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Building Negotiation Theory from Real-Life Negotiations

John Lande*

I. INTRODUCTION

For this symposium on improving negotiation theory, Professors David Matz and Adrian Borbély wrote an excellent article advocating the use of full-length accounts of actual negotiations to develop more realistic negotiation theory.¹ They propose using “full-length accounts databases against which to measure good practice prescriptions.”² Their article illustrates how we can use rich data from actual negotiations to build and ultimately test negotiation theories. Based on their reading of full-length accounts of negotiations, they suggest five key variables that are critical in understanding negotiation: “ghosts,”³ history, interactions, uncertainty, and power. Their observations provide a useful framework for further analysis and testing.

I strongly agree with their idea of using real negotiations to test our theories and develop better ones. Our field has become too comfortable with simple theories based on hypothetical situations and selective or misleading data from actual negotiations. For example, as Professors Matz and Borbély note, *Getting to Yes*, a classic in negotiation, provides an inaccurate account of the Camp David negotiation process.⁴ Similarly, in my study of actual negotiations, the two-model structure of negotiation theory popularized by *Getting to Yes* did not fit several negotiations.⁵

As Professors Matz and Borbély suggest, laboratory experiments of simulated negotiations can clarify elements of negotiation, but they have limited external validity, “skim[ming] over the complexity of real-life negotiations.”⁶ Similarly, surveys asking negotiators to characterize aspects of negotiations can be helpful but generally do not provide a realistic understanding of context and process, which are central to negotiation phenomena.

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1. David Matz & Adrian Borbély, *Learning from Book-length Accounts of Historical Negotiations*, 2017 J. DISP. RESOL. 41 (2017). This article considers mediation as a species of negotiation despite some differences between them in theory and practice. There is substantial overlap in the processes and accounts of mediations may be useful for analysis of negotiation.

2. Matz & Borbély, *supra* note 1.

3. 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 1.

4. Matz & Borbély, *supra* note 1.

5. 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, 16-46 (2014).

6. Matz & Borbély, *supra* note 1.

In this brief Article, I suggest that in developing negotiation theory, scholars should consider a wide range of accounts of actual negotiations.⁷ The book-length accounts that Professors Matz and Borbély recommend have a lot of value, though they inevitably are imperfect, subject to empirical biases, as described in Part II. In addition, some shorter accounts can provide valuable theoretical insights, as described in Part III. While existing accounts of actual negotiations can be useful for scholars, Part IV argues that creating new data designed to analyze real negotiations should be an important part of a serious research program to develop more realistic negotiation theory. It describes ways to produce more accounts of actual negotiations, particularly by faculty requiring students to produce them as course assignments, noting advantages and disadvantages of various approaches.

II. METHODOLOGICAL LIMITATIONS ON DEVELOPING GOOD THEORY FROM ACTUAL NEGOTIATIONS

It is a truism that it is impossible to gain perfectly accurate knowledge of human behavior through any empirical research method. Every method is subject to some biases that can lead to observations deviating from reality in various ways. Social science studies are subject to various sources of error such as “dishonest survey responses, memory failure, temporal variability, indirect measurements of unobservable objects of study, selective reporting, coding error, interrater reliability problems, and unrealistic measurement conditions.”⁸ As noted in our symposium conversations, accounts of negotiations are subject to biases such as faulty memory, self-serving interests, conceptual lenses, and cultural experiences and worldviews.⁹

Full-length accounts provide opportunities for very thorough understandings of negotiations through careful review of documentation, historical analysis, and interviews of multiple actors. However, even meticulously studied negotiations, such as Lawrence Wright’s account of the Camp David negotiations in *Thirteen Days in September*,¹⁰ are not immune from biases. Interview subjects have self-serving biases and public officials have particular interests in portraying themselves favorably. Actors have conflicting perspectives and it can be hard or impossible to reconcile conflicting accounts into a single truth. Researchers have biases to support their preferred theories. Writers like Wright want to tell interesting stories, highlighting dramatic details and omitting boring ones. Although well-researched accounts like Wright’s are the best possible version of reality, they inevitably are imperfect. Professor Matz makes a similar point in his review of Wright’s book:

7. This essay elaborates a discussion with David Matz in the “virtual book club” connected with the University of Missouri’s symposium, *Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding*. 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> [hereinafter Lande, *Conversation about Lande’s Framework*]; John Lande, *Symposium Book Club – Conversation about Lawrence Wright’s Thirteen Days in September*, INDISPUTABLY BLOG (Aug. 23, 2016), <http://www.indisputably.org/?p=9582> [hereinafter Lande, *Conversation about Thirteen Days in September*]. The conversations in these blog posts go into more detail about some issues in this essay.

8. Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1420-21 (2013) (footnotes omitted).

9. Lande, *Conversation about Lande’s Framework*, *supra* note 7; Lande, *Conversation about Thirteen Days in September*, *supra* note 7.

10. LAWRENCE WRIGHT, *THIRTEEN DAYS IN SEPTEMBER: CARTER, BEGIN, AND SADAT AT CAMP DAVID* (2014).

“The quotation marks that I have placed around the word “really” [regarding what really happened in the negotiation] suggest the limits inherent in any narrative built on what an author has chosen to select from interviews, memories, and documents.”¹¹

Of course, the fact that no research perfectly reflects reality does not prevent people from gaining clearer understandings of reality through careful study. Scholarly research is a cumulative effort in which scholars “triangulate” using multiple research sources and methods and considering how biases may affect observations and conclusions.¹²

Full-length accounts of major negotiations can provide rich understandings of negotiation in practice, which can lead scholars to develop useful theories. However, case studies of single cases, like Wright’s analysis of the Camp David negotiations, have limited potential to develop general theories because of numerous idiosyncratic elements in any case. For example, it is hard to generalize from the Camp David negotiation to other major international negotiations, let alone smaller, more routine negotiations in areas such as commercial, insurance, or family matters.¹³ Analyzing even several major case studies has limited potential to develop broad concepts and generalizations because of the limited ability to analyze a substantial number of comparable cases. Thus, scholars should develop and use a variety of data sources about actual negotiations, including but not limited to full-length descriptions.

III. SOURCES OF EXISTING DATA ABOUT ACTUAL NEGOTIATIONS

This section describes several existing sources of data about actual negotiations but I have not attempted to do a comprehensive search of potential data sources. Rather, this section identifies some specific sources and categories of sources as illustrative examples.

Professors Matz and Borbély identify several book-length analyses of international negotiations.¹⁴ Scholars should also use full-length – and shorter – accounts of negotiations in other contexts. I am most familiar with literature about negotiation of legal matters, as described below, but the same principles could be applied to negotiations in other contexts such as business, labor, public policy, legislation, and family matters.

Professor Marc Galanter coined the term “litigotiation,” which he defines as “the strategic pursuit of a settlement through mobilizing the court process,” pointing out that negotiation and litigation are “inseparably entwined.”¹⁵ Thus, negotiation scholars could analyze the negotiations depicted in the books *A Civil Action*¹⁶ and

11. David Matz, *Negotiation and the Art of the Narrative*, 31 NEG. J. 285, 285 (2015). Professors Matz and Borbély also note the methodological imperfection in creating full-length accounts. See Matz & Borbély, *supra* note 1.

12. See *Triangulation*, QUALITATIVE RES. GUIDELINES PROJECT, <http://www.qualres.org/HomeTri-3692.html> (last visited May 1, 2017).

13. Professors Matz and Borbély make a similar point. See Matz & Borbély, *supra* note 1.

14. See *id.*

15. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268-69 (1984).

16. JONATHAN HARR, *A CIVIL ACTION* (1995).

The Buffalo Creek Disaster,¹⁷ which describe major environmental cases that involved substantial negotiation in the litigation context. Similarly, *Damages* recounts the litigation and mediation of a medical malpractice case.¹⁸ Professor Jonathan Cohen wrote an article providing a detailed account of another medical malpractice case based on interviews with parties, lawyers, and hospital personnel, among others.¹⁹ There may be accounts of transactional negotiations such as Chris Honeyman's detailed description of the negotiation of a purchase of land.²⁰

Some sources may include many briefer accounts of multiple negotiations. For example, *When Talk Works* profiles twelve mediators and includes a detailed account of a case for each mediator.²¹ *Negotiation Journal* periodically publishes short case studies with accounts of negotiations.²²

Ideally, accounts of negotiation would cover the full duration of the negotiation, but it can be valuable to learn from parts of the process as in Professor Relis's focus on the final stage, during mediation. Professors Austin Sarat and William L.F. Felstiner conducted a valuable study of forty divorce cases based on audiotaped observations of conversations between divorce lawyers and their clients as well as interviews of them.²³ Much of these conversations involved strategizing about negotiation.

Some studies based on interviews or observations of actual negotiations do not include detailed accounts of the negotiations.²⁴ These studies can be useful but they do not permit other researchers to do secondary analyses of the negotiation interactions.

Some publications provide accounts of negotiations to illustrate practical techniques for teaching purposes but generally are not suitable for scholarly analysis.²⁵ Although these accounts are appropriate for instruction and practice, the details are

17. GERALD M. STERN, *THE BUFFALO CREEK DISASTER: HOW THE SURVIVORS OF ONE OF THE WORST DISASTERS IN COAL-MINING HISTORY BROUGHT SUIT AGAINST THE COAL COMPANY, AND WON* (1977).

18. BARRY WERTH, *DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998).

19. Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 BARRY L. REV. 89, 89 (2011).

20. Christopher Honeyman, *A Sale of Land in Somerset County*, 23 NEG. J. 203, 203 (2007).

21. DEBORAH M. KOLB & ASSOC'S., *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994).

22. See, e.g., Beth Roy & John Burdick, *Struggling in the Street and at the Table*, 31 NEG. J. 155 (2015) (discussing the accounts of two cases of negotiation about community issues in two cities).

23. AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (Oxford Univ. Press ed. 1995). For description of the research methodology, see David L. Chambers, *25 Divorce Attorneys and 40 Clients in Two Not So Big but Not So Small Cities in Massachusetts and California: An Appreciation*, 22 LAW & SOC. INQUIRY 209, 214-19 (1997).

24. See, e.g., TAMARA RELIS, *PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES* (2009); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (2d rev. ed. 1980); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1 (1963).

25. See, e.g., LAINEY FEINGOLD, *STRUCTURED NEGOTIATION: A WINNING ALTERNATIVE TO LAWSUITS* (2016); JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW TO GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2d ed. 2015). The Harvard Program on Negotiation publishes a series of case studies, primarily for instructional purposes, though some may be suitable for scholarly analysis. See *Case Studies & Articles*, HARVARD L. SCH., <https://www.pon.harvard.edu/shop/category/case-studies-articles/> (last visited Apr. 24, 2017).

selected to illustrate the teaching points and not to provide general understanding of the negotiation process.

IV. NEED TO CREATE ADDITIONAL DATA ABOUT ACTUAL NEGOTIATIONS

Scholars can base some theoretical analysis on existing accounts of negotiation such as those described in the preceding section. Using such accounts is efficient as it takes advantage of others' tedious and time-consuming work of collecting data. However, these accounts generally are not designed to analyze and test theoretical issues. They are likely to omit key variables, especially those relevant to potential rival hypotheses. Moreover, there may not be enough accounts of actual negotiations to do a lot of theory building and testing.

Thus, empirically-based negotiation theory would benefit from scholars designing their own studies to collect data relevant to important theoretical issues. This would provide for more thorough data on the variables of interest.

As an example, I interviewed lawyers about the two-sided case that they most recently settled in which both parties were represented. My interview protocol included questions about the following issues:

(1) when the negotiation began, (2) who initiated the negotiation, (3) why the negotiation was initiated at that time, (4) the time period between the first communication until final agreement, (5) whether the subject previously knew the lawyer for the other party, (6) how well the lawyers got along, (7) if the lawyers' relationship affected the negotiation process or outcome, (8) if the parties directly participated in the negotiation, (9) what the lawyers communicated about the negotiation with the client, (10) how the subjects prepared for the negotiation, (11) how much of the negotiation was conducted by phone, email, letter, or in person, (12) if both sides identified their interests or goals early in the negotiation, (13) what the subjects thought were the main goals of each side, (14) if there was any negotiation about the litigation process itself (such as discovery, timing, information sharing, or motions), (15) if there was a series of offers and counter-offers, and if so, how many times the parties exchanged offers, (16) what was the first offer or demand from each side, (17) what was the final agreement, (18) why the parties accepted the agreement that they did (as opposed to some other possible agreement), (19) the extent, if any, that the resolution was based on expectations about the likely result in court or typical settlements in similar cases, (20) whether the subjects thought that the settlement was appropriate, (21) how satisfied they felt about the negotiation process, and (22) how typical this negotiation was compared with their other recent two-sided negotiations of this type of case.²⁶

I interviewed only one lawyer for each case, so the data did not reflect perspectives of others involved in the case. I did not ask all the questions of all the subjects because of time constraints and I did not obtain any documents about the case that

26. Lande, *supra* note 5, at 11.

might have provided useful detail. Even so, these interviews produced detailed accounts of actual negotiations that provided a useful basis for theoretical analysis. These accounts do not provide the benefits of the full-length accounts that Professors Matz and Borbély advocate, but I was able to collect and compare accounts of multiple negotiations that were more routine.

Researchers can produce accounts of negotiations by interviewing negotiators to get detailed accounts of actual negotiations, varying the focus and source of data to fit theoretical issues of interest.²⁷ Ideally, researchers would interview multiple individuals in the same case to get a more complete understanding. Doing so can be difficult because some people may be unwilling to participate. Moreover, conducting multiple interviews for each case would result in fewer cases to analyze given the same number of interviews. Thus, researchers would need to consider the tradeoff between the number and depth of case studies.

To increase the number of accounts of actual negotiations, faculty could use course assignments requiring students to conduct interviews and write reports of the interviews.²⁸ Faculty could give instructions to students as if they were research assistants.²⁹ This assignment would have substantial educational value for students³⁰ and yield many case reports. If faculty discuss the interviews in class, they may generate non-obvious insights from the discussion involving multiple perspectives. The increase in number of cases from using these course-generated interview reports may be offset, however, by a possibly reduced quality and length of the reports.

Increased use of online dispute resolution (ODR) systems also could provide useful data for scholarly analysis. In cases where the parties communicate exclusively or primarily online, there would be electronic records of the parties' interactions that could be very useful for scholarly analysis. While it would be hard to collect records of ad hoc ODR negotiations, operators of ODR systems such as eBay³¹ presumably would have organized sets of files of such negotiations. There may be some limitations on the generalizability to negotiations that are primarily conducted offline, especially if the online negotiations are relatively simple. There may also be practical limits in getting permission to analyze these negotiation records. Nonetheless, records of ODR negotiations could become a useful source of data, especially if there is an increased use of ODR for a wide range of disputes of varying complexity.

27. Some academics are intrigued by the idea of conducting empirical research, often assuming that this necessarily involves quantitative analysis of a large sample of survey responses. Although there are benefits from such research, it is much more challenging than novices might imagine. See John Lande, *What Me—A Social Scientist?*, INDISPUTABLY BLOG (May 4, 2015), <http://www.indisputably.org/?p=7021>. Doing qualitative research based on interviews with negotiators has greater potential to contribute to the advancement of negotiation scholarship than many might expect.

28. 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>.

29. See John Lande, *Documents for the Cool Assignment*, INDISPUTABLY BLOG (Jan. 8, 2017), <http://www.indisputably.org/?p=10209> (providing documents with detailed instructions for students to conduct and document interviews).

30. *Id.* The assignment would have particular value for law students because there are major similarities between interviewing negotiators and interviewing clients. In both situations, interviewers need to gain the confidence of the subjects to disclose potentially sensitive matters, in part by protecting the confidentiality of information obtained in the interviews.

31. See Resolution Center, EBAY, <http://resolutioncenter.ebay.com/> (last visited May 1, 2017).

Hopefully, scholars would produce a body of studies with accounts of actual negotiations for thorough analysis. To be most helpful, these accounts should include detailed chronologies with descriptions of key interactions.³² Ideally, an enterprising research center could develop a public database of detailed accounts for use by negotiation scholars (as well as teachers and students).

V. CONCLUSION

Professors Matz and Borbély rightly criticize the current state of negotiation theory, much of which is not based on understandings of what happens in actual negotiations. They appropriately advocate analysis of full-length accounts of actual negotiations to provide more a valid basis for negotiation theory. It would be very desirable if a substantial body of such accounts existed and could readily be created as a basis for theorizing. Even if that was the case, there would be a need for complementary methodological approaches in collecting and analyzing data about actual negotiations. Scholars can make important contributions to the development of better negotiation theory by collecting detailed accounts of a range of real negotiations.

32. For guidance on developing case studies, see ALEXANDER L. GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (2005). See also James K. Sebenius, *Developing Superior Case Negotiation Studies*, 27 *NEG. J.* 69, 76-84 (2011). Although Professor Sebenius's article focuses on developing cases studies for instructional purposes, it includes useful suggestions relevant for scholarly case studies as well.