Should They Listen to Us? Seeking a Negotiation / Conflict Resolution Contribution to Practice in Intractable Conflicts

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Sanda Kaufman*, Chris Honeyman** & Andrea Kupfer Schneider***

I. INTRODUCTION

Conflict resolution (CR) has had its successes, particularly in what has become common negotiation and mediation practice in divorce, civil litigation, and small to medium scale public policy disputes. Yet despite these practical inroads and increasingly successful dissemination of the ideas of our field, CR practitioners in politics and policy (and other fields) are still conspicuous by their absence in the largest, most consequential conflicts. Negotiation remains the vehicle for addressing international conflicts nonviolently. However, as of 2007 when we first questioned the relative lack of practical impact (at the highest levels) of negotiation scholarship, the international relations practitioners did not seem to acknowledge any debt to, draw inspiration from, or request assistance from negotiation theory.[1] We propose here that in this respect, there has been change. Indeed, as we write in late 2016, the U.S. presidency has just been contested under some quite remarkable conditions. Among them, not the least interesting for our field is that the prevailing candidate centered his claim to fitness for the world's highest office on competence *in negotiation*[2]–even while dismissing many key notions and ethical precepts found in the field's literature. These changes together raise the question, how should we go about contributing positively to conflict management practice in public and international conflicts?

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1. Sanda Kaufman et al., *Why Don't They Listen to Us? The Marginalization of Negotiation Wisdom, in* NÉGOCIATION ET TRANSFORMATIONS DU MONDE (Christophe Dupont ed., 2007).

2. A Google search requiring both of the exact phrases "Trump speech" and "Art of the Deal" produced 26,900 references. GOOGLE, http://www.google.com (last visited Mar. 24, 2017). *E.g.*, Rena Flores, *Donald Trump: Living by "Art of the Deal" as campaign playbook*, CBS (Apr. 1, 2016 4:52 PM), http://www.cbsnews.com/news/how-donald-trump-is-using-the-art-of-the-deal-as-a-campaign-playbook/.

This Article revisits our 2007 initial effort[3] to examine what seemed at the time to be the negotiation field's failure to influence the handling of large-scale international and public conflicts. With the benefit of ten years' mulling, and with the impetus of two related symposia in the fall of 2016,[4] we will identify some possibly new symptoms of this failure. We call for new attention to a modified list of underlying causes for the lack of marked progress in many of the conflicts around the world that have yet to be resolved.

Our field's adherents don't readily see our imprint on the world, perhaps because many world conflicts continue despite our insights. We had expected our insights to lead to their resolution—or at the very least, to set in motion steps toward their nonviolent management. But perhaps this observation is overly pessimistic. Running the risk of exaggerating our field's importance, we propose that since we wrote the first article on this subject, our contemporaries collectively have become successful at communicating negotiation wisdom—possibly, beyond our dreams.[5] Why then do decision makers and interveners, having arguably heard us all well, continue in their failure to manage contemporary international and other large-scale conflicts per our field's wise advice?

We begin with observations from our 2007 chapter, in support of the notion that the larger "we,"—that is, we negotiation scholars[6]—should shoulder some of the responsibility for the rather abysmal record of practitioners in helping resolve public and international conflicts. We used the example of the Arab-Israeli conflict to illustrate some of the issues we identified at that time. We add here the example of global climate change negotiations to suggest that while the Middle East conflict is unique in many ways, some of the reasons for failure to manage it are shared with other intractable conflicts. Then we offer some reasons for our updated argument, that we negotiation scholars *have* been heard, only too well, by conflict management practitioners. We conclude with some suggestions for moving forward in the quest to inform practice about how to implement research insights and prescriptions and contribute to the management of intractable conflicts.

II.   (WHY) DID "THEY" NOT LISTEN TO US?

Negotiation is one of the oldest activities in which humankind has engaged; linguist Steven Pinker has even proposed that the very emergence of language may be due to people's need to communicate to find agreements over a broad set of transactional issues.[7] Until the 20th century, negotiation prescriptions were derived from observation and experience mostly in the context of politics and international

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3. Sanda Kaufman et al., *supra* note 1.

4. In addition to the Missouri Law School symposium that gave rise to this Journal issue, the Paris business school IESEG hosted a symposium on a related theme. We are indebted to our colleagues at both events for helping to flesh out our thinking, in more ways than we can count.

5. A Google search on the exact phrase "getting to yes" (an obvious allusion to our field's most famous book) together with the word "politics" now returns over 400,000 entries. GOOGLE, http://www.google.com (last visited May 28, 2017).

6. The authors use this formulation throughout the Article to signal that we include ourselves in the community of negotiation scholars, for better or worse, and to distinguish general statements about negotiation scholarship from the authors' analysis.

7. STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2002).

diplomacy.[8] The study of negotiations consisting of description, experimentation, prescription, and attempts at prediction then expanded in the 20th century to several realms beyond international, to include inter-personal, inter-group, organizational, business, and public situations.[9] Research results disseminated through journals, books, courses, and training have "infiltrated" a broad range of dispute management practices in family, community, commercial and workplace situations. Terms such as "win-lose," "win-win," "collaborative decision making," and "consensus building" are by now part of contemporary discourse in the Western world and beyond.[10] In some countries, the legal profession has embedded negotiations into its institutional structures, and has been partially transformed by negotiation theory;[11] in the United States, still widely regarded as a highly litigious society, institutionalization of negotiations has been for some time at the point where legal scholars speak of the "vanishing trial."[12]

The accumulated negotiation wisdom from research and practice might be expected to at least affect its initial domains of politics and international affairs. Yet in both contexts, large-scale conflicts such as those plaguing the Middle East, some African and some Latin American regions, and the countries neighboring the South China Sea have resisted theoretical analysis, prediction, or prescriptions for practice. To say this of intractable conflicts borders on tautology and should not surprise, since they are by definition resistant to resolution within time periods comparable to human life spans. However, even in situations not necessarily diagnosed as intractable, interventions remain challenging to design, implement, and evaluate. Granted, one major obstacle is the uniqueness of each case, and the relatively small number of instances in each class, which together tend to defeat useful generalizations. But the fact remains that negotiation theorists have not reshaped meaningfully the practices of the decision-making bodies and institutions managing societal conflicts.

We must recognize that over time there have been some notable examples of societal adoption of some negotiation precepts and prescriptions. For example, before we addressed this issue in 2007, the U.S. Environmental Protection Agency and several federal land management agencies had already adopted negotiation-based conflict management practices including mediation. The U.S. Institute for Environmental Conflict Resolution was founded in 1998 with a federal mandate, derived from law, to help federal agencies and other affected stakeholders "address environmental disputes, conflicts, and challenges through programs and services that provide situation assessments; conflict resolution; facilitated collaboration; and

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8. *See, e.g.*, NICCOLO MACHIAVELLI, THE PRINCE (3d ed. 1992); FRANCOIS DE CAILLIERES, THE ART OF DIPLOMACY (H.M.A. Keens-Soper, 1994).

9. *See generally* Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485 (2006) (reviewing the interdisciplinary field of Negotiation and how it came to be, as well as where it is heading).

10. Google searches on these terms (in quotes, for exactitude) return, respectively, 20.9 million; 50.6 million; 395,000; and 515,000 entries. GOOGLE, http://www.google.com (last visited May 28, 2017).

11. For example, the Environmental Protection Agency funds mediation for resolving disputes. The US Institute for Environmental Dispute Resolution has a roster of mediators it deems qualified to intervene in environmental conflicts and maintains a database of intervention in environmental disputes. The Government's labor-management mediation agency, the Federal Mediation and Conciliation Service, is much older, dating from 1947 (and replaced a still older predecessor).

12. *See* Marc Galanter, *A World without Trials*, 2006 J. DISP. RESOL. 7; Christopher Honeyman, *Worlds in a Small Room*, 2006 J. DISP. RESOL. 107; Andrea Kupfer Schneider, *Not Quite a World without Trials: Why International Dispute Resolution is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119.

capacity building, including training and program assessment."[13]   Several U.S. states also have offices promoting negotiations to resolve public disputes.[14]

There have also been some international successes. In South Africa, a large-scale conflict was resolved in ways consistent with negotiation prescriptions and was followed by a reconciliation process.[15] More recently, in 2016, the Colombian government managed to negotiate an end to its longstanding conflict with the Revolutionary Armed Forces of Colombia (FARC) guerrilla movement.[16]

In contrast, by 2007, the 1993 and 1995 Oslo Accords, aiming to bring peace to the Middle East and rooted in prescriptions dear to negotiation scholars, had already shown signs of weakness; they have since unraveled under a thousand cuts.[17] Civil war replaced the brief negotiated peace respite in Darfur.[18] Negotiations had limited, if any, impact in several other protracted, long-drawn conflicts around the world. Examples can be found on several continents: Rwanda, Zimbabwe, Tibet, Nepal, Kashmir, Indonesia, Spain, Yugoslavia, Cyprus, Sierra Leone, Congo, Uganda, and much of Latin America. In some of these places negotiation wisdom has been largely ignored, while in others conflict persists despite repeated interventions. In still other places, such as Sierra Leone, East Timor, Guatemala, and El Salvador, post-conflict institutions have fallen short of their promise to provide peace and justice.[19] Even in relatively successful cases like Bosnia and Kosovo, the ethnic groups remain divided and there is an unstable equilibrium among contending groups.[20]

III.   THE LOGIC OF NEGOTIATION FAILURE

In 2007 we offered some conjectures about why the negotiation field had (thus far) largely failed to inform the public and international contexts effectively, and to be recognized there as a source of practical advice.[21] We began by querying colleagues about this issue during a 2005 Négocia Conference session in Paris, and

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13. *About Us*, UDALL FOUND., http://www.udall.gov/OurPrograms/Institute/Institute.aspx (last visited Jan. 4, 2017).

14. The Ohio Commission for Dispute Resolution and Conflict Management is an example. *Commission on Dispute Resolution*, OHIO SUP. CT., https://www.supremecourt.ohio.gov/Boards/disputeResolution/ (last visited Apr. 30, 2017).

15. THE TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (2003).

16. *E.g.*, Nicholas Casey, *Colombia and FARC Sign New Peace Deal, This Time Skipping*, N.Y. TIMES (Nov. 24, 2016), https://www.nytimes.com/2016/11/24/world/americas/colombia-juan-manuel-santos-peace-deal-farc.html?r=0.

17. *E.g.*, YAIR P. HIRSCHFELD, TRACK-TWO DIPLOMACY TOWARD AN ISRAELI-PALESTINIAN SOLUTION, 1978-2014 (2014); Jonathan Rynhold, *The Failure of the Oslo Process: Inherently Flawed or Flawed Implementation?* 76 MIDEAST SEC. & POL'Y (2008); Dennis Ross et al., *From Oslo to Camp David to Taba: Setting the Record Straight*, THE WASH. INST. FOR NEAR EAST POL'Y (Aug. 14, 2001), http://www.washingtoninstitute.org/policy-analysis/view/from-oslo-to-camp-david-to-taba-setting-the-record-straight.

18. *E.g.*, Eric Reeves, *Don't Forget Darfur,* N.Y. TIMES (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/opinion/dont-forget-darfur.html.

19. Andrea Kupfer Schneider, *The Day After Tomorrow: What Happens Once a Middle East Peace Treaty Is Signed?* 6 NEV. L. J. 401, 409-13 (2006).

20. Sadri Ramabaja, *Northern Kosovo in a Turmoil of Geopolitical Contradictions*, THE EURASIA REV. (Sep. 27, 2015), http://www.eurasiareview.com/27092015-northern-kosovo-in-a-turmoil-of-geopolitical-contradictions-oped/.

21. Kaufman et al., *supra* note 1, at 177-87.

followed at other meetings, including the 2005 IACM conference in Seville, Spain, and 2006 meetings in Washington, D.C. and Atlanta, Georgia. Our colleagues' responses tended to focus on obstacles rooted in the situations themselves, as well as on the negotiation field's inability to disseminate prescriptions effectively. We proposed that negotiation scholars bear responsibility for the observed lack of impact in some other ways too.

A key observation guiding our 2007 analysis is that public and international conflicts are complex and "wicked:"[22] they typically involve multiple, layered relationships among numerous parties—individuals, interest groups, public, private and nonprofit organizations, and governments. Stakeholders act unilaterally and jointly in environments that are themselves in flux and not well-understood. "Wickedness" means that solutions to any specific problem are bound to interact in both known and unexpected ways with the systems in which they are embedded, sometimes resulting in the desired outcomes, but often also generating unwanted side-effects, which can sometimes be worse than the presenting problem and spur renewed conflict.

To generate some helpful steps toward linking negotiation theory and practice in public and international negotiations, we turned to psychologist Dietrich Dörner's book, *The Logic of Failure,*[23] for an analysis of antecedents of decision-making failure in complex situations. His findings offered a useful framework for our purposes because they use some of the cognitive shortcomings discovered experimentally, but combine them—often experimentally—with situational features of

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22. Rittel and Webber coined this term and discussed it in articles in the planning field. Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCI. 155, 155-69 (1973) (explaining that the search for scientific bases for confronting the "wicked" problems of social policy is bound to fail). For conflict resolution treatments, see Christopher Honeyman & James Coben, *Navigating Wickedness: A New Frontier in Teaching Negotiation*, *in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES 439-447 (2010); Calvin Chrustie et al., *Negotiating Wicked Problems: Five Stories*, *in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES 449-80 (2010); Jayne Seminare Docherty, *"Adaptive" Negotiation: Practice and Teaching*, *in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES 481-509 (2010); Leonard Lira Design: *The U.S. Army's Approach to Negotiating Wicked Problems, in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES 511-28 (2010). *See also* Jayne Seminare Docherty & Leonard L. Lira, *Adapting to the Adaptive: How Can We Teach Negotiation for Wicked Problems?*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 383-418 (2013); Leonard L. Lira & Rachel Parish, *Making it Up as You Go: Educating Military and Theater Practitioners in "Design"*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 419-41 (2013); Jayne Seminare Docherty & Calvin Chrustie, *Teaching Three-Dimensional Negotiation to Graduate Students*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 443-74 (2013); Howard Gadlin, David Matz & Calvin Chrustie, *Playing the Percentages in Wicked Problems: On the Relationship between Broccoli, Peacekeeping, and Peter Coleman's The Five Percent*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 475-510 (2013); Roy Lewicki, Sanda Kaufman & James Coben, *Teaching Wickedness to Students: Planning and Public Policy, Business, and Law*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES 511-37 (2013).

23. DIETRICH DÖRNER, THE LOGIC OF FAILURE: RECOGNIZING AND AVOIDING ERROR IN COMPLEX SITUATIONS (1989).

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complex situations to inform us of their interplay in individual and joint decision making.[24]

Dörner identified several reasons why analyses of complex situations are predictably flawed, yielding problem-solving approaches that are doomed to fail. Such are: (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. In Dörner's words:

> "Failure does not strike like a bolt from the blue; it develops gradually according to its own logic. As we watch individuals attempt to solve problems, we will see that complicated situations seem to elicit habits of thought that set failure in motion from the beginning. From that point, the continuing complexity of the task and the growing apprehension of failure encourage methods of decision making that make failure even more likely and then inevitable."[25]

Daniel Kahneman's *Thinking Fast and Slow*[26] has sharpened some of Dörner's portents of failure by positing two individual thinking modes, of which the slow one is necessary and suitable for complex decisions. Kahneman notes a general tendency to reach for the fast thinking habits that serve us well in simple situations, but are more likely to contribute to the logic of failure when complex systems are involved.

As negotiation scholars, we are not immune to the pitfalls Dörner and Kahneman describe; our analyses and solutions are therefore often at odds with the reality they purport to represent. This may account in part for the practicing negotiators' seeming marginalization of researchers' findings and prescriptions. Dörner[27] held out the hope that we can all learn, which is why we thought it important to become aware of our own shortcomings as negotiation scholars, to help mitigate them and to craft advice negotiators can use.

In 2007, we used the much-observed Middle East conflict[28] to illustrate many of our general observations about negotiation scholarship and its impact on the reality of public and international conflicts.[29] We had this example in mind as we

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24. This is a rare departure from the frequent research practice of identifying experimentally single cognitive biases in context-free circumstances that enhance their generalizability but are of limited utility in specific complex negotiations. *Id.* at 9.

25. *Id.* at 10.

26. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

27. DÖRNER, *supra* note 23, at 10.

28. *See* Sanda Kaufman et al., *supra* note 1. Numerous articles on a broad range of negotiation topics reach for this example, contributing to its familiar feeling compared to other international conflicts. Because of this conflict's almost constant presence in the news and a variety of Track 1 and 2 interventions, many think they know and understand this situation, although they might not venture similar claims about other international conflicts with a similarly long history such as the India-Pakistan, China-Tibet, China-Taiwan or Turkey-Greece disputes.

29. Our list contains "modal" observations in the public policy and international contexts, though there are notable exceptions of scholarly work that does not fall into the failure traps we describe. One example

identified some shortcomings of negotiation research that track Dörner's list, because it feels so familiar to so many of us that it obviates the need for lengthy description. This very feeling of familiarity is problematic on several levels: it leads us to believe we understand the stakes and dynamics of this conflict, and we become impervious to new information that might contradict our well-entrenched frames for this conflict. Therefore, while the system itself is constantly shifting, as does the region in which it is embedded, our understanding of it remains rather static, attached to the point in time when we acquired some understanding of it.[30] This may account for a "Groundhog Day" effect, as various international actors attempt repeatedly to intervene using the same approaches and proposing the same solutions for a conflict whose only static characteristic is its intractability.

We add here the example of international (and even intra-national) negotiations to mitigate global climate change, because it too is rife with examples of the logic of failure.[31] Here too there have been several attempts at crafting a global accord. The latest round took place in Paris in 2015, preceded by Kyoto (1997), and Copenhagen (2009). All had mixed results in terms of the negotiations, and a rather weak record in terms of effective global climate change action.[32]

In what follows, we single out several of Dörner's key ideas about the antecedents of collective decision failures, and pit them against our conflict examples to derive some insights about why negotiation research results do not seem to help practice as much as we would expect. We will then argue that in recent years there was a surprising adoption of our prescriptions by practitioners of public and international negotiations with results other than we expected.

A.   Lack of attention to context

According to Dörner—which we have adapted to negotiation decisions—we negotiation scholars are prone to failure when our analyses focus mainly on the negotiation process and its internal dynamics, to the near-exclusion of contextual factors such as geopolitics, governance systems, economy, culture, or history, and their contribution to observed outcomes.[33] Our advice also tends to ignore scale, so we frequently tend to transfer interpersonal prescriptions directly to international disputes, although the former is much more heavily relational while the latter are

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is focused on the Middle East conflict. *See, e.g.*, James K. Sebenius et al., *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, NEG. J., 231-44 (2005).

30. This also happens with people's understanding of environmental issues which are highly technical, such as environmental risks. Once a level of understanding is acquired, it becomes belief and is very difficult to update when new scientific information becomes available. This, combined with people's difficulty in understanding risk and uncertainty, accounts, for example, for people's expectation that global warming consists of steadily rising temperatures everywhere. Climate change deniers exploit this misunderstanding when they use normal local weather variations as "proof" that there is no climate change. *Id.* at 236.

31. Sanda Kaufman et al., *Sustainability*, *in* MANAGEMENT: THEORY, RESEARCH, AND PRACTICE 263-78 (A. Rahim ed., 2013).

32. *E.g.*, Robert O. Keohane & Kal Raustiala, *Toward a Post-Kyoto Climate Change Architecture: A Political Analysis*, THE HARVARD PROJECT ON INT'L CLIMATE AGREEMENTS (2008); Daniel Bodansky, *The Copenhagen Climate Change Conference: A Postmortem*, 104 AM. J. INT'L LAW, 230-40 (2010); Lee Chung Lau et al., *Global warming mitigation and renewable energy policy development from the Kyoto Protocol to the Copenhagen Accord—A comment*, 16 RENEWABLE & SUSTAINABLE ENERGY REVS. 5280-84 (2012).

33. DÖRNER, *supra* note 23, at 39.

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mostly transactional. Negotiation scholars also tend to overlook contextual sea-changes over time, which affect the reality and the incentives of key players. In Dörner's taxonomy of mistakes that lead to failure, this amounts to the sins of *ignorance and mistaken hypotheses*, and he strongly recommends that we figure out what variables *other* than internal process ones affect what we try to accomplish.[34]

For example, 70 years of events in the Middle East involving several wars and a variety of negotiation and intervention episodes in several tracks offer a long and relatively recent history, good for testing our theories and prescriptions and for understanding the effects of contextual factors on negotiation success. Nevertheless, over time we negotiation scholars have formed a robust consensus over explanations and recommendations, some of which have already proven unsuccessful and should send us back to our drawing boards—but do not.[35] Thus, instead of a trajectory of improvement in time because of the many interventions at different scales, we are seeing ebbs and flows around a steady intractable situation that does not seem any further along the path to resolution in 2017 than it was 10, 20 and 30 years ago.

Perhaps most surprising is the aura of success that continues to surround the Oslo I and II Accords, although their failure began almost immediately after the heart-warming events surrounding their signing in 1993 and 1995; recall the picture of Arafat, Rabin, and Clinton on the White House lawn and the Nobel Peace Prize the first two shared (along with Shimon Peres) for their Oslo accomplishments.[36] It seems the mere signing of the Accords is valued (still) even if by now we know it has no consequences for the reality of the Middle East conflict, which has since deteriorated in terms of both the parties' quality of life and their relationship.[37]

Similarly, we have now witnessed several rounds of international meetings failing to craft implementable and enforceable accords to curb global climate change, even when agreements were signed by all participants, as happened in Paris in 2015.[38] A key impediment to success is the Commons Dilemma structure of incentives[39] inherent in the context, which all countries face. Accordingly, if everyone abides by the agreement, the temptation is great for any one country to default (if the burden is too great or if it has different economic priorities), because the marginal damage may not be measurable if the defaulting country is not one of the biggest greenhouse gas producers;[40] and if other countries default on the agreement,

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34. DÖRNER, *supra* note 23, at 41-42.

35. *E.g.*, Oren Barak, *The Failure of the Israeli-Palestinian Peace Process*, 42 J. PEACE RES. 719-36 (2005).

36. *See The Nobel Peace Prize 1994*, NOBEL PRIZE, https://www.nobelprize.org/nobel_prizes/peace/laureates/1994/ (last visited Mar. 21, 2017).

37. In a most recent development, 2016 UN Resolution 2334 undid several of the Oslo Accords' key provisions for direct territory negotiations between the parties, practically nullifying the Accords. Jonathan Ferziger & Michael Arnold, *What UN Vote on Israeli Settlements Means -- and What's Next*, BLOOMBERG (Dec. 22, 2016 3:48PM), https://www.bloomberg.com/news/articles/2016-12-26/what-does-un-vote-on-israeli-settlements-mean-and-what-s-next.

38. *E.g.*, Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L LAW 291 n.19 (2016).

39. Garrett Hardin, *The Tragedy of the Commons*, 1 J. NAT. RESOURCES POL'Y RES. 243 (2009).

40. The biggest are China, the United States, and India: if everyone but these three countries abides by the climate change commitments, not much will be achieved on the path to climate change mitigation. Conversely, if these three giants do come through on their commitments, numerous small countries can default on theirs without a noticeable difference to the outcome. Note that the Trump administration's rejection of the Paris accord (which occurred during the late stages of editing this article) is unlikely to

then it makes even more sense for any country to also default rather than incur economic hardships when the beneficial effects are nullified by others' behavior. Unless this incentive structure is altered, it is unlikely that an international climate change agreement will reach its goals. None has so far. Other contextual issues include political events as well as recent discoveries of large deposits of natural gas around the world, which have made the exploration and development of renewable energy sources both more difficult and less urgent, because natural gas contributes less to the greenhouse gases than oil or coal.[41]

Although neither of these two issues is a matter of good process, ex-post analyses have focused mainly on process "errors" under a widely shared assumption that the process would have succeeded had it been handled per theoretical prescriptions and best practices.[42] However, such analyses tend to ignore the shifting incentives faced by the various participating countries, and other geopolitical events that affect them.[43] It would seem that refocusing the analyses on the obstacles to agreement would suffice to generate prescriptions that could help negotiators and increase the likelihood of success. But, as Dörner suggested, we tend to focus on what we think we can solve, in this case process.[44] Changing the Commons incentive structure is much more difficult, especially in the international context where accords are often unenforceable if a country defaults. After all, nobody would pursue drastic measures against China on such grounds, for example, both because of its size and complex economic ties, and because many Western nations are its debtors. This affords the largest contributor of greenhouse gases a space—couched in fairness arguments—to evade the agreements' import, or to secure exceptions that effectively thwart their main goal.

B.   *Ignoring scale and uniqueness*

Dörner suggests that *ignoring scale and uniqueness* of public and international conflicts, which defy simple generalizations or transfer of insights from case to case, contributes to the logic of failure. Although such conflicts are sufficiently large,[45] consequential and different from each other in key ways that warrant case study approaches and pilot tests of solutions, we negotiation scholars frame them in classes that obscure the very information necessary to resolve them, causing what

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forestall US compliance-in-practice with the its original commitments, because of both rapidly evolving state-level policies and enlightened actions by major private players.

41. *See How much carbon dioxide is produced when different fuels are burned?* U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=73&t=11 (last visited Mar. 24, 2017).

42. *E.g.* John Vidal, *Copenhagen climate summit in disarray after 'Danish text' leak*, THE GUARDIAN (Dec. 8, 2009), https://www.theguardian.com/environment/2009/dec/08/copenhagen-climate-summit-disarray-danish-text; Elke Schüssler, Charles-Clemens Rüling & Bettina B. F. Wittneben, *On Melting Summits: The Limitations of Field-Configuring Events as Catalysts of Change in Transnational Climate Policy*, 57 ACAD. MGMT. J. 140 (2013); Peter Christoff, *Cold climate in Copenhagen: China and the United States at COP15*, 19 ENVTL. POL. 637 (2010).

43. *E.g.*, Susanne C. Moser, *Communicating climate change: history, challenges, process and future directions*, 1 WILEY INTERDISCIPLINARY REVS.: CLIMATE CHANGE 31 (2009).

44. Akin to "pessimization" by which Anatol Rapoport (in his 1996 talk, upon receiving the Lifetime Achievement Award of the International Association for Conflict Management.) meant "solving very well the wrong problem."

45. Scale here refers size of the territory involved, the extent and gravity of decision consequences and the extent of their reversibility, and/or the number of people affected by them.

Dörner labeled "*intransparence*."[46] He warns that intransparence aids the "*methodists*"—decision makers with only a couple of strategies in their tool bag—who are therefore unable to cope with specific situations, all the more dangerous in situations where feedback takes extended time periods to materialize.

Thus, the Cyprus conflict, South Africa's reconciliation process, or the Northern Ireland peace process are sometimes held as models for what should be done in the Middle East conflict since, so the simplification goes, these are all conflicts between two ethnic groups.[47] We negotiation scholars sometimes recommend that what worked in one instance should be tried in the others, even though differences among the situations far outstrip any similarities along almost all dimensions we consider meaningful in negotiation theory.

Our diagnoses of root causes of the Israeli-Palestinian conflict—religion differences; identity; power imbalance; territory—have the advantage of clarity, simplicity, and recognition (we have experienced such problems too) as well as a misleading similarity with other conflicts we simplify (identity? as in Cyprus; religion? as in Kashmir; power imbalance? as in Northern Ireland; territory? as in Spain; etc.) This leads us to offer prescriptions and actions in the Middle East that predictably—by the logic of failure—have no impact, because they fail to address the real underlying complexity and differences.

We negotiation scholars also often recommend scaling up communication and negotiation strategies that worked in interpersonal situations to public and international conflicts such as the Middle East. For example, some scholars have contended that the reason for the continuing conflict in that region is the parties' failure to communicate effectively, as if that alone could resolve deep stakes and value differences.[48]

There is arguably no more unique situation in space and time than global climate change. It affects us all, without regard to rich and poor countries, fairness of the distribution of costs or consequences, or various other concerns such as who is at fault for the current situation. And yet we negotiation scholars approach climate negotiations as we might any other international environmental treaty, although the scale of its reach and consequences likely exceeds any others globally experienced by humanity. We might summon our collective knowledge and creativity to address the specific climate change challenges in multiple ways that do not rely entirely on the (unlikely) willingness of all countries to abide by an unenforceable agreement with uncertain effectiveness. Instead, we continue to organize and hold international meetings (in beautiful places) that require collective suspension of common sense as we propose to transfer considerable amounts of wealth from Western countries (no longer as wealthy as we like to believe they are) to (dictatorial or failed) governments that have already given ample evidence that they cannot be trusted with such riches.[49]

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46. DÖRNER, *supra* note 23.

47. Sanda Kaufman et al., *Multiparty negotiations in the public sphere*, in THE NEGOTIATOR'S DESK REFERENCE (Chris Honeyman & Andrea Kupfer Schneider eds., forthcoming 2017).

48. Andrea Kupfer Schneider, *The Day After Tomorrow: What Happens Once a Middle East Peace Treaty is Signed?* 6 NEV. L. J. 401, 402 (2006) (arguing that any one explanation as to why peace has not occurred in the Middle East is too simplistic).

49. World Bank, *Corruption is "Public Enemy Number One" in Developing Countries* (2013), http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim.

C.   *Conflicts shift over time, undermining predictions*

For a variety of reasons, some already mentioned, our colleagues' negotiation outcome predictions are often no better than chance. Since we can explain any past events in terms of our theories, we often confuse hindsight with insight. Dörner notes that we tend to observe and analyze situations at a single moment, instead of trying to figure out *where the systems are apt to go in time.* As the hockey great Wayne Gretzky's father used to say, the key to his amazing success was that he skated to where the hockey puck was going to be rather than to where it was.[50] We couple this, Dörner says, with a tendency to avoid confronting our own mistakes and learning from them.

For example, in April 2005, only four months before it was implemented almost without a hitch, scholars predicted failure for the planned withdrawal of Israeli settlers from the Gaza Strip.[51] Reasons included the unilateral nature of the move instead of a negotiated arrangement, which our colleagues tend to believe is the only way to resolve this and any other conflict—as well as various attributions of psychological traits to the settlers, the Israelis, and Israeli leadership that most of us would not countenance when describing other countries and their[52] conflicts.[53] It illustrated well our overconfidence in our ability to understand other cultures, stakes, scales, and circumstances different from our own. However, in a departure from the tendency to ex-post explanations of past events, known as Monday-morning-quarterbacking, it was a rare and commendable attempt to apply our theories to the future.

In the climate change case, the trajectory of the global climate system is as critical, if not more so, than in the Middle East example, and more uncertain. This conflict and possible solutions to it depend heavily on what we believe or predict to be the state of the world in the near-, medium-, and far-future. Nonetheless, negotiators and their observers treat the climate as a steadily, linearly moving, and predictable variable instead of the complex system that it is. This has reached the point where, despite evidence to the contrary, negotiators believe that they can limit—with the right global agreement—the temperature increase, 80 years from now, to

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50. Derek Christensen, *Skate to Where the Puck is Going*, http://www.derekchristensen.com/skate-to-where-the-puck-is-going/ (last visited May 1, 2017).

51. *See* Robert Mnookin, *The Internal Israeli Conflict: The Past, Present, and Future of the Jewish West Bank and Gaza Settlements*, 21 NEG. J. 165, 165-70 (2005); Karen Tenenbaum & Ehud Eiran, *Israeli Settlement Activity in the West Bank and Gaza: A Brief History*, 21 NEG. J. 171, 171-75 (2005); Lawrence Susskind et al., *Religious and Ideological Dimensions of the Israeli Settlements Issue: Reframing the Narrative?*, 21 NEG. J. 177, 177-91 (2005); Ehud Eiran et al., *Political Dimensions of the Israeli Settlements Issue: Historic Opportunities and Challenges*, 21 NEG. J. 193, 193-207 (2005); Susan Hackley et al., *Psychological Dimensions of the Israeli Settlements Issue: Endowments and Identities*, 21 NEG. J. 209, 209-19 (2005); Bruce Patton et al., *Legal Issues and Human Rights Dimensions of the Israeli Settlements Issue: Victims and Spoilers*, 21 NEG. J. 221, 221-30 (2005): James K. Sebenius et al, *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEG. J. 231, 231-44 (2005).

52. This is a cognitive bias identified by experimental psychologists. *E.g.*, Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, UTAH L. REV. 1 (2004); Baruch Fischhoff, *Hindsight is not equal to foresight: The effect of outcome knowledge on judgment under uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975).

53. We meet again the effect of our sense of deep familiarity with this particular conflict, which we would argue is misleading us all and leading us to mistaken conclusions.

2ºC, based on models that have failed to predict with such precision even the temperature shifts over the past decade.[54]

This stance has led to a search for one big, overarching solution to which all countries would subscribe, instead of a web of testable near- and further-future strategies. These strategies should match the different geographic levels and scales and be commensurate with our current prediction ability. This approach could be complemented with a mix of unilateral and joint solutions responding in more nuanced ways not only to the climatic conditions but also to other components of this wicked, complex system. For example, in the United States, greenhouse gas emissions have declined by 8% between 2005 and 2014,[55] but not because of a federal policy to abide by international agreements.[56] Rather this is the result of several factors including numerous bottom-up local and regional efforts.[57] Are such results less valuable because they are not part of an international agreement? Should we insist on obtaining them only through international negotiations that have proved rather fruitless so far?

Researchers including Dörner have alerted us to our confirmatory bias, which leads us to prefer information confirming what we already believe, which in effect serves to strengthen our beliefs but opens us to blind spots.[58] To counter this tendency, Kahneman et al. have suggested that we should actively seek information about how our theories, prescriptions, and decisions might be wrong; or, as they have called it, a pre-mortem.[59] Contrary to our own advice to others, however, we negotiation scholars don't usually seek counterevidence to test our prescriptions, and rarely if ever do we recognize or correct our errors. Instead, we prefer to believe certain stakeholders foiled the strategies we recommended, which would otherwise surely have worked.

D.   *The map is not the terrain; the model is not the reality*

We also fail to update theory and prescriptions with new information and evidence from those directly involved in events. Having attributed failure to external factors, we continue in Dörner's "methodist's" fashion to recommend the same strategies, interventions, training programs and workshops, with predictably scant results. Dörner claims that we are "infatuated" with our own hypotheses and that we studiously avoid pitting them against reality. He stresses the importance of verifying that our mental models adequately represent the reality we are trying to affect, by challenging our own assumptions and by frequent reality checks, to buck our confirmation bias.

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54. *E.g.*, David A. Stainforth et al., *Uncertainty in predictions of the climate response to rising levels of greenhouse gases*, 433 NATURE 403-06 (2005); Virginie Guemas et al., *Retrospective prediction of the global warming slowdown in the past decade*, 3 NATURE CLIMATE CHANGE 649-53 (2013).

55. Ctr. for Climate & Energy Sol., *U.S. Trends in Greenhouse Gas Emissions*, C2ES, https://www.c2es.org/facts-figures/us-emissions/trends (last visited May 8, 2017).

56. Richard J. Lazarus, *Super wicked problems and climate change: Restraining the present to liberate the future*, 94 CORNELL L. REV. 1153, 1209 (2008).

57. These include the difficult to anticipate increased natural gas availability, decreased economic activity owing to the 2007 recession, and a reduction in miles traveled (also for several reasons). Ctr. for Climate & Energy Sol., *supra* note 55.

58. *E.g.*, Raymond S. Nickerson, *Confirmation bias: A ubiquitous phenomenon in many guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

59. Daniel Kahneman et al., *Before you make that big decision*, 89 HARV. BUS. REV. 50-60 (2011).

For example, we negotiation scholars recommend negotiation and other kinds of training for the parties in the Israeli-Palestinian conflict, at great international expense. Had such training worked for those who underwent it per our models, we should have reaped some benefits by now. However, accumulating evidence indicates that we have been targeting for training those to whom we may have had access but who do not have much, if any, input in decision making on either side; that we are often training them for interpersonal skills or for what we diagnose as root conflict causes (hatred, intolerance, etc.), with no discernible impact on the situation; and/or that we are teaching interaction and communication models that may not match well the Middle Eastern cultural contexts.[60] Despite our dismal success record, we persist in the same vein. We account for this record in terms of obstacles external to our interventions—lack of adequate funding, traveling difficulties for some participants, or governments' chicanery.[61] We do not tend to reconsider our prescriptions and approaches and their match to the participants' needs or *their* decision making reality.[62]

In the same vein, we expect the United States (or other interveners) to act as we recommend in this conflict, despite evidence of factors outside their control that affect the parties' incentives and choice of alternatives in that region. For example, not much, if anything, has changed in the international approach to the Palestinian-Israeli conflict even while the entire Middle East—within which the speck of land occupied by the parties is embedded—has undergone drastic upheavals and transformations.[63] Any observer not vested in past frames would recognize that it is nigh impossible for these contextual changes not to have affected the Palestinians and the Israelis and their prospects for peace, and, therefore, recognize the need to reconsider our intervention recommendations.

Similar mental model effects are found among climate change negotiators. Ignoring any other individual and country concerns—with their economies or ability to make the sacrifices required to curtail greenhouse gases—scholars recommend "educating the public" despite poll evidence that climate change science has been widely accepted.[64] Surveys show, however, that although people around the world are aware of climate change and the need to act to mitigate it, many continue to prioritize their current well-being over that of a future generation at the end of the century.[65] Thus, it is not lack of education that leads to low public willingness to make serious sacrifices now for results they will be unable to verify and a future they will never know.[66] Appeals to the better angels of our nature do not seem to work well in this case, but we continue to make them as if they did, instead of devising strategies that not only reduce atmospheric greenhouse loads at the end of

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60. *E.g.*, Mohammed Abu-Nimer, *Conflict resolution training in the Middle East: Lessons to be learned*, 3 Int'l Negot. 99-116 (1998).

61. *E.g.*, Jeremy Pressman, *Visions in collision: What happened at Camp David and Taba?* 28 Int'l Security 5-43 (2003).

62. Sanda Kaufman & Eric Blanchot, *Theory Meets Reality: Negotiation and Mediation in Mali*, in The Negotiator's Desk Reference, *supra* note 47.

63. The Arab Spring, the Syrian civil war, the rise of ISIS, and the long-term wars in Iraq and Afghanistan are obvious elements; unfortunately, they are not the end of the list.

64. Gallup Poll, *U.S. Concern About Global Warming at Eight-Year High*, http://www.gallup.com/poll/190010/concern-global-warming-eight-year-high.aspx (last visited May 4, 2017)

65. *Cf.* Kimberly A. Wade-Benzoni, *Giving Future Generations a Voice in the 21st Century, in* The Negotiator's Desk Reference, *supra* note 47.

66. *Id.*

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the century but also have some immediate benefits, to incentivize people to act now. Here, we encounter again a Commons Dilemma dynamic, at an individual rather than country level: those who profess willingness to make those sacrifices are typically sufficiently affluent that they feel they can afford it; however, even *they* are unwilling to act unless everyone is forced to go along. They do not wish to see everyone else default on sacrifice while they continue to uphold it.

Ideological lenses broadly shared by our field color our analyses, confusing "is" with "should" and "because." Our shared values also guide prescriptions. We tend to believe we know what is good, just, or desirable for everyone. We frame power as inherently "bad," and lack of power as inherently "virtuous." We conflate fairness with symmetry (as in "cycles of violence" or "extremists on both sides").

For example, we negotiation scholars wholeheartedly supported initiatives such as the 2003 Geneva Accord, soundly rejected by both Israelis and Palestinians (having been concluded among people who represented mainly themselves, with no mandate from either side). That accord suited well our sense of justice and of what a good outcome to the conflict should be. Moreover, some of the proponents are veterans of the Oslo Accords and all-around respected, reasonable people who speak much as we do (and in English) and advance the two-state solution many of us deem just. So, we are willing to ignore our own advice regarding the need for mandate, for adequate representation of all interests, or for bringing along the constituencies. It is as if we believe we know better than the stakeholders what is good for them.

We also fail to consider the differences in polities, institutions, and decision-making processes of the parties to the Israeli-Palestinian conflict. When we analyze the conflict, we either treat them both as democracies, or both as dictatorships. Thus, we mistakenly expected Ariel Sharon and his successors to make decisions by fiat, as Arafat and his successor did. We also mistakenly continue to expect Palestinians living in the West Bank or the Gaza Strip to speak their minds to us freely, as Israelis do in Israel, although such free speech can and has cost Palestinians their lives.

In one of our most frequent simplifications, we speak of two populations, each comprised of moderates and extremists (no nuances),[67] and we are even quite sure that the former are many and the latter are few. However, democracies by their nature can handle their extremists if they are indeed few and unrepresentative of the majority's will; on the other hand, in a dictatorship where the extremists rule, it does not matter how few extremists there are, since they can thwart the will of the many. For that matter, we tend to paternalistically discard suggestions that most Palestinians might agree with their elected government which we deem extremist (Hamas), and so we choose to ignore any Palestinian discourse disconfirming our wishful perceptions, as well as repeated opinion survey results that contradict our firm beliefs.[68]

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67. Andrew Kydd & Barbara F. Walter, *Sabotaging the peace: The politics of extremist violence*, 56 INT'L ORG. 263-96 (2002); Dan Jacobson, *Intraparty dissensus and interparty conflict resolution: A laboratory experiment in the context of the Middle East conflict*, 25 J. CONFLICT RESOL. 471-94 (1981).

68. *See, e.g.*, Clyde Haberman, *Dennis Ross's Exit Interview*, N.Y. TIMES, Mar. 25, 2001, § 6, at 36; Editorial, *Looking Beyond Yasir Arafat*, N.Y. TIMES, Dec. 14, 2001, at A38; Jane Perlez, *Clinton, After Courting Arafat, Feels Frustrated by Latest Turn*, N.Y. TIMES, Oct. 11, 2000, at A1 (all discussing frustration with Palestinian leadership as opposed to the popular support of their actions).

Similar considerations play out in climate change negotiations with respect to the many differences among the countries, which affect their respective ability to abide by their treaty commitments, and the interplay of fairness and power with a physical problem to be solved. In treaty negotiations we seek (commendably) to be fair to countries that are less endowed with resources, and for whom treaty commitments might be more difficult than for wealthy countries.[69] However, climate change is a physical rather than a social problem, and as such not fairly distributed across the globe, or amenable to resolution by means other than physical. Therefore, while fairness can be used a criterion when selecting among possible alternative solutions, it cannot be a goal on the same level as the curtailing of greenhouse gas emissions. This means in principle that climate change objectives cannot be traded for fairness objectives, as they have in the past negotiations.

Nevertheless, scholars continue to offer various schemes for sharing the "pain" as models for an accord whose main goal is fairness.[70] This reflects a shift, from the goal of producing a scheme effective at reducing global greenhouse gases production, to a fairness *goal* (rather than a criterion for selecting among alternative solutions). Climate change proceeds apace as we debate whether China or India should be "given a turn" to pollute in consideration of the fact that they haven't had the opportunity Western countries had during the industrial revolution.[71] This can be interpreted in two ways: either the global community prizes fairness above climate outcome effectiveness, or the scholars studying this process are seeking to justify what will predictably be the result as China responds to the Commons incentive it faces. Either way, our analyses do not serve us well.

Other differences exist among groups of countries negotiating climate change agreements. Centralized governments (such as those of the European Union) are better positioned to impose climate change regulations than the U.S. federal government, which to do so must intervene in 50 states' jealously guarded management of their resources.[72] In Western countries, a free press can investigate and uncover any deviations from accord commitments, which amounts to a measure of enforcement. In Asian, African, and Latin American countries such monitoring is more difficult. In some, there is no free press; in others, there is no press at all, or governments have few or no transparency obligations. Therefore, what we know about the extent of abidance by treaties is mostly what such governments report, with no independent verification ability. Under such differing circumstances, we can be almost sure that enforcement can only occur in Western countries. However, climate change transcends political boundaries: it results from all greenhouse gas contributions, and will likely not abate unless they are all reduced.

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69. *See* WILLIAM MARK ADAMS, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN THE THIRD WORLD 200 (1992); W. Neil Adger et al., *Toward Justice in Adaptation to Climate Change, in* FAIRNESS IN ADAPTATION TO CLIMATE CHANGE (W. Neil Adger ed., 2006).

70. *E.g.*, Chukwumerije Okereke, *Climate Justice and the International Regime*, 1 WILEY INTERDISCIPLINARY REVS.: CLIMATE CHANGE 464, 464-74 (2010); Jouni Paavola & W. Neil Adger, *Justice and Adaptation to Climate Change* 23 (Tyndall Centre for Climate Change Research, Working Paper No. 23, 2002).

71. Jayant Sathaye et al., *Climate Change, Sustainable Development and India: Global and National Concerns*, 90 CURRENT SCI. 314, 314-25 (2006).

72. Ironically, per fn40 above regarding the very recent US pulling out of the Paris accords, some of the 50 states may assert themselves and lead (or even push) federal policy rather than the converse.

If we continue to believe that climate change can be curbed through negotiated global treaties (a broadly shared mental model that will take more than half a century to be factually validated) we will continue to invest all our efforts in this direction—a strategy that is vulnerable rather than robust, as it puts all climate eggs in one negotiated basket. If we are wrong, we will have wasted considerable resources battling windmills, and will have missed the opportunity to explore and invest in other possibilities. An alternative, robust strategy might consist of decentralized efforts to adapt to climate change consequences in recognition of the fact that even if reduced emissions now might reduce global temperatures by a couple of degrees in the long run (80-100 years), climate change effects in the short and medium run are already felt in many regions and need attention and resources now.[73] But such a strategy would require a shift from the current approaches that have repeatedly failed, which is difficult—especially to those invested in the current negotiation model.

E.   *Heroes and villains forever: frozen frames and avoiding uncertainty*

Our stable framing of *parties* is rather impervious to information. We tend to pick heroes and villains, and their labels persist despite changes in the situation. We ignore the parties' own rhetoric, attributing to them attitudes and motives we prefer even when they deny them.[74] We train or poll people who have no actual influence or place at the negotiation table, or even lack the freedom of speech to exercise their opinions at all. They reward us with indifference to our advice. Dörner speculates that our reluctance to take in new information that might upset our beliefs is rooted in the rather paralyzing *positive feedback between uncertainty and information gathering*. He gives the example of Frederick the Great, who at the dawn of the Seven Years' War refused information about the modernization of his enemies' artillery.

We tend to freeze our frames of Middle East actors despite the fluid reality. Perhaps the most vivid example is that of Ariel Sharon, whom many of us have demonized while we rehabilitated Yasser Arafat.[75] We did much the same with their successors, Benjamin Netanyahu and Mahmoud Abbas respectively. Although we are all aware that complex reality is never starkly Manichaean, these two frames, which in retrospect have been remarkably off the mark, have remained steadily impervious to information along the years. It took their passing for some of us to partially revise our frames of Sharon and Arafat, under the onslaught of information difficult to ignore. In Sharon's case, even in the face of the unilateral withdrawal from the Gaza Strip that he engineered, analysts continued to discuss

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73. Gian-Reto Walther, et al., *Ecological Responses to Recent Climate Change*, 416 NATURE 389, 389-95 (2002).

74. Harold H. Kelly & John L. Michela, *Attribution Theory and Research*, 31 ANN. REV. PSYCHOL. 457, 457-501 (1980).

75. *See, e.g.*, James Bennet, *Mideast Turmoil: The Overview; Arafat Can Leave, But only to Exile, Sharon Tells Him*, N.Y. TIMES, Apr. 3, 2002, at A1, A8 (Javier Solana, the Foreign Policy Chief of the EU, referring to both Sharon and Arafat, "Neither is a saint, and sometimes I'm inclined to think that perhaps a new generation of persons in Israel and Palestine could in the 21st century come with a solution to the conflict."); Opinion, *Sharon and Arafat in a Deadly Dance*, N.Y. TIMES, Dec. 20, 2001, at A39; *The Surprising Mr. Sharon*, THE ECONOMIST, Nov. 24, 2005, at 13; *Ariel Sharon Sets Off on his Own*, THE ECONOMIST, Nov. 24, 2005, at 57.

his hidden agenda and self-serving motives that supposedly would one day become apparent (and remain consistent with our old frame.)[76] We speculated that his heart was surely not in the Gaza pullout, which in our eyes diminished the value of the move.[77] On the other hand, many of us eagerly abandoned the hero frame of Arafat after his death, because he suddenly proved a convenient scapegoat for some societal dysfunctions that could no longer be ignored, and most importantly for the failed Camp David negotiations.

Climate change also has "heroes" and "villains," requiring us to ignore information to preserve our frames. For example, Al Gore has successfully contributed to our awareness of global climate change and of the need to act *now* (a word that by now covers more than a decade) to forestall it, or forever miss the mark.[78] He has become the most well-known advocate for climate action and an ardent proponent of the cap-and-trade strategy to limit greenhouse gas emissions. His environmentally wasteful personal behavior and his prospect to profit greatly from implementation of the cap-and-trade policy he proposed, although long in the public domain, have not dented his positive public image. In contrast, we tend to hold in contempt businesses framed (often for good reason) as great polluters. When some of these "villains" act in socially responsible ways, however, they rarely succeed in altering our image of them; in fact, we tend to suspect some trickery or some sneaky benefit to accrue to them from climate change-wise actions. Thus, an oil company that starts investing heavily in solar power will not necessarily be rewarded in its public image.

F.   Solving what we can versus what we should

Having diagnosed a conflict (possibly simplistically) as rooted in identity, religious differences, or interpersonal hatred, we persistently "treat these ailments" (often at the interpersonal level, regardless of how decisions are made or by whom), ignoring the real incentives inherent in the situation. This is what Dörner referred to as *solving problems we can solve instead of the ones we ought to solve*, rooted in a tendency to simplify complexity.[79]

For example, the breakthrough at the Camp David negotiations between Egypt and Israel, which resulted in the return of the Sinai to Egypt and an enduring (if cold) peace, has been credited partly to Carter offering Begin autographed pictures of the participants for his grandchildren.[80] Do we really believe that Begin was about to reject the accord but broke down only because of Carter's gesture to his grandchildren?! We should all expect that when our leaders negotiate on our behalf in high-stakes conflicts, the personal—such as reminders about their families—plays but a small role, or preferably, none. In this case the Camp David negotiators

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76. Yael S. Aronoff, *From Warfare to Withdrawal: The Legacy of Ariel Sharon*, 15 ISRAEL STUD. 149, 149-72 (2010).
77. Sara Roy, *Praying with Their Eyes Closed: Reflections on the Disengagement from Gaza*, 34 J. PALESTINE STUD. 64 (2005).
78. AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (2006).
79. Akin to "pessimizing," coined by Anatol Rapoport, Professor of Peace Studies and Emeritus Professor of Psychology, University of Toronto, Speech upon receiving Lifetime Achievement Award of the International Association for Conflict Management, 1996.
80. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 6 (2005).

luckily had no idea about our musings, and acted as statesmen instead, with rather positive, durable results.

Climate change negotiators also tend to address the problems they think they can solve—and we are not telling them to do anything differently. In this, the most complex of circumstances, they continue to focus on containing global warming to less than 2ºC by 2100, which has acquired a slogan status of sorts.[81] Many are aware of this target, but few—except for climate scientists—understand how this might be measured or where, or what it means for us at any specific location. But it would be much more difficult to set other, more complicated, and potentially more controversial site-specific goals, which might also entail differential responsibilities. Since climate change effects are less than fairly distributed across the globe, as is local capability to respond and adapt, negotiating locally-responsive solutions appears even more complicated than holding down global temperature.

G. If they're like us, they must mean well. If they're not like us…

Despite genuine effort and progress, we still lack useful knowledge about cultures different from ours. We rarely have access to literature in the language of disputants[82] (for reality checks), and we couple this with lack of humility, believing we understand others despite evidence to the contrary. We frame parties as "like us"—essentially good (consistent with what Dörner termed a conviction that *intentions are unquestionably good*), seeking the same "good life"—or as "extremist" and "irrational," when we fail to make sense of their interests, values and actions that differ from ours. The "extremist"[83] label denotes our lack of comfort with certain disputants, rather than (verifiable) levels of popular support for them. These "extremists" shoulder blame for our failed prescriptions. We also tend to believe that our negotiation approaches work for everyone else (if we, not our less competent rivals, train them).

Most scholars who analyze the Middle East conflict, including many of those who produced the April 2005 issue of the *Negotiation Journal*, are not conversant with either Hebrew or Arabic. Therefore, they are unable to read original texts we would consider essential for understanding a conflict, its moods, trends, frames, stakes, and history. When performing case studies of domestic conflicts, we negotiation scholars attach great importance to words and often engage in content analysis of written and oral communications. However, when analyzing the Middle Eastern conflict, we don't even mention language issues, let alone consider them to be an obstacle to our understanding.[84] Yet this may account for one of our most dangerous illusions – that we are sufficiently like the Israelis and the Palestinians to understand them, to establish that they would wish for the same outcomes as we do, and that, therefore, when they fail to pursue those outcomes they must be either

81. Tim Lenton, *2[degrees]C or not 2[degrees]C? That is the Climate Question: Targets to Limit the Global Temperate Rise Won't Prevent Climate Disruption. Tim Lenton Says that Policy-Makers Should Focus on Regional Impacts,* 473 NATURE 7, 7-8 (2011).

82. THE NEGOTIATOR'S FIELDBOOK (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). *See* Sanda Kaufman, *The Interpreter as Intervener, in* THE NEGOTIATOR'S FIELDBOOK 535-46 (2006) (discussing the inherently slippery nature of language in negotiation, a central issue in "scaling up" negotiation theories to international disputes).

83. Unless we are willing to extend the extremist label to large groups of people, it stands for those who advocate for values and actions outside our mainstream.

84. *See* Kaufman, *supra* note 82, at 535, 545.

extremist or irrational.[85] We forget our own advice to practicing negotiators: we should assume that most people are quite adept at pursuing their own interests, even if we do not happen to understand what they are; and that we should make every effort to understand these interests. So instead of continuing to misinterpret the mismatch between what we assume are the Israelis' and the Palestinians' interests and their observed actions, we should redouble our effort to understand what they want.

Although culture is by now established as a dimension needing attention in international negotiations, many of us still harbor rather limited notions of how to deal with cultural differences. To educate our students about such differences, we at times use simulations in which we ask them to role-play "the other" (invariably obtaining a stereotypical rendition of the role-played culture). It is difficult for us to concede that a thorough understanding of a culture very different from our own is virtually impossible even through immersion. Nevertheless, for negotiating business deals across cultures, for example, we could identify several critical factors of which we need to be mindful to smooth the interactions. This is not quite as true of negotiation training, however. Many of us have taken the American interest-based negotiation model on the road and have modified the content to some extent to accommodate the cultural differences we can identify.[86] However, this model has deep roots in Western values, ways of thinking, broad civil society rules, communication styles, and even manners.[87] Therefore, it may require a lot more research, understanding of cultural differences, and adaptations to suit contexts that are culturally considerably different from ours. Progress begins with the small step of recognizing the evidence that our negotiation approach may not readily suit everyone.[88]

Climate change negotiations are also affected by the cultural diversity of the negotiators as well as by the conviction that *intentions are unquestionably good.* It is true that many countries lack the ability to cope with climate change, and if we want to negotiate an agreement we should make efforts to help them when possible. However, it is also true that many of these countries have realized that Western nations desire the agreement much more than they do.[89] If we were teaching our students how to buy a used car or a bazaar artifact, we would counsel them not to show too keen an interest unless they wanted to see the price climb in proportion to their enthusiasm. We would also tell them not to disclose all their information, to avoid opening themselves to exploitation, and to seek leverage. For once, such wisdom may also apply to international negotiations—but we are not reminding negotiators to exercise caution and test their assumption of the universality of good intentions.

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85. *See* ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 20 (1994) (explaining the importance of partisan perceptions).

86. For an ambitious example, see the EU-funded "ADR MEDA" project, which sought no less than to establish commercial mediation and arbitration in ten Middle Eastern countries at once, using a lightly modified American model. *Promotion of International Commercial Arbitration and other Alternative Dispute Resolution Techniques in the MEDA Region,* ADR CTR. INT'L, www.adrcenterinternational.com/adr-project/meda/ (last visited May 28, 2017).

87. *See* Christopher Honeyman et al., *Introduction: The Second Generation of Negotiation Teaching*, *in* RETHINKING NEGOTIATION TEACHING 1-11 (2009).

88. *See* Kaufman & Blanchot, *supra* note 62.

89. Poor nations tend to have day-to-day survival worries that eclipse what they are told might happen at the end of the century.

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H. The long march and our impatience with it

Perhaps surprisingly, we exhibit the same *impatience* as the public at large when we expect long-term, intractable conflicts to be resolved by a few moves we recommend at the next turn. However, Dörner considers that it is unwise to abandon an established course of action too soon, and recommends perseverance especially in complex situations that take time to absorb changes and show progress, and do not turn on a dime.

We choose not to give much attention to the hard slog through transforming systems—efforts that take years or decades and involve micro-level negotiations that are every bit as important as the big negotiation. Indeed, the Oslo Accords may have failed in part because they were concluded among leaders who did not go through this slog and failed to negotiate with their own constituencies, to bring them along with their drastic change of rhetoric and action after years during which they had been persuaded of the contrary. Since that time, the Israeli society has reportedly undergone transformation and has changed important components of its ideological infrastructure, such as school textbooks, to build consensus around land-for-peace agreements—the kind we usually recommend and support. However, there seems to be no such parallel change on the Palestinian side either in rhetoric, in school textbooks, or in mosque sermons, which are important makers and indicators of public opinion. Yet, we rarely recommend attention to such aspects of the conflict, possibly because any remedies to them can be expected to work very slowly and may likely not involve negotiations.

This *impatience* inappropriately applied to slow-changing systems is even more apparent in matters of climate change. Social-environmental systems (involving social structures and the natural context in which they are embedded) are notoriously low in feedback, as Dörner has argued. That is, actions aiming to benefit the natural environment take a relatively long time (compared to the length of a human life) to show both results and any unwanted side-effects. Climate change negotiations to hold down global temperature increases recognized this when they set their target for results in the year 2100. However, the downside for negotiators is that they are asking countries to invest heavily "on trust" in a very long process whose returns are practically unverifiable. Impatience is understandable here. Is the negotiation doomed to failure as Dörner would predict? This is the case so far, but perhaps only because we have again forgotten our own prescriptions for creativity, contingent agreements based on scenarios of the range of possible outcomes, and other devices that might overcome these obstacles. Instead, we are asking country representatives to act on faith, with rather poor results.

We fail to integrate the research and practical knowledge gained in other domains, where conflict management has been more successful, more broadly. At least on this score, a serious effort at such integration has been underway. A notable result to date is the *Negotiator's Fieldbook,*[90] which sought to make integrated sense of the wisdom of some 30 fields, using contributions from 80 writers. And, about the time of publication of this issue, that book is to be replaced by the *Negotiator's Desk Reference,*[91] which has significantly expanded the initial effort.

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90. THE NEGOTIATOR'S FIELDBOOK, *supra* note 82.

91. THE NEGOTIATOR'S DESK REFERENCE, *supra* note 47.

IV. SHOULD THEY LISTEN TO US?

We have reviewed a host of reasons for why the negotiation field does not appear to have had a notable impact on contemporary major conflicts or their resolution or management. We negotiation scholars don't readily see our imprint on the world, since many conflicts continue despite our insights. However, this may not be our only problem. We could look at this picture differently. Exaggerating our field's importance, we might argue instead that in some sense we have been successful beyond our dreams, although people who heard us so well continue in their failure to manage contemporary international and other large-scale conflicts.

Here are some signs of our collective success, which we will exaggerate a bit to make the point. In general:

- Western decision makers in high places often now use our language of conflict resolution; for example, they are trying to "Get to Yes" and they claim they are seeking "win-win" solutions;
- They often go to great lengths to publicly adopt a cooperative stance, respond calmly to provocations, and return to the cooperative stance (the tit-for-tat strategy for repeated prisoners' dilemma, cf. Axelrod, 1980);[92]
- They are against the use of violence by anyone and are reluctant to use it themselves;
- Armed conflicts where one side wins and the other loses seem anathema to them, especially as they seek balance and objectivity in interventions;
- They favor balanced analyses and are eager to put themselves in the other's shoes and see conflicts from the opponent's perspective;
- Where before they may have seen situations in black ("them") and white ("us"), they now discern nuances;
- They apologize readily for errors past and present;
- They tend to be humble and value other cultures, not just their own.

Thus, it is as if decision makers have sat in one of our negotiation and conflict management classes and have aced it. Why, then, are they still not obtaining the results we promise in class for those who take our advice? Several hypotheses come to mind, with likely a combination of them at work:

- Decision makers don't implement well what they learned—they don't put their money where their mouth is, as it were; i.e., they negotiate positionally – but their position is now one of "win-win," although often just as inflexible as the former win-lose stance;
- The situations they deal with are so complex and rooted in the past that no amount of good practice can overcome the obstacles;
- The "others" have not read our books or taken our courses; they misunderstand or mistrust our overtures, our openness to them, and our genuine good will; they take these as license to exploit;
- Our theory and advice are not as good as we thought they are.

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92. Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3, 4 (1980); At times the result approaches comedy, as in Vladimir Putin's "magnanimous" response to President Obama's response to the 2016 Russian hacking.

We will focus on the last hypothesis, because it is about the only one over which we have a measure of control. In most professions, when people try something several times and fail repeatedly, they review their approach, heeding the definition of insanity (wrongly) attributed to Einstein as consisting of "doing the same thing over and over again and expecting different results." The world in 2017 seems in flames at least as much as in any other time period, if not more.[93] By now, shouldn't we review our theories and recommendations?[94]

Some of the problems with our theories and recommendations still derive from Dörner's observations. Now, as before our theories and jargon became mainstream, we still assume against evidence that it is possible, as an observer, not only to understand what a conflict is about, but also what the stakeholders *really* want (despite what they tell us they want) and what they *should* want. This may stem from our mistaken belief in the universality of our values and human wants. For example, we believe everyone values human life above all else, has the same image of "the good life" as we do, and would recognize our solutions as good for them.

We the advice givers tend to live (rather comfortably) in countries where the rule of law allows us to relax in the knowledge that agreements will be upheld, that there is recourse for defaulting on agreements, and that criminals will be punished. This is not the case in many other countries. More people in the world live in different circumstances than in our own. Often, their only recourse and defense against violent death or depredation is taking justice in their own hands, using violent means if necessary. Not to have to do that is a luxury. Therefore, their priorities are different from ours. Their strategies and solutions are also different from ours. Our advice is often irrelevant to their circumstances, and privileges other criteria. In fact, were the tables turned, we too would reject such advice about how to handle opponents.[95]

Now when we seem to have the ear of those we want to reach (and do, through many workshops in high and small places) we probably fail to equip our audience with key insights. For example, we may not have communicated the notion that plans need to change in response to what others do, rather than be set in stone and followed to the "win-win" end. We may also communicate poorly the fact (likely familiar to seasoned negotiators and interveners) that when we negotiate we always should have a plan B up our sleeves in case our plan A does not pan out. Thus it is

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93. While we believe this reflects the general sentiment, we should also note that widespread sentiment may also show a general difficulty in assessing the present coldly against other periods in history. There is reason to believe that the world's tensions at present, severe as they are, are not close to the level of the Cuban Missile Crisis, let alone the two world wars of the last century.

94. We note here that our field's theories are not static. In the last ten years, sophisticated new thinking on intractable conflict has been gradually emerging (Peter Coleman and his Columbia University-based team are examples. *See* Peter Coleman & Rob Ricigliano, *Getting In Sync: What To Do When Problem-Solving Fails To Fix The Problem*, *in* THE NEGOTIATOR'S DESK REFERENCE, *supra* note 47; Peter Coleman, Nicholas Redding & Joshua Fisher, *Understanding Intractable Conflicts*, *in* THE NEGOTIATOR'S DESK REFERENCE, *supra* note 47; Peter Coleman, Nicholas Redding & Joshua Fisher, *Influencing Intractable Conflicts*, *in* THE NEGOTIATOR'S DESK REFERENCE, *supra* note 47. But these more recent ideas have yet to make their way into most scholars' consciousness, let alone that of most practitioners. We write in support of them, not criticism.

95. Anyone who has mediated between groups of mediators or negotiation scholars (as one of the authors has) may have noted that when it is their own skin that's in the game, even in conflicts that are not violent or life-threatening, highly trained professionals often apply something less than their training's best practices.

that our pupils pursue their strategies to the bitter end, whereas opponents not encumbered by theories swiftly move to their plans B when they hit rough spots.

Perhaps these and other mistakes we negotiation scholars make in our theory and advice to others stem from our belief in the benefits of cooperation. In the past 30-40 years, we have slowly moved from a decision-theoretic, transactional approach to negotiations and conflict management that yields a set of strategic prescriptions driven by the parties' stated objectives, to a value-driven approach that sets cooperation itself as an *objective*, instead of as a means to attain certain objectives.[96]

Increasingly, our research and teaching focus not on resolving conflicts, but on fostering cooperation in the belief that it will lead to conflict resolution of the proper kind. Therefore, we not only discourage (in class and outside it) but impede outcomes where one party is the winner, even if this would put a definitive (or even temporary) end to a conflict. Witness the international agitation for cease-fires around the world that are then either disregarded or only momentary cessations of hostilities, as has happened for example in several of the conflicts ravaging the Middle East. We expect, and have persuaded our trainees, that the outcomes we believe are right and just can only be obtained through negotiations. When diplomacy repeatedly fails, we pick ourselves up and try again.[97] Parties in conflict have developed exquisite skills at humoring international interveners, and at continuing their hostilities in dark alleys before new outbreaks and a renewed rush to cease-fires.[98] International interveners are often more horrified of casualties than the parties in conflict themselves, and pursue casualty avoidance even when renewed hostilities create more victims than if one party had been allowed to "win" the last time. The last 5 years in Syria offer examples of everything here, and more than we have said so far. It would be worth exploring what would have happened around the world in each case where the international community has intervened and demanded a cease-fire, had they not done so.

Thus, we negotiation scholars bring a point of view to our advice, but we are reluctant to recognize this, believing ourselves to be, and to have to be, evenhanded. However, in international matters, interveners have interests affected by the various conflicts and therefore legitimately have a point of view.[99] For example, we may prefer one side to prevail rather than another (are we indifferent to whoever prevails in Syria?) But, having set evenhandedness at the top of our criteria, we are now apt to undermine our own interests in the quest for it.

We still think we understand others' cultures and circumstances and even offer advice on how to handle cross-cultural negotiations. However, there is a hefty dose of hubris in this belief. Not only do we not understand other cultures as well as we think, but the others—all speaking our language—have become adept at using our terms and citing our values to lull us into a feeling of universality and legitimacy of claims. For example, when Morsi (Egypt) and Erdogan (Turkey) were elected "democratically" and then proceeded to become ruthless, corrupt dictators stifling

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96. *See, e.g.*, Robert J. Condlin, *Bargaining With a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1 (2007).

97. *E.g.*, CHARLES L. PRITCHARD, FAILED DIPLOMACY: THE TRAGIC STORY OF HOW NORTH KOREA GOT THE BOMB (2007).

98. Kaufman & Blanchot, *supra* note 62.

99. Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141, 141-49.

dissent,[100] we defended them in the spirit of respecting the will of the people.[101] This reflected a glaring misunderstanding of the two countries, of what the will of the people may have been, of the brutal outcomes of their choices, of the degree of fairness of the elections and of the freedom to front candidates. In both cases the army—which we regard with suspicion as a threat to democracy because in our experience it is—turned out to be a better defender of freedom, though not with much success.

V.   THE FALLACY OF SUCCESS: IT DOES NOT TRANSFER

Our perspective shift led us to contend that our field has in fact been very successful in propagating prescriptions. We propose that one reason behind this success is that we negotiation scholars have slowly reoriented our theories and prescriptions toward valuing cooperation *per se*. Cooperation as a value is now taught even in preschools, schools and summer camps. Although seemingly innocuous or even beneficial at times, this switch, permeating our culture, has far-reaching consequences. For example, we do not like to talk to people who hold different values, because we might have to disagree openly; so we prefer to talk to, and respect people who think like us and share our values. We feel uncomfortable, aggressive, and uncooperative when we disagree. That our teachings may have contributed to polarization in our society does not deter us from continuing to teach and promote cooperation as a value, instead of the strategy that it really is—one among several—for attaining our objectives.

Notice where our negotiation theories work best: mostly in transactional situations, based on which we built our theory.[102] Business negotiations are in this class. This does not mean that we should not pay attention to relationships, emotions, the shadow of the future, or fairness in other contexts, but the least we can say is that all these considerations would play differently and carry different priorities in large public or international conflicts. For example, here is one Sunday Minute Tip from the Harvard Program on Negotiation:[103]

> Negotiators often fall back on positional bargaining, the traditional haggling approach to negotiation. One side makes a strong opening demand, the other side stakes their own claim, and they exchange concessions until they either split the difference or come to an impasse. This type of win-lose approach overlooks opportunities to create—and not just distribute—value. *You can convert a win-lose negotiation into a win-win one when you:*

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100. Alaa Al Aswany, Opinion, *Egypt's Two-Front War for Democracy*, N.Y. TIMES (Nov. 10, 2013), http://www.nytimes.com/2013/11/11/opinion/aswani-egypts-two-front-war-for-democracy.html; Daniel Dombey, *Turkey's Erdogan Lurches Toward Authoritarianism*, FIN. TIMES (May 6, 2014), https://www.ft.com/content/e89e8d74-cfc1-11e3-a2b7-00144feabdc0.

101. *See* Samer S. Shehata, Opinion, *In Egypt, Democrats vs. Liberals*, N.Y. TIMES, July 3, 2013, at A25.

102. A cursory look at the Harvard Program on Negotiation's Insider or Sunday Minute advice columns reveals that the general-sounding, rarely contextualized prescriptions are illustrated predominantly with examples from business negotiations.

103. E-mail from Harvard Program on Negotiations to Sanda Kaufman, Professor, Cleveland State Univ. (Nov. 27, 2016, 10:24 AM) (on file with author).

- Create a problem-solving atmosphere where all parties feel it's safe to brainstorm options;

- Resist making demands, offers, and threats during the early stages of talks; and

- Explore each side's interests—the underlying needs, hopes, fears, and concerns that motivate you."

This is likely intended for, and seems useful to, business people who might otherwise tend to act unnecessarily competitive; even for the business context, however, such brief advice is incomplete, offering no alternative if this approach does not bear fruit. For example, it ignores any leverage differences, or the possibility that the counterpart, not having read the Sunday minute, misunderstands this approach as lack of leverage.

However, we are particularly hard-pressed to see how these prescriptions could be implemented in negotiations with Iran, China, North Korea, Russia, Syria, Mali, the Sudan, Cuba, Venezuela or Peru. One reason stems from an older negotiation prescription, from the time when we did not yet value cooperation itself, but rather considered it to be a strategy among others. We were advised then to attempt cooperation (per advice from the Harvard Program on Negotiation, create a problem-solving atmosphere and refrain from making demands or threats in early stages);[104] but if our counterparts did not seem to be willing to "play that game" and reveal their interests, we were to quickly switch to a competitive stance to defend effectively the interests of those we represent.

More generally, we get in trouble with broad decontextualized prescriptions when we extend our prescriptions to large groups (rather than individuals), different cultures with different preferences, objectives, negotiating traditions, behavioral rules and legal contexts, and different understandings of power and its role in negotiations. While we occasionally find examples of successful international negotiated agreements (especially about trade), analysis often reveals that what made them happen was usually not one of our Western values-rooted prescriptions. In exchange, we see that coalitions and trust matter, and double-crossing burns bridges.

Is there a gap between the transactional framework within which we developed many of our prescriptions and the complex situations on which we focused here? In the transactional framework, a negotiator (working on his/her own behalf) is aiming for a deal, with relatively clear interests and objectives, and knowable opponents. The process lasts for a relatively short time period, during which the rest of the world is usually relatively constant, which fits the "all else being equal" bill. In the reality of international or public decision negotiations, negotiators juggle their own current and future interests, those of an organization or constituency they represent, opponents who are more difficult to know and who face similar challenges, and a shifting context that modifies the negotiator's wants and objectives. Such negotiations last for relatively long time periods—often years and even decades

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104. *Id.*

during which the individuals themselves and their context change sufficiently to invalidate most calculus, preparation and alternatives.[105]

VI. CONCLUSION

Added together, our field's various forms of mistakes make for a daunting list. We can, however, do something about all this. Although Dörner's advice was developed in the context of planning and of responding to environmental challenges, we can adapt much of it to reorienting negotiation theory and practice to mitigate some shortcomings. We can restore cooperation to its place among strategies that conflicting parties should consider, rather than encouraging it under all circumstances. We can and should learn to set aside at least some of our prejudices and learn about specific conflicts, instead of investing them with our image of them. We can learn to resist our paternalistic instinct to attribute to others the same motives and values we have, and allow that there are things we may not understand about them, which does not make them irrational. We can strive to understand the circumstances, risks, and dangers others face in waging their conflicts. We should verify occasionally that we are using factual knowledge rather than value-driven opinions when we think about how to resolve various conflicts. We can recognize the values and interests bases for our recommendations, instead of believing ourselves principled and evenhanded. We should test our recommendations as Kahneman suggested (with a pre-mortem) and we should refrain from engaging in the same way over and over even when we fail over and over. Finally, we would do well to check our hubris, and yes, our Western privilege.

Despite some of our field's limitations, over the past 25 years we negotiation scholars have contributed to significant changes in several contexts where negotiation and intervention are practiced. Can we similarly learn to influence "political culture"? This critical hypothesizing on negotiation scholarship is intended to challenge all of us to scrutinize our own ways of thinking, and to heed our own advice to negotiators when we warn them of the numerous judgmental biases and frames that detract from their ability to realize the full potential of negotiations. Since we claim to value reflective practice, we should engage in it too, learning from our previous efforts even when the lessons may be ambiguous because we are dealing with "wicked problems." We should be more critical in evaluating our own impacts.[106] We also need to continue to work with more sophistication and more determination across disciplinary boundaries, to develop robust theories and practices, especially when the stakes are high, as they are anywhere conflict is violent. One difficult challenge for the optimists among us is to recognize the scale/complexity/culture limits of applicability of our precepts, and when our kind of negotiation should not be used or may fail. But the numbers, variety and knowledge bases of scholars and practitioners available for this task are large and growing. The task may be difficult; but it should not be beyond our collective capacity.

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[105] *See* Kaufman et al., *supra* note 47.

106. For example, should we still call the Oslo Accords a success?