach to take, what elements of should be included in any particular approach, or even whether to use a relatively narrow or broad conception of negotiation. Thus, negotiation may be like the famously ambiguous concept of pornography, that we (think we) know it when we see it<sup>12</sup> – though various people “know” different things to be negotiation.

Along the same lines, Rishi Batra examines the confusion about the terms “integrative” and “distributive” negotiation, perhaps the most widely used terminology in our field. He notes that these terms sometimes are used referring to negotiators’ mindsets, behaviors, approaches, styles, structures, and even negotiators themselves.<sup>13</sup> The terms are heavily value-laden, inappropriately suggesting that there is a generally right and wrong way to negotiate.<sup>14</sup> Moreover, it is unclear if the terms provide an accurate portrayal of reality or whether they actually function as lenses that distort our understandings.<sup>15</sup> Given these problems, he writes that we might avoid using these terms, use other terms, or use these terms for their historical value.<sup>16</sup> He suggests referring to these terms noting the problems with them and using clear definitions.<sup>17</sup> For example, one might define a negotiator’s integrative mindset as “looking for joint gains in a negotiation.”<sup>18</sup> Although he focuses on the use of these terms in teaching, his observations also are relevant for scholars.

### III. NATURE AND SOURCES OF NEGOTIATION THEORY

The concept of theory has multiple meanings but in this context, a theory is a “plausible or scientifically acceptable general principle or body of principles offered to explain phenomena”<sup>19</sup> or, more simply, a “generalized explanation[] of how nature works.”<sup>20</sup> Consider the following widely-recognized phenomenon in negotiation. Clark Freshman and Chris Guthrie note “solid and consistent empirical research [showing] that negotiators with more ambitious goals outperform negotiators with more modest goals.”<sup>21</sup> Of course, negotiators with higher goals do not always get better results for various reasons, such as a counterpart negotiator’s possibly relatively greater skill or negative reaction to extreme demands. Moreover, the mere correlation between higher goals and more favorable results is not a causal

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11. *Id.*

12. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that he could not define hard-core pornography but he knows it when he sees it).

13. Rishi Batra, *Using the Terms Integrative and Distributive Bargaining in the Classroom: Time for Change?*, 2017 J. DISP. RESOL. (forthcoming 2017).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Theory*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/theory> (last visited Dec. 24, 2016).

20. *Theory*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Theory> (last visited Dec. 24, 2016) (footnotes and links omitted).

21. Clark Freshman & Chris Guthrie, *Managing the Goal-Setting Paradox: How to Get Better Results from High Goals and Be Happy*, 25 NEG. J. 217, 219 (2009).

theory because it does not explain what about having higher goals is related to getting better results.

A causal theory must include a causal mechanism linking the causal factor and the result.<sup>22</sup> For example, negotiators may set higher goals because of greater self-confidence, knowledge, skill, self-interested orientation, or perhaps other factors that actually cause better results. A critical step in establishing causal theories is ruling out rival theories,<sup>23</sup> which requires multiple studies to produce confidence in the results. This is very difficult because negotiation is such a complex phenomenon involving so many potential causal variables including contextual differences, which may be particularly significant, as Adrian Borbély and colleagues point out.<sup>24</sup> Moreover, much of the empirical research on negotiation is based on laboratory experiments of simulated negotiations. As David Matz and Adrian Borbély argue, research using this methodology can help explain discrete elements of negotiation, but it has limited external validity, “skim[ming] over the complexity of real-life negotiations.”<sup>25</sup>

Prescriptive theories – general advice about how to act – can be related to descriptive causal theories. This is particularly important in the negotiation context considering the great frequency that people negotiate and their need to choose desirable negotiation strategies. There may be a clear link between empirically-based descriptive theories or principles (such as higher goals lead to better results) and prescriptive theories (such as advice recommending that negotiators should start by making extreme demands).

Although causal theories that are well validated empirically are ideal, there is a paucity of empirically-validated theories of negotiation and so people must rely on knowledge that is based on less rigorous methods. Some understandings are based on less persuasive sources such as conventional wisdom, anecdotes, hypothetical cases, and “common sense,” but some more useful knowledge is based on sources such as suggestive empirical data, logical analysis, clinical experience, historical analysis, and literary insights.

Matz and Borbély argue that book-length detailed accounts of actual negotiations can provide insights that we cannot learn from other sources and thus could change our generally accepted thinking about negotiation.<sup>26</sup> Scholars can use these accounts inductively to develop new theories and deductively to test existing theories of negotiation dynamics.<sup>27</sup> For example, these accounts can help explain negotiators’ perception of their choices, the dynamics of the process as it unfolded, as well as analysis of things that they did not perceive and why they changed their

22. NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 343 (2013).

23. *Id.*

24. Adrian Borbély et al., *A “Grand” Unified Negotiation Theory... in Context*, 2017 J. DISP. RESOL. (forthcoming 2017).

25. David Matz & Adrian Borbély, *Learning from Book-Length Accounts of Historical Negotiations*, 2017 J. DISP. RESOL. (forthcoming 2017). David Matz and I discussed some methodological questions in producing and analyzing data about actual negotiations. See John Lande, *Symposium Book Club – Conversation with David Matz about Lande’s Framework for Advancing Negotiation Theory*, INDISPUTABLY BLOG (July 26, 2016), <http://www.indisputably.org/?p=9450>.

26. Matz & Borbély, *supra* note 25.

27. *Id.* See John Lande, *Symposium Book Club – Conversation with David Matz about Lawrence Wright’s Thirteen Days in September*, INDISPUTABLY BLOG (Aug. 23, 2016), <http://www.indisputably.org/?p=9582> (discussing insights from book-length account of the 1978 Camp David negotiation with Israel and Egypt).

minds.<sup>28</sup> Matz and Borbély suggest that although more routine negotiations are less likely to be as complex, involve sophisticated parties, and evoke as much emotion as in larger-scale negotiations, routine negotiations are likely to manifest many of the same dynamics as in the bigger cases.<sup>29</sup>

I share their concern that negotiation scholars and teachers have become too comfortable with simple theories based on hypothetical situations and selective or misleading data from actual negotiations.<sup>30</sup> So, I strongly agree with their recommendation to use real negotiations to test our theories and develop better ones.<sup>31</sup> The book-length accounts that they recommend have great value, though they inevitably are imperfect and major negotiations described in these books have idiosyncratic elements. Thus, it is hard to analyze a substantial number of comparable cases and generalize insights from them to more routine cases.<sup>32</sup> I argue that it is important to complement analyses of a small number of large negotiations with a larger number of smaller cases. I recommend that scholars conduct new research on actual negotiations.<sup>33</sup> One way for faculty to do so is to require students to produce them as course assignments.<sup>34</sup> Doing so could not only yield valuable data for scholars but also help students learn about the reality of negotiation and become better observers and practitioners. Rishi Batra also recommends empirical analysis of actual negotiations, particularly through careful observation.<sup>35</sup>

David Matz notes that literary works can be particularly helpful in developing an emotional understanding of the experience of negotiating and its relationship to negotiation behavior.<sup>36</sup> Similarly, Rebecca Hollander-Blumoff argues that literature can crystallize human experience, touching people, and capturing their imagination to yield useful insights relevant to negotiation.<sup>37</sup> She provides vivid illustrations of the potential of offering new and nuanced insights about negotiation by analyzing three novels. She contrasts common negotiation theory about the importance of using objective criteria with the insights of a furniture dealer in Donna

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28. Matz & Borbély, *supra* note 25.

29. *Id.*

30. John Lande, *Building Theory from Real Life Negotiations*, 2017 J. DISP. RESOL. (forthcoming 2017).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* See John Lande, *A Cool Course Assignment for next Semester — and a Scholarship Opportunity*, INDISPUTABLY BLOG (Dec. 15, 2016), <http://www.indisputably.org/?p=10169>; John Lande, *Documents for the Cool Course Assignment*, INDISPUTABLY BLOG (Jan. 8, 2017), <http://www.indisputably.org/?p=10209>.

35. Batra, *supra* note 13. See also John Lande, *Symposium Book Club – Conversation with Rafael Gely about Walton and McKersie’s A Behavioral Theory of Labor Negotiations*, INDISPUTABLY BLOG (July 19, 2016), <http://www.indisputably.org/?p=9388> (noting careful sociological study underlying Walton and McKersie’s classic book).

36. See *Reading List*, *supra* note 2. See also John Lande *Symposium Book Club – Conversation with David Matz about Lee Blessing’s Walk in the Woods*, INDISPUTABLY BLOG (July 15, 2016), <http://www.indisputably.org/?p=9345> (play portraying fictional conversations between American and Soviet arms control negotiators); John Lande, *Symposium Book Club – Conversation with David Matz about David Grossman’s to the End of the Land*, INDISPUTABLY BLOG (Aug. 24, 2016), <http://www.indisputably.org/?p=9585> (novel contrasting the experience of an Israeli woman with others’ perceptions of her); John Lande, *Symposium Book Club – Summary of Michelle Lebaron’s Suggested Readings about Understanding Different Worldviews*, INDISPUTABLY BLOG (Aug. 15, 2016), <http://www.indisputably.org/?p=9542> (highlighting the importance of understanding individuals’ perspectives and relationships in understanding conflict).

37. Rebecca Hollander-Blumoff, *Novel Negotiation*, 2017 J. DISP. RESOL. (forthcoming 2017).

Tartt's novel *The Goldfinch*.<sup>38</sup> The furniture dealer argued that "There was really no such thing as a 'correct' price. . . . An object – *any* object – was worth whatever you could get somebody to pay for it."<sup>39</sup> A second novel, *Life After Life*,<sup>40</sup> imagines the life of one woman lived over and over again with different narrative arcs and different outcomes. Although this novel doesn't deal with negotiation per se, it illustrates the vast contingency of life in which people are "interconnected in a web of behavior and circumstances" in which they cannot "be the sole determinant of the process or the outcome."<sup>41</sup> A third novel provides careful portraits of a German soldier and French resistance fighter in World War II.<sup>42</sup> It does not focus on negotiation but nonetheless helps appreciate the value of empathy, which can be an important element in negotiation.<sup>43</sup>

#### IV. CHALLENGES IN DEVELOPING GOOD NEGOTIATION THEORY

Sanda Kaufman, Christopher Honeyman, and Andrea Kupfer Schneider assess successes and failures of negotiation theory as a useful resource for Western negotiators.<sup>44</sup> Although they focus on negotiation of major intractable conflicts, particularly Middle East and international climate change negotiations, their insights may be applicable generally to negotiation theory. They begin by noting some successes in the dissemination of contemporary negotiation theory including the use of the language of conflict resolution, attempts to see conflicts from others' perspectives, appreciation of others' cultures, balanced perspectives (rather than extreme attributions of "us" and "them"), apologies, demonstration of efforts to cooperate, setting goals of joint benefit, and opposition to use of violence.<sup>45</sup> Even so, they argue that decision makers and interveners often fail to follow sound negotiation theory in handling major conflicts. They use psychologist Dietrich Dörner's work to identify eight reasons why they use flawed problem-solving approaches. These include:

- (1) decision makers' lack of attention to context, (2) ignoring scale and uniqueness, (3) failure to predict outcomes and anticipate decision side effects and long-term repercussions (due to a focus on isolated cause-and-effect relationships), (4) the cumulative effects of numerous small judgmental mistakes, over-generalizations, and rigid mental models of reality, (5) frozen frames, with low tolerance for uncertainty, (6) a tendency to solve the problem we can solve instead of the one we ought to solve, (7) the conviction that everyone's intentions are unquestionably good, (8) and impatience with low-feedback systems.<sup>46</sup>

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38. *Id.*; DONNA TARTT, *THE GOLDFINCH* (2013).

39. Hollander-Blumoff, *supra* note 37 (quoting TARTT, *supra* note 38, at 452).

40. KATE ATKINSON, *LIFE AFTER LIFE* (2013).

41. Hollander-Blumoff, *supra* note 37.

42. *Id.* (discussing ANTHONY DOERR, *ALL THE LIGHT WE CANNOT SEE* (2014)).

43. *Id.*

44. Sanda Kaufman, Christopher Honeyman & Andrea Kupfer Schneider, *Should they Listen to Us? Seeking a Negotiation / Conflict Resolution Contribution to Practice in Intractable Conflicts*, 2017 J. DISP. RESOL. (forthcoming 2017).

45. *Id.*

46. *Id.* (citing DIETRICH DÖRNER, *THE LOGIC OF FAILURE: RECOGNIZING AND AVOIDING ERROR IN COMPLEX SITUATIONS* (1989)).



They argue that negotiation theory is generally based on transactional negotiations, where the dynamics differ from negotiations of conflicts.<sup>47</sup> As suggested in other articles in this symposium edition, they argue that negotiation theory focuses too much on the internal dynamics of negotiation and fails to adequately consider contextual factors such as “geopolitics, governance systems, economy, culture, or history, and their contribution to observed outcomes.”<sup>48</sup> Negotiation theory has incorporated insights from behavioral economics about cognitive errors of negotiators but theorists often fail to recognize their own cognitive errors. For example, theorists are subject to confirmatory bias, reinforcing our existing beliefs and causing us to neglect other possible explanations.<sup>49</sup> Moreover, Kaufman and her colleagues argue that negotiation theory naively and paternalistically privileges cooperation and even-handedness as ends in themselves rather than as means to obtain desired goals when appropriate.<sup>50</sup>

Noam Ebner offers an even more fundamental critique of negotiation theory. Based on an extensive review of how people and their everyday behaviors have radically changed in recent years, he argues that “people-as-negotiators, and therefore negotiation itself, ha[s] also undergone significant change.”<sup>51</sup> Although he focuses primarily on technological changes, he notes that other factors, such as gender, culture, and the environment have been changing rapidly, which may contribute to changes in negotiation.<sup>52</sup> “Once you look for change, it is everywhere.”<sup>53</sup> He describes how people’s bodies (especially our brains) are physiologically changing, and how we are changing our behaviors, are being changed by our new behaviors, and are interacting in new ways.<sup>54</sup> He illustrates his thesis by describing changes in behavioral, psychological, and emotional elements of negotiation including attention, communication, empathy, and trust.<sup>55</sup> He uses these points to show how these elements of the classic book, *Getting to Yes*, are different than they used to be.<sup>56</sup> Moreover, the overall effects of these changes may be greater than the sum of the individual changes.<sup>57</sup> As a result, he argues that the “negotiation field must explore whether its most foundational skills, and the principles it has accepted near-axiomatically for the past fifty years, can remain unaltered, given negotiator change and negotiation change.”<sup>58</sup> He notes that negotiation scholars and teachers are “prone to the status quo bias, given our vested interest in things staying largely the same, allowing us to use largely the same textbooks and teach the same courses”

47. Kaufman et al., *supra* note 44.

48. *Id.* For other articles discussing failure to consider negotiation context, see Borbély et al., *supra* note 24; Matz & Borbély, *supra* note 25. See also John Lande, *Symposium Book Club – Conversation with Adrian Borbély about Organizational Negotiation*, INDISPUTABLY BLOG (July 28, 2016), <http://www.indisputably.org/?p=9477> (discussing dynamics of organizations as negotiating entities).

49. Kaufman et al., *supra* note 44.

50. *Id.*

51. Noam Ebner, *Negotiation is Changing*, 2017 J. DISP. RESOL. (forthcoming 2017).

52. *Id.*

53. *Id.* See also John Lande, *Symposium Book Club – Conversation with Rishi Batra about “The Half Life of Facts,”* INDISPUTABLY BLOG (Aug. 25, 2016), <http://www.indisputably.org/?p=9588> (discussing Samuel Arbeson’s theory about certain phenomena that change so slowly that we do not notice the changes and thus do not realize that our understandings are outdated).

54. Ebner, *supra* note 51.

55. *Id.*

56. *Id.* (citing ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011)).

57. Ebner, *supra* note 51.

58. *Id.*

rather than questioning the validity of our traditional canon of negotiation theory.<sup>59</sup> He urges us to undertake a new research agenda, considering this canon through “a combination of candid reflection and research replication [and] subject it to tests of relevancy, accuracy and suitability.”<sup>60</sup>

## V. THEORETICAL FRAMEWORKS

Contributors to this symposium have suggested several new frameworks for understanding negotiation. These frameworks identify conceptual distinctions and organizing ideas but are not theories as described above in Part III.<sup>61</sup> Based on their reading of full-length accounts of negotiations described above, David Matz and Adrian Borbély identify five key variables that are critical in understanding negotiation: “ghosts,”<sup>62</sup> history, interactions, uncertainty, and power.<sup>63</sup>

Adrian Borbély, Noam Ebner, Christopher Honeyman, Sanda Kaufman, and Andrea Kupfer Schneider suggest an approach to address the challenge of uncertainties in negotiation. They propose a two-part structure of (1) ideas common to all negotiations and (2) factors that vary depending on the context.<sup>64</sup> The first part would include “items such as interdependence, mutual gains and beneficial tradeoffs, the necessity to prepare for negotiation, the importance of discovering interests behind positions, the potential gap between intent and impact in communicating with the other party, the role played by one’s best alternative to a negotiated agreement (BATNA), and the potential value-added of an intervener in certain situations.”<sup>65</sup> The second part would consist of “context-specific elements—the particular norms, processes and habits of negotiation in particular contexts, such as sales, procurement, management, public decisions, plea bargaining or international settings.”<sup>66</sup> In particular, they suggest that the contexts will vary in terms of the stakes, settings, and scope of particular negotiations, as well as the particular users and audiences of the theories.<sup>67</sup> They argue that negotiation theorists’ challenge is to “conceptualize the gap between the current state of general negotiation theory and any context’s own perspective.”<sup>68</sup>

The symposium speakers collectively generated an annotated bibliography of scholarship on negotiation<sup>69</sup> and I collected some of the key frameworks from these

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59. *Id.*

60. *Id.*

61. See *Conceptual Framework*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Conceptual\\_framework](https://en.wikipedia.org/wiki/Conceptual_framework) (last visited Dec. 28, 2016). For example, the economic concepts of supply and demand constitute a framework but they do not explain the effects of changes in supply and demand. *Id.*

62. They define ghosts as “players in the minds of the negotiators, players to whom the negotiators feel accountable, players who may have given instructions beforehand, players whose views are imagined by the speakers as facts unfold, who may be literally on-call or only imaginatively so, who may be individuals or constituencies.” Matz & Borbély, *supra* note 25.

63. *Id.*

64. Borbély et al., *supra* note 24.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *Reading List*, *supra* note 2. The literature on negotiation theory is vast, especially considering the wide range of disciplines that deal with negotiation. So, the reading list inevitably was far from comprehensive, but it provided a collection of readings that the speakers believed to provide some of the most useful ideas about negotiation, ranging from classics to some of the latest contributions to the field.

readings as part of the symposium's "virtual book club."<sup>70</sup> Based on a review of negotiation texts from various disciplines, I created an outline of theoretical issues and virtually all the elements of the frameworks in the symposium readings could fit into this outline.

*In General*

- Definition of Negotiation
- Disputes, Transactions, and Decision Making
- Complexity, Uncertainty, and Risk
- Theoretical Perspectives

*Negotiation Structure and Process*

- Motivations, Goals, and Interests
- Negotiation Models
- Alternatives to Negotiated Agreement and Bargaining Zone
- Criteria of Success
- [Structure and] Stages of Negotiation
- Negotiation Strategy and Planning
- Information Bargaining
- Escalation, Impasse, and Failure to Agree
- Overcoming Barriers to Agreement
- Legal and Ethical Constraints

*Individual Negotiators*

- Individual Qualities and Skills
- Identity [including gender, race, ethnicity, national origin, religion, and culture]
- Perception, Cognition, and Emotion
- 

*Negotiation Relationships*

- In General
- Reputations
- Agents, Teams, and Leadership
- Multiple Parties and Coalitions
- Negotiation Audiences

*Negotiation Interactions*

- Communication Modes
- Communication Units and Sequences
- Trust
- Fairness and Justice
- Power and Influence<sup>71</sup>

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70. John Lande, *Symposium Book Club – Summary of Negotiation Frameworks*, INDISPUTABLY BLOG (July 14, 2016), <http://www.indisputably.org/?p=9637>.

71. Lande, *supra* note 5. This chapter describes each element in the outline.

Although there was some overlap in the structure and content of the texts I reviewed, there were striking differences between them, and I developed this outline by synthesizing key elements from those texts. Of course, this outline is not the only way that one could organize elements of negotiation theory as one could revise this outline by adding, deleting, or modifying elements.

Many of the categories in this outline contain useful theories. For example, the category of fairness and justice includes theories of procedural justice, which has been the subject of extensive empirical research and causal theorizing.<sup>72</sup> Elements in the outline can be used as building blocks for causal theories. Many variables within each category can be considered as causes of particular effects in negotiation. For example, one can theorize that negotiators' motivations may affect the strategies they use. Depending on one's focus, a variable may be a cause or effect. Thus, one could consider negotiators' strategies as causal factors affecting particular outcomes in addition to being the causal result of negotiators' motivations.

## VI. POSSIBILITY OF A GRAND UNIFIED THEORY OF NEGOTIATION

This symposium stimulated serious discussion of whether it would be possible to develop a grand unified theory of negotiation and, if so, what it might look like.<sup>73</sup> Adrian Borbély and company identify a challenge of developing what might be called a "Goldilocks unified theory" of negotiation: one that is neither too general nor too specific.<sup>74</sup> If it is too general because it lacks contextual variation, it is unlikely to be helpful in understanding or conducting negotiation.<sup>75</sup> If it is too specific because it has too much context, it also would not be very useful because it would miss commonalities across contexts.<sup>76</sup> Thus, rather than aiming for a single unified theory, they suggest that it may be more fruitful to develop a "'theory of context' generalizing contextual impacts on negotiation, beyond any specific context."<sup>77</sup>

As an instructive parallel to aspirations for a grand unified theory of negotiation, Noam Ebner provides a useful summary of unsuccessful attempts of theoretical physicists to develop a unified "theory of everything."<sup>78</sup> He identifies three potential parallels for negotiation theory. First, physicists have not reached consensus about whether things can be predicted with certainty or whether there inevitably will be some uncertainty so that physicists can know things only generally without being able to predict how things will occur in each particular situation.<sup>79</sup> Second, physicists keep discovering new phenomena and thus their theories have been incomplete, needing to be revised to accommodate new discoveries.<sup>80</sup> Third, there has been conflict between physicists about their theories, which has been constructive in some instances and not others.<sup>81</sup> Ebner hopes that negotiation theorists can

72. See Rebecca Hollander-Blumoff, *Just Negotiations*, 88 WASH. U. L. REV. 381 (2010).

73. See Lande, *supra* note 53.

74. Borbély et al., *supra* note 24.

75. *Id.*

76. *Id.*

77. *Id.*

78. See Noam Ebner, *On the Forming of Unified Field Theories*, 2017 J. DISP. RESOL. (forthcoming 2017).

79. *Id.*

80. *Id.*

81. *Id.*

successfully cooperate as they try to integrate multiple worldviews into a unified theory.<sup>82</sup>

## VII. CONCLUSION

Our current negotiation theory needs improvement. As we develop better negotiation theory, we should start by appreciating the valuable work that has been done by our predecessors.<sup>83</sup> Moving forward, we should acknowledge that scholars are subject to the same cognitive biases that we document in our work. For example, it is easy to fall prey to the status quo and confirmatory biases that keep us from developing better understandings of negotiation. Thus, we should take conscious action to carefully consider how traditional ways of thinking distort our understandings and whether there are better ways to understand negotiation. This is particularly important considering that people – and negotiation – are constantly changing and at accelerating rates.

We can make a good start in improving negotiation theory by clarifying our vocabulary. Although it would be unrealistic to expect that everyone will use words with the exact same meaning, it should be possible to improve our communication so that we can better understand each other. We will not be able to develop a single, universally-accepted definition of negotiation, for example, but it may be possible to move toward a more commonly-accepted way of understanding it.<sup>84</sup>

More generally, it would help to use clearer language instead of much of our jargon.<sup>85</sup> In particular, the widely-used two-model system in negotiation theory

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82. *Id.*

83. For a review of the history of negotiation research, see John Lande, *Symposium Book Club – Conversation with Roy Lewicki about Key Issues in Negotiation*, INDISPUTABLY BLOG (July 18, 2016), <http://www.indisputably.org/?p=9375> (summarizing discussion in Roy Lewicki, *Teaching Negotiation: The State of the Practice*, in HANDBOOK OF CONFLICT MANAGEMENT RESEARCH 493-95 (Oluremi B. Ayoko, Neal M. Ashkanasy & Karen A. Jehn eds., 2014)). See also John Lande, *Symposium Book Club – Conversation with Sanda Kaufman about Decision-Making*, INDISPUTABLY BLOG (July 20, 2016), <http://www.indisputably.org/?p=9398> (discussing classic books by Thomas Schelling, Howard Raiffa, and Daniel Kahneman); John Lande, *Symposium Book Club – Conversation with Sanda Kaufman about Schelling’s Strategy of Conflict*, INDISPUTABLY BLOG (July 21, 2016), <http://www.indisputably.org/?p=9420>; John Lande, *Symposium Book Club – Conversation with Sanda Kaufman about Raiffa’s Art and Science of Negotiation*, INDISPUTABLY BLOG (July 24, 2016), <http://www.indisputably.org/?p=9428>; John Lande, *Symposium Book Club – Summary of Classics on Interest-Based Negotiation*, INDISPUTABLY BLOG (July 25, 2016), <http://www.indisputably.org/?p=9439> (summarizing ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) and Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984)); John Lande, *Symposium Book Club – Conversation with Sanda Kaufman about Wheeler’s Art of Negotiation*, INDISPUTABLY BLOG (Aug. 16, 2016), <http://www.indisputably.org/?p=9546>; John Lande, *Symposium Book Club – Conversation with Sanda Kaufman about Kahneman’s Book, Thinking, Fast and Slow*, INDISPUTABLY BLOG (Aug. 17, 2016), <http://www.indisputably.org/?p=9553>.

84. Communication scholars can provide some useful concrete concepts for describing aspects of negotiation. See John Lande, *Symposium Book Club – Conversation with Linda Putnam about Communication in Negotiation*, INDISPUTABLY BLOG (Aug. 22, 2016), <http://www.indisputably.org/?p=9614> (describing a wide range of concepts that communication scholars use in analyzing negotiation).

85. James Sebenius appropriately criticizes “obscurantist language” and recommends a “general presumption is against the use of jargon.” James K. Sebenius, *Why A Behavioral Theory of Labor Negotiations Remains a Triumph at Fifty but the Labels “Distributive” and “Integrative” Should Be Retired*, 31 NEG. J. 335, 343 (2015).

(often referred to as integrative and distributive negotiation) is especially problematic and people should use better concepts. In addition to Rishi Batra's<sup>86</sup> and Rafael Gely's<sup>87</sup> contributions in this symposium on this subject, Andrea Schneider argues that the integrative and distributive "labels" are confusing, repetitive, and simultaneously underbroad and overbroad, and that they conflate general negotiation approaches and specific negotiation tasks without explaining the skills needed to perform the tasks.<sup>88</sup> James Sebenius critiques the integrative-distributive "folklore" of negotiation, which confuses issues (such as the division of money, which is not inherently distributive or integrative) with negotiators' behavior in seeking joint gains or not.<sup>89</sup> Moreover, he notes that reference to distributive and integrative "models" gives the false impression that they are distinct and coherent models.<sup>90</sup> I compared conceptions of the two traditional negotiation models as described in law school negotiation texts with descriptions of actual negotiations and found the theoretical definitions sometimes did fit the cases I studied. The texts did not use a consistent definition of the models and, collectively, they described a bundled set of variables that, in practice, were not always correlated with each other.<sup>91</sup>

Negotiation theory needs to better reflect the reality of negotiation. We need more empirical research that accurately portrays negotiators' perspectives and that focuses on actual negotiations with all their contextual complexities. There are many ways to produce this knowledge including detailed case studies of major negotiations, studies of a larger number of smaller and more routine negotiations, and observations of actual negotiations. Perhaps paradoxically, we may also gain deeper insights into the reality of negotiation by focusing on fiction and the arts.<sup>92</sup>

In our *Tower of Babel* symposium, we discussed whether it is possible to develop a unified theory that would integrate knowledge about negotiation into single comprehensive understanding. This would be a daunting undertaking, especially considering that physicists have been unable to develop a unified theory of physics despite investment of much greater resources over a longer period of time. Nego-

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86. Batra, *supra* note 13.

87. See Lande, *supra* note 35 (discussing problems with the integrative-distributive negotiation typology).

88. Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13, 19-24 (2012). She recommends using the terms assertiveness, empathy, flexibility, social intuition, and ethicality. *Id.* For further discussion, see John Lande, *Symposium Book Club – Conversation with Andrea Schneider about Her Skills Paradigm Article*, INDISPUTABLY BLOG (Aug. 18, 2016), <http://www.indisputably.org/?p=9570>.

89. Sebenius, *supra* note 85, at 336-40, 342.

90. *Id.* at 340-42. He advocates using, instead, the terms "creating value" and "claiming value." *Id.* at 343-44.

91. Lande, *supra* note 8, at 18-36. I recommend that, rather than using the bundled models, we use instead a framework consisting of the following *unbundled* variables (i.e., that are not assumed to vary with each other): "(1) the degree of concern, if any, negotiators have for the other side, (2) the communication process used in trying to reach agreement, (3) the extent that negotiators create value in the negotiation, (4) the negotiators' tone, (5) the use of power in negotiation, and (6) the source of norms that negotiators use." *Id.* at 9, 46-54. For discussion of my framework, see Lande, *supra* note 25; Lande, *supra* note 35. The variables in this framework can readily fit into the overall framework described above. See *supra* text accompanying note 71.

92. See Hollander-Blumoff, *supra* note 37; John Lande, *Symposium Book Club – Summary of Michelle LeBaron's Articles about Culture and Negotiation Theory*, INDISPUTABLY BLOG (Aug. 14, 2016), <http://www.indisputably.org/?p=9533> (arguing that "both arts and science need to inform development of the negotiation field moving forward").

tiation theorists have an additional challenge that physicists do not face in that, unlike basic physical matter and energy, negotiation inevitably involves humans' agency and subjectivity. These human factors exponentially complicate negotiation theorists' efforts due to the huge number of variables that are difficult to define, measure, and predict. Moreover, a unified negotiation theory seems unlikely considering the very broad range of phenomena involved in negotiation, the multiplicity of disciplinary perspectives, and the limited empirical research about actual negotiation.

This symposium had the more modest goal of moving toward greater mutual understanding of negotiation. While producing a unified *theory* may not be realistic (especially in the short-term), it might be possible to develop a generally-accepted theoretical *vocabulary and conceptual framework*. Even this would be an ambitious undertaking considering all the perspectives, contextual variations, individuals, and institutions involved. There is no central decision-making entity to issue authoritative edicts on language or concepts. Moreover, life and negotiation are constantly changing, so our understandings of negotiation must regularly change as well. However, with careful reflection, observation, and conversation, we may be able to move together to communicate more clearly and develop increasingly valid approximations of reality.

Andrea Schneider and Chris Honeyman, my friends and collaborators in planning this symposium, have been both part of the problem and part of the solution in developing good negotiation theory. Their leadership over more than a decade has contributed to the ever-expanding sprawl of negotiation theory, making it increasingly difficult to understand this central part of the dispute resolution world.<sup>93</sup> Their contribution to this symposium, as part of their larger project, hopefully will help us organize our knowledge in a meaningful and helpful way. This has been a project of a large segment of our field including, but by no means limited to, the contributors to the *Tower of Babel* symposium. Going forward, hopefully additional scholars, teachers, students, and practitioners will join in this quest.

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93. For a description of the history of their work on negotiation theory, see Borbély et al., *supra* note 24.