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Nancy Welsh

Texas A&M University School of Law, [nwelsh@law.tamu.edu](mailto:nwelsh@law.tamu.edu)

Sharon Press

[sharon.press@mitchellhamline.edu](mailto:sharon.press@mitchellhamline.edu)

Andrea Kupfer Schneider

Marquette University Law School, [andrea.schneider@yu.edu](mailto:andrea.schneider@yu.edu)

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# NEGOTIATION THEORIES ENGAGE HYBRID WARFARE

*Nancy A. Welsh, Sharon Press and Andrea Kupfer Schneider*<sup>1</sup>

## I. INTRODUCTION

When Calvin Chrustie and Chris Honeyman first approached the authors of this Article regarding the potential application of negotiation scholars' expertise to the problem of hybrid warfare,<sup>2</sup> our first reaction was confusion. First, what exactly was hybrid warfare? Second, since "war" was in its name, what did our field have to say that could even potentially be useful? This Article, in some sense, is designed to begin to respond to those questions and, hopefully, to encourage other scholars in our field to weigh in with their contributions and criticisms. This Article represents only a start.

Although hybrid warfare is a relatively unfamiliar concept, there is now evidence of its potential occurrence everywhere. When hackers manage to shut down a city's water system<sup>3</sup> or a hospital's operations,<sup>4</sup> these may be examples of hybrid warfare. When trolls increase the spread of disinformation<sup>5</sup> and social polar-

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<sup>1</sup> Nancy Welsh is the Frank W. Elliott, Jr. University Professor of Law and Director of the Dispute Resolution Program of Texas A&M University School of Law. Sharon Press is Professor of Law and Director of the Dispute Resolution Institute at Mitchell Hamline School of Law. Andrea Schneider is Professor of Law and Director of the Kukin Program for Conflict Resolution at Cardozo School of Law. The authors thank Calvin Chrustie and Charlotte Ku, as well as Texas A&M law students Max Junkins and Robert Notari for their comments on an earlier draft of this article.

<sup>2</sup> See Chris Honeyman, Calvin Chrustie, Andrea Kupfer Schneider, Veronique Fraser & Barney Jordaan, *Hybrid Warfare, International Negotiation and an Experiment in "Remote Convening,"* 36 NEG J. 573 (2020).

<sup>3</sup> See Brian Barrett, *The Threat to the Water Supply is Real – and Only Getting Worse*, WIRED (April 2, 2021), <https://www.wired.com/story/threat-to-water-supply-is-real-and-only-getting-worse/> [<https://perma.cc/XAY2-LEAW>]; Joseph Marks, *The Administration Wants to Prevent an Attack on Water Supplies*, THE CYBERSECURITY 202, THE WASHINGTON POST (Jan. 27, 2022), <https://www.washingtonpost.com/politics/2022/01/27/administration-wants-prevent-an-attack-water-supplies/> [<https://perma.cc/U56J-HUDE>].

<sup>4</sup> Michaela Ramm, *Ransomware Attack Confirmed at MercyOne's Parent Company, CommonSpirit Health*, DES MOINES REGISTER (Oct. 14, 2022), <https://www.desmoinesregister.com/story/news/health/2022/10/14/mercyone-hospital-parent-company-confirms-ransomware-attack-led-to-outages/69562995007/> [<https://perma.cc/B7LG-GD3R>].

<sup>5</sup> Michael Scholtens & Pedro Pizano, *Russian Disinformation Grows Resilient to Western Sanctions and Big Tech Pushback*, THE CARTER CENTER (Dec. 13, 2022), [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/democracy/russian-disinforma-](https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/russian-disinforma-)

ization on social media,<sup>6</sup> this is another potential example of hybrid warfare. When the owner of a small, apparently unsuccessful restaurant nonetheless seems to have the money needed to pay the high rents required to remain on the main street of an upscale city neighborhood<sup>7</sup> or a large number of casinos in the same region are doing surprisingly well,<sup>8</sup> these once again have the potential to represent evidence of hybrid warfare. The tactics of hybrid warfare include—but certainly are not limited to—cyberattacks, disinformation such as fake news campaigns, subversive business practices, money laundering, weaponization of migrants, gradual border displacements, espionage, and “hostage diplomacy.”<sup>9</sup> Notice, however, that none of these actions must *necessarily* be undertaken by a nation or its agent. Any of them *could be* undertaken by a malevolent individual, a criminal, or a criminal network. Or any one of them could simply be a by-product of “the bustle of the globalized world.”<sup>10</sup> This opacity is part of what makes the existence of hybrid warfare so disorienting and frightening.

So how do we know hybrid warfare when we see it? And do negotiation theories, concepts and skills have any applicability to addressing the phenomenon of hybrid warfare? Our intent in this Article is to respond to those questions and then to do a bit of reframing to begin to explore negotiation theories, concepts and skills that might help us deter or respond to hybrid warfare. In the

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tion-grows-resilient-to-western-sanctions-and-big-tech-pushback.pdf [https://perma.cc/5B8M-XZCQ]; Sophie Bushwick, *Russia's Information War Is Being Waged on Social Media Platforms*, SCIENTIFIC AMERICAN (March 8, 2022), https://www.scientificamerican.com/article/russia-is-having-less-success-at-spreading-social-media-disinformation/ [https://perma.cc/WXZ6-7LNK].

<sup>6</sup> Massimo Calabresi, *Inside Russia's Social Media War on America*, TIME (May 18, 2017), https://time.com/4783932/inside-russia-social-media-war-america/ [https://perma.cc/UA39-8S4L].

<sup>7</sup> Virginia Chamlee, *How Do Criminals Launder Money Through a Restaurant?*, EATER (Sept. 1, 2016), https://www.eater.com/2016/9/1/12533030/money-laundering-restaurant [https://perma.cc/H3BH-3CD7].

<sup>8</sup> Catherine Porter, Vjosa Isai & Tracy Sherlock, *Lavish Money Laundering Schemes Exposed in Canada*, THE NEW YORK TIMES (June 15, 2022), https://www.nytimes.com/2022/06/15/world/canada/canada-money-laundering.html [https://perma.cc/76R6-YEHU].

<sup>9</sup> Elisabeth Braw, *Grayzone Aggression Needs a Whole-of-Society Approach*, AEI (Jan. 9, 2023), https://www.aei.org/op-eds/murky-threats-why-defense-against-gray-zone-aggression-needs-a-whole-of-society-approach/ [https://perma.cc/7BZA-W9T5]; Elisabeth Braw, *Grayzone and Non-Kinetic Threats: A Primer*, AEI (Oct. 23, 2020) https://www.aei.org/wp-content/uploads/2020/10/Elisabeth-Braw-Grayzone-Non-Kinetic-Threats-Primer.pdf [https://perma.cc/KL9P-7AA7] (“coercive diplomacy”); see also Scott Tait, *Hybrid Warfare: The New Face of Global Competition*, FINANCIAL TIMES, https://www.ft.com/content/ffe7771e-e5bb-11e9-9743-db5a370481bc [https://perma.cc/R77C-VJJE].

<sup>10</sup> Elisabeth Braw, *Deterring Gray-Zone Aggression, Statement Before the House Foreign Affairs Subcommittee on Asia*, AEI (July 28, 2022), https://www.aei.org/research-products/testimony/deterring-gray-zone-aggression/ [https://perma.cc/J2ET-DQJ ].

process, and as we will explain, we will reframe our focus—from *responding to* hybrid “warfare” to *engaging in* hybrid “conflict management.”

We also will do a bit of reframing regarding the sorts of negotiation theories, concepts and skills that are potentially relevant in this context. We will begin with negotiation theories that assume one-on-one or bilateral relations, and, although we will demonstrate that these theories and their underlying concepts are foundational, we also will point out why they are not sufficient in the multilateral context of hybrid warfare. Rather, we will urge that international diplomacy and multiparty negotiation theories and skills, as well as the more recent scholarship that has developed regarding hostage negotiation and “wicked problems,”<sup>11</sup> are likely to be most relevant.

International diplomacy and multiparty negotiation theory build upon classic bilateral negotiation theory but also involve key differences. These include, most importantly, looking beyond the individual or entity we believe to be sitting at the main negotiating table with us. In the context of hybrid warfare—or hybrid conflict management—it is not always clear who actually *is* on the other side of the negotiating table and “pulling the strings” that are causing us harm. Is it an enemy nation—or “just” a rogue criminal? Also, in this context of hybrid warfare, we need to consider those who are not—and will never be—at the main negotiating table but who can nonetheless influence what occurs at that table. These constituencies and influencers include private entities such as citizens, civic organizations, businesses, investors, financial and legal advisors, as well as governmental actors at the local, national, and international levels. Such actors can take actions and engage in parallel processes, away from the negotiating table, that will make our side more or less vulnerable, more or less powerful. They can do the same for the other side. This multiplicity of actors in inter-

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<sup>11</sup> See Christopher Honeyman & James Coben, *Navigating Wickedness: A New Frontier in Teaching Negotiation*, in *VENTURING BEYOND THE CLASSROOM* (2010); Calvin Chrustie et al., *Negotiating Wicked Problems: Five Stories*, in *VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES* (2010); Jayne Seminare Docherty, *Adaptive Negotiation: Practice and Teaching*, in *VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES* (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* (2010). See also CHRISTOPHER HONEYMAN ET AL., *EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES* (2013) (containing five chapters on teaching about wicked problems).

national and multiparty negotiations raises unique complications involving unstable coalitions (at and away from the negotiation table), complexities in communication and process management, and the likelihood of constantly changing “best alternatives to negotiated agreements” or BATNAs.<sup>12</sup> These sorts of negotiations are not just complicated. They are “complex” and even “wicked,” as in “wicked hard” to manage or perhaps even impossible to resolve. They also often trigger or arise in the midst of crisis. The theories, concepts and skills that have been identified to deal with international diplomatic and multiparty negotiation and “wicked” problems, as well as those utilized in hostage negotiations, thus seem to be tailor-made to address the challenges presented by hybrid warfare.

So let us begin.

## II. REFRAMING THE RESPONSE TO HYBRID WARFARE AS HYBRID CONFLICT MANAGEMENT

Hybrid warfare and gray zone conflict are two terms that have arisen recently to highlight that in the relations between rival nations, “the space between war and peace is not an empty one—but a landscape churning with political, economic, and security competitions that require constant attention.”<sup>13</sup> This basic concept—nations will engage in constant, intense and sometimes quite underhanded efforts to disrupt and destabilize each other—is not at all new. History is replete with examples of competing sovereigns working to erode each other’s national economies, undermine their governments’ and key institutions’ legitimacy, encourage internal discord, and weaken their alliances with other sovereigns.<sup>14</sup>

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<sup>12</sup> ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991).

<sup>13</sup> Frank G. Hoffman, *Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges*, 7 *PRISM* 31, 34 (2018).

<sup>14</sup> Some of the most well-known literature in diplomacy surrounds this premise. Hundreds of years ago, in *THE ART OF WAR*, Sun Tzu wrote: “The supreme art of war is to subdue the enemy without fighting” and “Supreme excellence consists of breaking the enemy’s resistance without fighting” and “All warfare is based on deception.” SUN TZU, *THE ART OF WAR* (trans. Ralph Sawyer, 1994). And Niccolò Machiavelli’s *THE PRINCE* (1532) also is written in light of the ongoing struggles across Italy. More recently, one could read Samuel Huntington’s book, *THE CLASH OF CIVILIZATIONS* (1996) in the same light.

In recent years, though, following the fall of the Soviet Union and the rise of the United States as the only real superpower with overwhelming military advantage and a tendency to engage in global policing, military and political scholars began to express fear that the U.S. had become less vigilant, less cognizant of the existence and threat of a still-churning, intensely competitive international landscape. According to some scholars, this inattention had the potential to reduce American foreign policy to a dangerously “reactive and tactical emphasis” on the use of military force “by default.”<sup>15</sup>

At the start of the Cold War, U.S. diplomat George Kennan observed a similar state of affairs—i.e., a mode of conflict occurring in the midst of a time of peace—and coined the term “political warfare” to describe it:

In broadest definition, political warfare is the employment of all the means at a nation’s command, short of war, to achieve its national objectives. Such operations are both overt and covert. They range from such overt actions as political alliances, economic measures, and “white” propaganda to such covert operations as clandestine support of “friendly” foreign elements, “black” psychological warfare and even encouragement of underground resistance in hostile states.<sup>16</sup>

Anyone who has read a John LeCarre novel has entered the morally ambiguous netherworld of political warfare between nations.<sup>17</sup> But a novel is not real, the experience is vicarious, and the world of real-life spies is quite distant from the lives of most of us. What differentiates gray zone conflict or hybrid warfare is that it is very real, very potent and it can—and does—strike quite close to our homes. This is due to two widely-heralded developments – the pervasiveness of international trade and the amazing power and connection of the internet. Notice how all of the following exam-

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<sup>15</sup> Hoffman, *supra* note ??? at 34.

<sup>16</sup> George F. Kennan, *Policy Planning Staff Memorandum 269*, U.S. DEP’T OF STATE (May 4, 1948), <http://academic.brooklyn.cuny.edu/history/johnson/65ciafounding3.htm> [<https://perma.cc/574E-65TE>]; Todd C. Helmus, Raphael S. Cohen, Alireza Nader, Andrew Radin, Madeline Magnuson & Katya Migacheva, *The Growing Need to Focus on Modern Political Warfare*, RAND CORPORATION, [https://www.rand.org/pubs/research\\_briefs/RB10071.html](https://www.rand.org/pubs/research_briefs/RB10071.html) [<https://perma.cc/5RG2-XXSF>].

<sup>17</sup> See e.g., JOHN LE CARRÉ, *TINKER, TAILOR, SOLDIER, SPY* (1974); JOHN LE CARRÉ, *SMILEY’S PEOPLE* (1982); JOHN LE CARRÉ, *THE SPY WHO CAME IN FROM THE COLD* (1963).

ples of hybrid warfare weaponize the connectivity of international trade or the internet:<sup>18</sup>

- China regularly pressures foreign companies into sharing trade secrets and intellectual property with Chinese corporate partners, with particularly negative impacts on U.S. companies whose business is based on specific technology rights, know-how, and data. These practices have weakened the U.S. economy while allowing China to accelerate the growth of its technology sector.<sup>19</sup>
- China has made opportunistic investments in core U.S. companies when those companies required fresh capital to withstand the negative economic effects of the COVID pandemic.<sup>20</sup>
- In December 2022, the U.S. agreed to a prisoner exchange that enabled the Russian government to gain the release of convicted Russian arms dealer Victor Bout, who was serving a prison sentence for conspiracy to kill Americans. This was in return for Russia’s release of basketball star Brittney Griner, who was arrested for possession of a small amount of cannabis oil as she traveled from New York to join her off-season basketball team in the Russian Premier League.<sup>21</sup>
- Russian businessman and Putin ally, Yevgeny Prigozhin, admitted recently that he had interfered in U.S. elections and would continue doing so “[c]arefully, accurately, surgically and in our own way, as we know how to do.” Prigozhin has previously been accused of sponsoring Russia-based “troll farms” that seek to affect U.S. politics.<sup>22</sup>

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<sup>18</sup> See Christopher A. Corpora, *How to Undermine a Nation-State in 120 Days: Mediation and Negotiation in a Hybrid Warfare World*, 24 *CARDOZO J. OF CONFL. RESOL.* (forthcoming 2023) (describing hybrid warfare areas of action, and key differences between liberal democracies and authoritarian regimes in their use of hybrid warfare).

<sup>19</sup> Jon Bateman, *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, U.S. China Technological “Decoupling”: A Strategy and Policy Framework* 51–52 (2022); see generally, Scott Tait, *Hybrid Warfare: the New Face of Global Competition*, *FIN. TIMES* (Oct. 13, 2019), <https://www.ft.com/content/ffe7771e-e5bb-11e9-9743-db5a370481bc> [<https://perma.cc/8L7S-LSSZ>].

<sup>20</sup> Honeyman et. al., *supra* note 2 (citing Gaouette, Starr & Slama).

<sup>21</sup> Jordan Greer, *Brittney Griner Detainment, Explained: Russia Releases Phoenix Mercury Star in Prisoner Swap*, *SPORTING NEWS* (Dec. 8, 2022), <https://www.sportingnews.com/us/nba/news/brittney-griner-russia-phenix-mercury-wnba-detainment/ujlwbpb8kivgkx1plja8mhxw> [<https://perma.cc/H6FY-SH6K>].

<sup>22</sup> *Russia’s Prigozhin Admits Interfering in U.S. Elections*, *REUTERS* (Nov. 7, 2022), <https://www.reuters.com/world/us/russias-prigozhin-admits-interfering-us-elections-2022-11-07/> [<https://perma.cc/RV2G-K6CF>].

- In 2017, a computer virus traced back to the Russian government brought down Ukraine’s computer systems and harmed many multinational firms, including US pharmaceutical manufacturer Merck. The firm then was unable to fulfill orders for its vaccine against human papillomavirus and had to borrow the U.S. government’s entire emergency vaccine supply.<sup>23</sup>

This description of just a few varied examples of hybrid warfare has probably captured your attention (and perhaps more than you expected in a scholarly law review article). Perhaps you are feeling a bit apprehensive now, a bit fearful—and even hope that somebody is doing something about this danger that we face. The authors of this Article felt similarly and therefore decided to become involved in the project to identify how negotiation scholars might assist in responding to hybrid warfare.

But also consider how this Article’s framing of the problem and these examples of hybrid warfare may be partially responsible for your reaction. The advantage of labeling these phenomena as a part of “warfare” and emphasizing the imminent danger they present makes it more likely that political, military and business leaders will pay attention to the issue and choose to devote needed resources to addressing the problem.<sup>24</sup> This is incredibly important.<sup>25</sup> Indeed, as we will emphasize later in this Article, the failure to acknowledge and attempt to address (or at least mitigate the impact of) the dangers presented by hybrid warfare invites disastrous consequences.

However, there is also a danger in this framing – one that we know well. When dispute resolution advocates first suggested the

<sup>23</sup> Braw, *supra* note 9.

<sup>24</sup> Our thanks to Calvin Chrustie for drawing our attention to this very useful aspect of the current framing of hybrid warfare and acknowledging that the framing also may need to be different to allow us to see how the underlying phenomena can be addressed through the application of negotiation theories.

<sup>25</sup> See, MASON CLARK, INSTITUTE FOR THE STUDY OF WAR, *RUSSIAN HYBRID WARFARE* 8 (2020) (urging that if the U.S. continues to “focus on deterring the kind of war Russia does not intend to fight [major conventional great power wars] while underestimating the role military force can and must play in preventing Moscow from accomplishing its aims through hybrid war, then the US will likely suffer serious strategic defeats even as its defense strategy technically succeeds”); INSTITUTE FOR THE STUDY OF DIPLOMACY, *DISCOURSE, DISSIDENT, AND STRATEGIC SURPRISE: FORMULATING U.S. SECURITY POLICY IN AN AGE OF UNCERTAINTY* 1-2 (2006) (reporting, among its major findings, that the U.S. was not prepared to deal with adverse developments in Iran, East Africa, and Afghanistan due to senior officials’ misinterpretation or rejection of field information because they had “slip[ped] into a static mindset that discourages alternative policy approaches” and this mindset led them to “both ignore dissenting information and analysis and discourage professionals in the field from offering dissenting advice”).



potential role of mediation in the courts, many lawyers reacted negatively. They saw no place for this consensual process. That was where adjudication – trials – took place. Trials required gladiators, not mediators or even negotiators. That perspective shifted as lawyers changed their framing to recognize that courts host the litigation process, not just trials. Indeed, trials are just one part – a potent but statistically small part – of the litigation process. Negotiation, meanwhile, plays a much more substantial part in the litigation process and the resolution of cases. Mediation fits as well.

Similarly, the framing of hybrid warfare can “feed a dangerous tendency to confuse war and peace”<sup>26</sup> and make us forget to notice that war, as a specific dispute resolution process, necessarily involves violence and armed conflict. Our fearful reaction to the framing of war can make us forget that nations (and even businesses) engaged in intense competition and international politics frequently turn to subversion, harassment, and espionage while they nonetheless manage to avoid violence and remain at peace. The Cold War certainly involved all these elements. The acts associated with hybrid warfare have an intensely political goal, but they do not always represent acts of war and thus do not always require—and should not always result in—a military response. Some commentators criticizing use of the term “hybrid warfare” warn:

[T]he angst over shadowy activities short of war by malevolent actors could push policy makers to counter minor threats to U.S. interests rashly, in ways that backfire or perhaps erode U.S. legitimacy as a global or regional influencer of stability and prosperity. Not understanding the difference between peace and war can cause miscalculations that land us in the latter.<sup>27</sup>

Perceiving that the other party has engaged in hybrid warfare, we may counter with a violent, military response—rather than something far short of that.

And there is another danger. Because hybrid warfare is hard to define and detect, security experts have explained to us that they often recognize it by looking at the identity of the actor on the “other side.” For many of the negotiation experts who have spent the last decade trying to understand how we have incorporated systemic racism in our processes, this does not sit well.<sup>28</sup> Surely, there

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<sup>26</sup> Donald Stoker & Craig Whiteside, *Blurred Lines: Gray-Zone Conflict and Hybrid War—Two Failures of American Strategic Thinking*, 73 NAVAL WAR COLL. REV. 19, 20 (2020).

<sup>27</sup> *Id.* at 31.

<sup>28</sup> See, Michael Z. Green, *Negotiating While Black*, in NEGOT. DESK REFERENCE 563, 573–74 (2017) (“Unless the black person in the negotiation *has as much information* as a similar white

must be a more objective and reliable way to identify when we should have our guard up that does not lead to discrimination and unfair treatment.

Further, one of the lessons uncovered in the exploration of negotiation has been the danger of stereotyping—of not approaching each negotiation with a fresh sense of curiosity and openness. While it is true there are characteristics that are common to culturally similar individuals, we also know that one cannot safely assume that everyone from a particular cultural background or nation will behave similarly. This is especially true as we consider intersectionality,<sup>29</sup> the notion that we all are made up of many different cultural and other aspects. As the world has become increasingly more interconnected through travel and social media, it is harder to imagine individuals as uniquely influenced by a single culture or national identity.<sup>30</sup> Thus, it is increasingly problematic to define an individual actor solely by her nationality.

Gale Miller suggests, in “Codes of Culture in Negotiation,”<sup>31</sup> that a more helpful way of using culture in navigating negotiation is to “treat[ ] diverse definitions of culture as resources that are potentially useful in responding to the practical circumstances of ongoing negotiations.”<sup>32</sup> Note that Miller describes culture as just one resource of presumably many, and second, that it is only “potentially” useful. It is this type of humility we believe to be warranted in considering the culture (and nationality) of the

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counterpart, be it through social or Internet networks or some other means, and the white person negotiating with her *focuses* on excising any *conscious and subconscious* race-based stereotypes from the process, negotiating while black even in 2015 and even with relatively well-meaning counterparts, means that unproductive obstacles still exist.”). See also, Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH U. J. L. & POL’Y 71 (2010); Ellen Deason & Sharon Press, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RESOL. 453 (2021); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721 (2017).

<sup>29</sup> Initially coined by Kimberlé Crenshaw in 1989 as a way to explain the oppression of African-American women, the term is now used more broadly to refer to the many different social identity forces that make each of us who we are. See Katie Steinmetz, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today*, TIME (Feb. 20, 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality/> [<https://perma.cc/Q92H-JRLE>].

<sup>30</sup> See JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES (3d ed. 2014). “A cultural prototype describes the way that many people in a culture act. . . . But not everyone in a particular culture follows the prototype. This is why scholars and laymen like to represent cultures in terms of a bell curve. The area under the bell is the central tendency or prototype.” *Id.* at 26.

<sup>31</sup> Gale Miller, *Codes of Culture in Negotiation*, in THE NEGOTIATOR’S DESK REFERENCE 607 (Chris Honeyman & Andrea Kupfer Schneider eds., 1st ed. 2017).

<sup>32</sup> *Id.* at 609.

counterpart even in hybrid warfare, both to avoid discrimination and to navigate responses appropriately calibrated to the threat. Indeed, as we have discussed this issue with those who are more familiar with hybrid warfare, they have acknowledged that it is the identity of the *target* – i.e., if the target is a *governmental* institution – that is even more important in determining whether an attack represents an example of hybrid warfare as compared to criminal activity.

Thus, “hybrid warfare” as our primary frame for any and all attacks or significant disruptions may encourage dangerous stereotyping, militarization, and thinking in terms of violence, armed victory, defeat, and surrender, when we should be looking to the other tools of state and private economic and relational power that are available to achieve a nation’s political objectives or the protection of an industry.<sup>33</sup> The negotiation strategies we examine in more depth in this article are useful for preparation, defense, conflict avoidance, and mitigation—all of which might be more effective in the long term—and often are just as available to private actors as to state actors.

However, the involvement of state actors in this area of course remains crucial, and states certainly are not limited to responding to hybrid warfare with military interventions. They also wield important diplomatic, informational, and economic tools of power. The full set of the tools available to exercise state power is known by the acronym “DIME” (Diplomatic, Informational, Military, Economic).<sup>34</sup> The use of these diplomatic, informational, and economic tools of state power may garner some straightforward victories, but they more generally represent tools for *managing* ongoing competition and conflict with other sovereign nations. And it is in the *management* of hybrid conflict—sometimes quite intense and threatening conflict—that negotiations occur among and within states, private entities, and constituents.

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<sup>33</sup> There is a very substantial literature on the power (and danger) of framing. In the dispute resolution field, Leonard Riskin famously described the way that lawyers’ philosophical map (i.e., their framing of disputes) limited their ability to “see” the underlying interests that could be so important in helping parties reach resolution. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). See also Barbara Gray, *Mediation as Framing and Framing within Mediation*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH AND PRACTICE (Margaret S. Heitman ed., 2006); ROY J. LEWICKI ET. AL., MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES (4th ed. 2003).

<sup>34</sup> These tools, along with military tools, represent the tools of power that a nation can employ as part of its grand strategy. These tools also are known by the acronym “DIME”—diplomatic, informational, military, economic. Stoker & Whiteside, *supra* note 25, at 16, 19.

How then can we best respond to the existence of hybrid warfare? We urge here that we should think in terms of the tools of “hybrid conflict management.<sup>35</sup>” Indeed, thinking in terms of diplomatic, informational and economic responses is actually more compatible with what we will do next in this Article—consider how negotiation theories, concepts and skills might be applied to address the current situation<sup>36</sup> for state entities and the private sector. For the remainder of the Article, therefore, as we discuss the potential application of negotiation theories, concepts, and skills in response to hybrid warfare, we will describe this as engaging in hybrid conflict management. We now turn to those relevant negotiation theories, concepts, and skills.

### III. REFRAMING NEGOTIATION TO ACKNOWLEDGE MULTIPLE PARTIES AND COMPLEXITY

There is a substantial literature of negotiation theory, as well as a substantial literature regarding the concepts and skills that are important to effective negotiation. For the purposes of these theories’ and skills’ application to the context here—involving competing nations, international actors, advanced technology, and a whole host of means (short of violence) to disrupt and undermine—we have differentiated between negotiation theories and skills developed for use in a bilateral context and negotiation theories that have been developed for use in the context of international relations, diplomacy and other multiparty disputes. The theories developed in the bilateral context are foundational, important building blocks. Most of these are classic or standard theories. Hostage negotiation introduces the element of crisis to this one-on-one context. Meanwhile, the theories developed in the multilateral contexts go further, as they respond to situations that are not just complicated, but complex and mercurial.<sup>37</sup>

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<sup>35</sup> See also Cynthia Alkon & Sanda Kaufman, *A Theory of Interests in the Context of Hybrid Warfare: It’s Complex*, 24 *CARDOZO J. OF CONFL. RESOL.* — (2023).

<sup>36</sup> In a very similar manner, the messiness of life events has to be corralled into legal categories – transformed into legally cognizable causes of action in order to be addressed in court. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See also Marie A. Failing, *Parallel Justice: Creating Causes of Action for Mandatory Mediation*, 47 *U. MICH. J.L. REFORM* 359 (2014) (discussing the use of mediation for disputes that do not squarely fit in legal categories).

<sup>37</sup> Guy Burgess et. al., *Applying Conflict Resolution Insights to the Hyper-Polarized, Society-Wide Conflicts Threatening Liberal Democracies*, 39 *CONFLICT RESOL. Q.* 355 (2022).

### A. *Bilateral Negotiation Theories and Skills*

When one thinks of negotiation, many of us jump to the paradigm of one-on-one negotiation with a counterpart we can identify, whose interests we might be able to surmise, and surrounding an interaction either stemming from a dispute or a deal where we also understand the parameters of what is to be negotiated. As just acknowledged, these assumptions generally do not apply to the hybrid warfare context.

Yet it is also worthwhile to understand the classic negotiation theories. They are both foundational in general and also provide lessons for the many organizational entities that, when faced with an attack, will have to undertake a myriad of internal negotiations in order to navigate the attack, figure out a response, and deal with the aftermath of the attack. Therefore, in this part of our Article, we will suggest how bilateral negotiation theories and skills apply to corporations or other private institutions that suspect they are the targets of hybrid warfare as well as governmental entities that are the targets themselves or are responding to key industries' need for assistance with hybrid conflict management.

#### i. Value Claiming vs. Value Creating

One primary theory of negotiation divides the tasks of negotiation into two parts—value claiming and value creating, or distributive negotiation versus integrative negotiation.<sup>38</sup> Theorists argue that in any negotiation we are facing both a distributive challenge and potentially an integrative challenge. Distributive is exactly what it sounds like—the parties to the negotiation must divide the “what” of the negotiation—and how that substance gets divided between the parties is the subject and challenge of the negotiation.<sup>39</sup> Value creating, or trying to integrate the parties' interests or needs,<sup>40</sup> assumes that perhaps the “pie” can be expanded. Working together, the parties might find ways to resolve the dispute that benefit both of them or find tradeoffs between their interests (i.e., one party does not care about timing while the other party cares

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<sup>38</sup> See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *Geo. L.J.* 1789 (2000); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR CO-OPERATION AND COMPETITIVE GAIN* (1986); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

<sup>39</sup> See *id.* (explaining the division of negotiation tasks between “zone definition” and “surplus allocation”).

<sup>40</sup> PAULINE GRAHAM, *MARY PARKER FOLLETT PROPHET OF MANAGEMENT* (2003).

more about the final amount, even if paid out over time).<sup>41</sup> How to accomplish this value creation is discussed further below.

In a situation of hybrid warfare, it is quite simple to understand the distributive side of this equation. The data is taken hostage and will be returned only with the payment of a sum of money, or the attack purposely wreaks havoc on the supply chain, water supply, or other resource in order to improve the strategic position of the attacker. One key danger is that this distributive approach is triggered very quickly (as a cousin to the “fight” response) and can be carried over into the target’s internal negotiations, with the target assuming that there are limited internal responses or, for example, that any solution helping to bolster security will be at the expense of public relations, the legal team, or the CEO. Understanding how value creation can work—and the mindset needed in order to engage in value creation—can help the target in its internal negotiations. How can this attack—however unfortunate—be used to build trust with the public, enhance cooperation within an industry, build a relationship with the government, or better prepare for a larger incident (or all of the above)? Once we recognize that every company will likely face some sort of crisis like this, how can the company work to improve its internal workings to better find value in the conflict? The next negotiation theory focuses particularly on how to approach value creation and make it work.

## ii. Principled Negotiation

Likely the best-known negotiation book across the world, *Getting to Yes*,<sup>42</sup> outlined the theory of principled negotiation, distinguishing between hard and soft bargaining, and finding a third way of negotiating with your counterpart. (Note that while *Getting to Yes* uses the terminology of principled bargaining and we have suggested *supra* the similarity between principled negotiation and value creation, other negotiation scholars have separated these approaches into adversarial versus problem-solving negotiation<sup>43</sup> or

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<sup>41</sup> Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984); Jennifer Brown, *Creativity: Creativity and Problem-Solving*, 87 *MARO. L. REV.* 697 (2004); Michael L. Moffitt, *Disputes as Opportunities to Create Value*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 173 (Michael L. Moffitt & Robert C. Bordone eds., 2012).

<sup>42</sup> FISHER ET AL., *supra* note 12.

<sup>43</sup> Robert Mnookin & Andrea Schneider, *The Tension Between Empathy and Assertiveness*, 12 *NEGOTIATION J.* 217 (1996); Andrea Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 *HARV. NEG. L. REV.* 143 (2002); Andrea

competitive versus cooperative negotiation.<sup>44</sup>) The four main concepts of *Getting to Yes* are as follows:<sup>45</sup>

- a. Separate the people from the problem
- b. Focus on interests
- c. Generate options
- d. Use objective criteria

Separate the people from the problem conceptualizes the idea that people (with their emotions and baggage and assumptions) are not the same thing as the issue at hand. The issue might be challenging, the people might be challenging, or both might be challenging, and each of those situations should hold different responses. Later in *Getting to Yes*, the authors encourage the reader to be hard on the problem and soft on the people—in other words, recognizing that effective negotiators do not need to be jerks even when the problem is sticky (or wicked, as we discuss below). As we engage in hybrid conflict management, this advice could be particularly useful. The stress and concerns over a hybrid warfare attack could easily lead to assumptions regarding the identity and motivations of the attacker,<sup>46</sup> and even further, to disputes within a company regarding where to place blame, fear of consequences for speaking the truth about the situation, desires to lead (or hide), and wishes to circle the wagon rather than share information. Recognizing that the problem is terrible—a hybrid warfare attack from an unknown hostile outsider—should not necessarily result in treating people terribly within the institution as a response is negotiated. It does not even mean that the attacker should be treated terribly – something we will discuss in more detail in connection with hostage negotiation.

The second element of *Getting to Yes* is to focus on the interests. The interests of a party are their needs and desires as opposed to positions. For example, in any negotiation, a position could be a demand for an amount of money or a promise to sue. The interest underlying such a demand or threat could be as varied as financial need, desire for respect, punishment, or even a strategy to gather information. And while the interests of the aggressor in a

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Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. JOURNAL OF LAW AND POLICY 13 (2012).

<sup>44</sup> GERALD WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 47–54 (3rd ed. 1982).

<sup>45</sup> FISHER ET AL., *supra* note 12, at 11.

<sup>46</sup> See *supra* notes 28-33 where we discuss the danger of overmilitarizing the conflict and/or stereotyping the attacker.

hybrid warfare attack are likely to be opaque, the interests of a private institutional target should be clear and set out in advance so that the internal negotiations can focus on strategy that meets the company's interests. In an attack, a company's primary interest could be, at the heart of things, staying in business. And, therefore, additional interests to meet that core interest could include keeping client data safe, protecting important intellectual property, and minimizing unfortunate public relations. These core and additional interests lead to strategies such as mitigation and building alliances with government or security agencies to respond effectively. One of the key actions that companies can take in advance, recognizing that any entity could be a target, is to have agreed in advance upon their interests and to have shared these interests with key internal constituencies—i.e., legal, IT, customer relations, public and government relations, as well as the board of directors.

A third element of *Getting to Yes* is to generate options. This concept is based on the idea that successful negotiators recognize that there could be more than one way to meet your interests (or those of the other side). Considering multiple options—in a legal dispute, for example, considering non-financial ways to make the other side whole, payment plans, and so forth—might make the negotiation more productive for both sides. A classic example in the international arena involves the agreement reached by Israel and Egypt at the Camp David Accords. Both nations ostensibly wanted control over the Sinai, but Egypt's interest was in sovereignty (having the Egyptian flag flying over all of the Sinai) while Israel cared most about security (and where Egyptian tanks were stationed.) Based on these complementary interests, they agreed that the territory would be handed over to Egypt, while Egypt pledged not to position offensive weapons there.

And the final element of *Getting to Yes* is to use objective criteria in order to inform your agreement. First, using objective criteria helps us develop our BATNA—best alternative to a negotiated agreement.<sup>47</sup> What happens if we do not reach agreement with a particular counterpart? In practice, this means learning and referencing standards that could be relevant—case law, business practices, and so forth. Understanding objective criteria also helps us develop goals in a negotiation—what are justifiable, aspirational, and specific goals in a particular negotiation.<sup>48</sup> In a

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<sup>47</sup> *Id.* at 102.

<sup>48</sup> RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (1999); Andrea Schneider, *Aspirations in Negotiation*, 87 *MARQ. L. REV.* 675,



situation of hybrid warfare, this might be one of the most challenging elements for those newly acquainted with these attacks as there do not yet appear to be standard best practices. That is changing—and for the companies and law firms that advise targets, this is one of the areas where these advisors could be most useful in terms of illuminating the responses that other companies have used. While hybrid attacks may never be normalized, the expertise that could be shared in terms of hybrid conflict management could help targets demonstrate that they are responding in the most effective manner. Moreover, as insurers and governments become more integrated with the private sector in developing effective responses, perhaps their expertise in dealing with state actors could be shared across local, national and international levels.

### iii. Negotiation Skills Paradigm

A third theory of negotiation focuses on the skills needed to be an effective negotiator rather than on trying to determine which style or approach one should take to negotiate.<sup>49</sup> These five skills—assertiveness, empathy, flexibility, social intuition, and ethicality—are the basis of any approach, and effective negotiators will utilize these as needed depending on the context and counterpart in the negotiation. These five skills are perhaps more likely to be needed and used in the context of the internal negotiations surrounding an attack rather than with the counterpart, as explained in greater detail below, but our discussion of hostage negotiation also suggests they can have potential application across the table.

Assertiveness relies on preparation of the “case” or substance of the negotiation. This is often tied to the objective criteria described above as outlined in *Getting to Yes* and focuses on knowing both your limits (or BATNA) as well as setting forth optimistic goals for the negotiation that meet your interests. The second part of assertiveness is the ability to speak persuasively, focusing on strong communication skills. Having knowledge of the limits and goals of the negotiation—even with a hostage taker as discussed below—can be crucial and we will return to a broader discussion of how to use this skill in a crisis. These skills are also required for the stressful and likely intense internal negotiations surrounding an attack.

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675–78 (2004), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=Hein.journals/marqlr87&section=30](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=Hein.journals/marqlr87&section=30) [<https://perma.cc/3GQB-SW5X>].

<sup>49</sup> Schneider, *supra* note 43.

Empathy is the understanding of the negotiation counterpart's view—whether or not one agrees with it—as well as understanding the emotions and motives behind the negotiation. This is well worth investing in when one can research the counterpart and will be working with them over time; this is obviously far more challenging when the counterpart is unknown (and, again, will be discussed further below in the analysis of crisis negotiation theory).

Flexibility has two components in a negotiation—one is being flexible in a negotiation approach and the other is being flexible in the negotiation outcome. For the first, effective negotiators will tailor their style (more distributive or integrative; more adversarial or more problem-solving; etc.) to the particular needs of the situation in light of the importance of the substance and the style of the counterpart (perhaps becoming more competitive to respond to another more adversarial negotiator, for example). In terms of flexible outcomes, again building on the theory outlined in *Getting to Yes*, effective negotiators will look to generate creative options to try to meet the particular needs of the parties.

Social intuition is the set of skills surrounding all things not explicitly said—the nonverbal and paraverbal elements of communication such as body language, eye contact, pace, and tone of a negotiation.<sup>50</sup> The ability to monitor oneself, read the counterpart, and build rapport within these elements is crucial in most negotiations. In the context of hybrid conflict management—particularly if demands are sent via bots and there is limited communication—it is unclear whether and how these skills can be brought to bear across the table with the aggressor. However, within the internal negotiations of the target's team, these skills are needed to build rapport and trust, while monitoring the mood and needs of the team.

Finally, the skill of ethicality encompasses the concepts of trust and reputation, highlighting how important it is for negotiators to consider how their actions can build—or harm—trust and information exchange between the parties. Again, we assume this skill is important when negotiators will be dealing with each other repeatedly—in an office, as supplier and vendor, repeat-play lawyers, and so forth. Yet, as we turn to negotiation theories for crisis, it is also useful to recognize that trust can matter even within the confines of

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<sup>50</sup> See also Andrea Schneider & Noam Ebner, *Social Intuition from the Negotiator's Desk Reference* (Marquette L. Sch., Paper No. 18-05) (Chris Honeyman & Andrea Kupfer Schneider eds., 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3123336](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123336) [<https://perma.cc/KZ2M-WYAC>].

a single transaction. How can I trust that if ransom is paid, my data will be released?

It is to this crisis context that we turn to next.

#### iv. Crisis Negotiation Theory

The field of hostage negotiation, or more recently crisis negotiation, has in the last several decades become its own separate focus with police forces around the world now recognizing that particularized training and expertise can prove effective in saving lives and keeping communities safe.<sup>51</sup> Given how some hybrid warfare attacks represent, in effect, hostage taking of one kind or another, it is logical to examine the lessons of crisis negotiation in order to illuminate how these theories can translate and provide lessons to those dealing with hybrid warfare. Also, note that we are now turning exclusively to how to deal with the aggressor rather than focusing on the skills that one can also easily use within the team.

One essential element to note about crisis negotiation is the juxtaposition of one-off interactions and awareness that preparatory training is crucial.<sup>52</sup> This is perhaps the most important part of crisis negotiation theory that we should apply directly to hybrid conflict management. In other words, while the parameters of each *crisis* are unknown (perhaps this is someone holding their child or partner hostage; perhaps this is someone threatening suicide by jumping from a bridge; perhaps this is a robbery gone bad), hostage negotiation teams are extensively trained in the parameters of the *response*. They understand, in advance of any given situation, how to put together their team, how to contain the situation, how to manage the press, and so forth. This element of extensive pre-planning for an unknown context is crucial to success.

The first lesson from hostage negotiation is containment—how you establish control over the situation and, in hostage negotiation, limit any potential harm. In responding to hybrid warfare, this lesson can be directly transferred—in a cyberattack, for example, how can the target limit harm to its systems? Can the virus attack be contained? Is the protocol to shut down? To transfer to another

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<sup>51</sup> See Volpe et al., *Negotiating with the Unknown*, in THE NEGOTIATOR'S DESK REFERENCE 297, (Honeyman & Schneider eds. 2017).

<sup>52</sup> *Id.* at 301; see also Paul J. Taylor & William Donohue, *Lessons from the Extreme: What Business Negotiators Can Learn from Hostage Negotiations*, in THE NEGOTIATOR'S DESK REFERENCE 311, 323 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

server? What are plans for backup? Understanding what is under attack—and what systems are still operating—is key to then being able to move forward. (As one of the symposium speakers pointed out, if the protocol after an attack is to email all employees, what do you do if it is the email system itself that is attacked?) Having multiple routes of communication is key—and preparing and training in advance in order to be able to control the extent of the attack is likely to limit the damage. Indeed, to mitigate the effects of an attack, some insurers are beginning to require businesses to engage in defensive preparatory action,<sup>53</sup> and governmental actors are exploring insurance-related “backstops.”<sup>54</sup>

A second lesson from hostage negotiation theory is to “sweat the small stuff” (which is perhaps counterintuitive to the belief that one should focus on the important issue at hand).<sup>55</sup> Yet numerous theorists write that refraining from assumptions, working on early communication and using active listening from the outset to discover interests and motivations are crucial (and note that this harkens back to the classic negotiation theories discussed above). The motto of the NYPD hostage negotiation team is “talk to me,” deriving from the belief that establishing communication and trust is essential and effective. This advice would be translated in the hybrid conflict management context in two ways. First, in the (unwanted) relationship between the aggressor and the target, focusing on details and refraining from jumping to quick conclusions is important. Often, as outlined above, we do not necessarily know who is behind the attack. Even if we know (or suspect) their nationality, we do not know their goals in the attack. We do not know the extent of the attack. “Sweating the small stuff” in this context is a good reminder to drill down and slow down in order to try to find out more about the attack and the attacker’s motivations before responding. The second way this advice should be translated is in the gathering of the internal team to be ready to respond. Focusing on how the team operates, listening carefully to the concerns of each actor, implementing the protocols for contain-

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<sup>53</sup> See Tina Reed, *As Cyber Attacks on Health Care Soar, So Does the Cost of Cyber Insurance*, AXIOS (March 6, 2023) (observing that some insurers are requiring “health systems to harden their defenses in order to secure coverage such as strong data backup strategies, use of tools such as multi-factor authentication, employee security training, and segmentation of networks”).

<sup>54</sup> *Id.* (reporting on the White House’s release of a national cybersecurity strategy, “which floated the idea of building a federal cyber insurance backstop to protect against massive losses to the economy in the wake of future cyber threats”).

<sup>55</sup> Taylor & Donohue, *supra* note 52, at 314–16.

ment, and using all of the negotiation skills outlined above in terms of internal team negotiations<sup>56</sup> fall under the advice to recognize that communication underlies successful negotiation responses even prior to figuring out how to substantively address the issues about which you might be negotiating.

A third element commonly taught in hostage negotiation lessons is the importance of the relationship and focusing on emotions. Police negotiators work to “manage a hostage taker’s anxieties”<sup>57</sup> and to understand their motivation. The need for this sort of concern regarding the relationship and focus on emotions is likely to vary wildly in the hybrid conflict management context. Most crisis negotiation (at least as it is presented in local police departments’ training) is estimated to be emotional or relational—nearly eighty percent by some estimates.<sup>58</sup> This element will be different in hybrid warfare where there generally is no personal relationship between the aggressor and target.<sup>59</sup> Therefore, some of the specific training undergone by hostage negotiation teams may not be directly applicable. On the other hand, managing anxieties within the internal target team seems to be very good advice given the likely stress of the situation. By acknowledging the existence of stress among the team members and recognizing that responses under stress can be less optimal, a target team that manages their stress level will be more effective.

Finally, a last lesson from hostage negotiation is the importance of closing the deal—making sure that every final detail of the (hopefully peaceful) surrender is managed all the way to the end. In hybrid conflict management, this lesson could be easily translated to any negotiation to ensure that the final resolution (if it is actually a negotiated one) is carried out by both parties. Here too, the lessons from hostage negotiation are to go slowly and pay attention to the details so that the end of the deal (often the most fraught) goes smoothly.

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<sup>56</sup> See Discussion *supra* Part IV.

<sup>57</sup> Taylor & Donohue, *supra* note 52 at 317.

<sup>58</sup> *Id.* at 316.

<sup>59</sup> Chris Honeyman & Ellen Parker, Thinking Ahead in the Grey Zone, 24 *CARDOZO J. CONFLICT RESOL.* — (2023).

## B. *International and Multiparty Negotiation Theories and Skills*

We now begin our discussion of negotiation theories, concepts, and skills that apply in contexts of even greater complexity. As noted previously, these situations—involving many parties, both at and away from the table, many relationships, many interests, many parallel processes, and many alternatives to negotiation—are not just *complicated*. They are *complex*.<sup>60</sup> Scholars have noted that “[c]omplicated systems have many interconnected and moving parts, each deliberately engineered to perform some clearly defined functions in well-understood and predictable ways. When such systems break, engineers can figure out what is wrong and fix it.”<sup>61</sup> Later in this Article, these are described as “clock” problems. The idea is the same. Problems interfering with the operation of a *complicated* system can be predictably isolated and fixed.

In contrast, *complex* systems and contexts—“including all biological organisms, natural (non-human) ecosystems, as well as humans and their societies”<sup>62</sup>—are far from mechanistically designed. They are not predictable. They evolve, their component parts are interdependent, and even “simple interactions among the components of complex systems can quickly yield chaotic, unpredictable, and at times irreversible outcomes.”<sup>63</sup> Later, this Article describes problems in these contexts as “cloud” problems.

### i. Two-level Diplomacy

As we turn to negotiation theories of more complexity, a place to start is with international relations and the theory of two-level diplomacy. Hybrid warfare by its definition is well within the confines of international relations and so an understanding of basic negotiation theories that encompass the complexity of international and domestic parties is a logical next step.

The theory of two-level diplomacy, first outlined by Robert Putnam,<sup>64</sup> is similar to theories of labor relations negotiation in that it recognizes that the parties ostensibly sitting down across the “table” to negotiate may not in fact be the only parties concerned.

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<sup>60</sup> See also Alkon & Kaufman, *supra* note 35 (discussing complication and complexity in conflict).

<sup>61</sup> Burgess et al., *supra* note 37 at 359.

<sup>62</sup> *Id.* at 359.

<sup>63</sup> *Id.*; see also Alkon & Kaufman, *supra* note 35.

<sup>64</sup> Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

In labor negotiations, this is easy to conceptualize, as the union negotiators will have the entire membership behind them that they will need to manage in order to get the membership to agree to the deal. Similarly, management negotiators will have the executive team of the company and perhaps the board of directors as well who will need to sign off on any deal. In international relations, the concept of dealing with different constituencies can be illustrated below:<sup>65</sup>

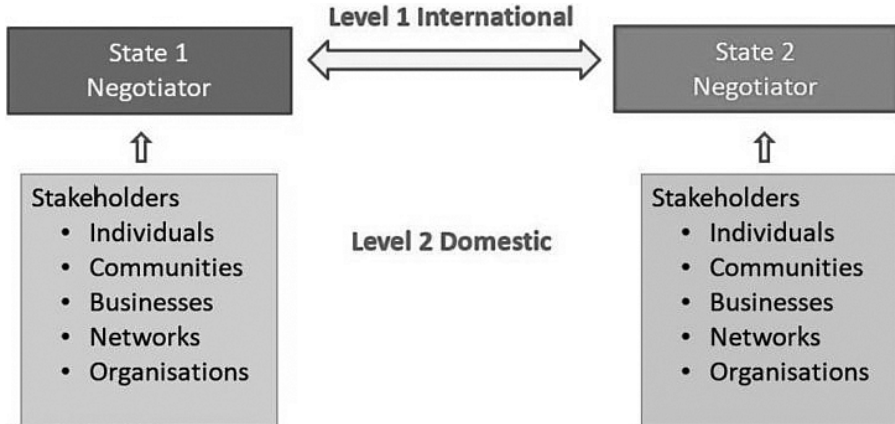


Figure 1 Putnam 1988

While two negotiators (perhaps foreign or trade ministers) at the state level will be the ones conducting the negotiation, there is a host of domestic actors to be considered and, perhaps, appeased. Moreover, the more democratic the country, the more likely it is that these domestic groups—from the legislature that might need to approve the agreement to important constituencies in the next election to crucial economic actors—will have voice and potential power to veto any agreement. Hence, an understanding of the interests of all of the actors and managing negotiations among these constituents is needed to move forward in these more complex spaces.

The lessons for engaging in hybrid conflict management are obvious as aggressor-target negotiations will involve constituents of varying levels of importance and influence during the negotiation. On the aggressor side, constituents could include whoever is paying for the attack, which could also be different than who desired or directed the attack. On the target side, constituents will include

<sup>65</sup> Chart from *Public Emotions as an Indicator of the Outcomes of the Brexit Negotiations*, UK IN A CHANGING EUROPE (Nov. 15, 2017), <https://ukandeu.ac.uk/public-emotions-as-an-indicator-of-the-outcomes-of-the-brexite-negotiations/>.

the customers, employees, board, executives, and even government agencies who will want their interests to be considered as part of these negotiations. As we have outlined above, managing all of these parties and interests will need excellent preparation and negotiation skills. Most importantly, understanding hybrid conflict management as a two-level negotiation can help the target start to identify relevant parties and actors to bring into the negotiation and to understand the interests of each constituent. The depiction above can help in visualizing the inevitable complexity of these negotiations and highlights the need for advance training and preparation.

## ii. Multiparty Negotiation Theories, Concepts and Skills

Negotiation scholars observe that “multiparty negotiations are not only more complex than two-party negotiations, but they are also different in kind because multiparty negotiations have unique dynamics.”<sup>66</sup> Many of these unique dynamics are the natural by-product of involving more parties, as noted with the prior discussion of two-level negotiation. But, in addition, these multiple parties may then interact with *each other*. Coalitions are likely to form, with associated issues of timing and instability. Communication and process management become more difficult. Finally, due in large part to the opportunities for communication and coalition formation, negotiators must deal with the “constantly shifting or kaleidoscopic nature of each party’s BATNA.”<sup>67</sup>

A key difference between bilateral negotiation and multiparty negotiation is, quite simply, the fact that there are more parties at the table, and they can choose to create or join coalitions in order to improve upon their individual power and influence. Parties may enter into winning coalitions, blocking coalitions, or coalitions that have both effects.<sup>68</sup> They may also defect from coalitions at any time if they perceive acting on their own or joining a different coalition to be more favorable. This, of course, makes coalitions quite unstable. There is also the danger, however, that choosing to act on one’s own may prove unfavorable—e.g., being left out of a final agreement or with reduced bargaining power.<sup>69</sup>

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<sup>66</sup> Lawrence Susskind et al., *What We Have Learned About Teaching Multiparty Negotiation*, 21 *NEGOT. J.* 395, 396, 405–06 (2005).

<sup>67</sup> *Id.* at 396.

<sup>68</sup> *Id.*

<sup>69</sup> See generally RUSSELL KOROBKIN, *NEGOTIATION: THEORY AND STRATEGY* (2d ed. 2009).



The instability—or potential fluidity—of coalitions obviously can make it much more difficult to determine reservation points, known more colloquially as bottom lines or walkaway points.<sup>70</sup> This suggests the value of thoughtful sequencing to increase the likelihood of creating effective and stable coalitions.<sup>71</sup> The initiating party's success in persuading other parties to join and remain in a coalition can affect subsequent targets' perceptions of the initiator's credibility and trustworthiness.<sup>72</sup> Because defections always remain a danger, it can also be valuable to discuss the reputational costs of defection and determine whether it is possible to create enforceable coalition agreements that prohibit defection.<sup>73</sup>

Commentators writing on the dangers of hybrid warfare have already begun to suggest the importance of developing coalitions with others on the same side of the negotiating table. Elisabeth Braw, for example, has proposed that the U.S. should reach an agreement with its NATO allies regarding appropriate retaliations in response to some of China's activities.<sup>74</sup> She has similarly recommended that the U.S. should team up with leading companies to enable them to withstand or avoid yielding to Chinese pressure.<sup>75</sup> Her recommendation that the U.S. and its allies should publicly signal their intent to retaliate is designed to deter China from taking certain actions. At the same time, engaging in such a public commitment could have the secondary effect of disincentivizing coalition partners' defection.<sup>76</sup>

Additional parties introduce additional challenges in both communication and process management. Someone must take responsibility for ensuring that required communications with coalition partners occur. Meanwhile, however, there is the danger that

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<sup>70</sup> *Id.*

<sup>71</sup> James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 324, 324 (Richard J. Zeckhauser et al. eds., 1996); *see also* David A. Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, in NEGOTIATION ANALYSIS 153, 158–9 (H. Peyton Young ed. 1991). Decisions regarding sequencing may be based on patterns of deference, bootstrapping (i.e., beginning with the easiest target and ending with the hardest target), or signaling (i.e., persuading the hardest target to join first).

<sup>72</sup> Sebenius, *supra* note 71.

<sup>73</sup> *Id.*

<sup>74</sup> Braw, *supra* note 10.

<sup>75</sup> *Id.*; *see generally* Elisabeth Braw, *Why Corporate Apologies to Beijing Backfire*, WALL STREET J. (July 24, 2022), <https://www.wsj.com/articles/why-corporate-apologies-to-beijing-backfire-taiwan-china-ccp-beijing-consumers-dior-boycott-uyghurs-11658689342> [<https://perma.cc/LV2U-ZJC2>].

<sup>76</sup> Braw, *supra* note 10.

some information will be shared with all coalition partners when it would have been better to share the information with only one partner—or share it in only a sequential fashion.<sup>77</sup>

Communication and process management become even more difficult if the coalition partners must ensure regular communication with constituencies who are not at the table, but whose cooperation, influence or non-opposition is important. First, those constituencies need to be identified. Then, protocols or systems must be put in place to ensure appropriate communication.<sup>78</sup> Particularly in multiparty negotiations in the public sphere, where constituencies may range from individual citizens to very sophisticated civic organizations, constituencies can vary substantially in their types and levels of knowledge and their access to data and processing ability.<sup>79</sup> In the hybrid warfare context, commentators have recommended increasing communication and developing alliances between governmental agencies and corporations, as well as among the many federal governmental agencies responsible for wielding the tools of diplomatic, information, military and economic state power.<sup>80</sup> Particularly as we consider the use of social media and other tools to create and exacerbate national discord and mistrust in governmental institutions, it certainly seems that it would be wise to identify the citizenry as important constituencies and ensure regular communication with them.<sup>81</sup>

When there are multiple parties, the interactions among their BATNAs also make negotiations more difficult. Relatedly, the creation and instability of coalitions can result in quick changes to each party's BATNA. As noted above, commentators have suggested the importance of a shared strategy between the U.S. and its NATO allies in response to China. But if China then develops an alliance with some of its strongest economic partners—other nations or perhaps even powerful multinational corporations—everyone's BATNA changes. In addition, events external to the multiparty negotiation process can affect those BATNAs. Think of the COVID pandemic and its effect on global supply chains. Paral-

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<sup>77</sup> Sebenius, *supra* note 71 (discussing information sequencing).

<sup>78</sup> Sanda Kaufman et al., *Multiparty Negotiations in the Public Sphere*, in *THE NEGOTIATOR'S DESK REFERENCE*, Vol 2, 413, 414–15 (HONEYMAN & SCHNEIDER, eds. 2017).

<sup>79</sup> *Id.*

<sup>80</sup> Linda Robinson et al. *The Growing Need to Focus on Modern Political Warfare* RAND CORP. (2019), [https://www.rand.org/pubs/research\\_briefs/RB10071.html](https://www.rand.org/pubs/research_briefs/RB10071.html) [<https://perma.cc/EH5M-RXD6>].

<sup>81</sup> *Id.* (noting successful engagement of the population in combatting social media bots in Finland).

lel processes occurring in other parts of the world or economy, without communication and coordination, can also change parties' BATNAs.<sup>82</sup> Finally, constituencies not at the table can influence the negotiating parties' BATNAs.

### iii. Wicked Problems

The term "wicked problems" was first used by public planners Horst Rittel and Melvin Webber in 1973.<sup>83</sup> Chris Honeyman and James Coben picked up the term in 2010<sup>84</sup> and defined wicked problems as exhibiting some combination of the following features:

- The problem is ill-defined and resists clear definition as a technical issue, because wicked problems are also social, political, and moral in nature. Each proposed definition of the problem implies a particular kind of solution which is loaded with contested values. Consequently, merely defining the problem can incite passionate conflict.
- Solutions to a wicked problem cannot be labeled good or bad; they can only be considered better or worse, good enough or not good enough. Whether a solution is good enough depends on the values and judgment of each of the parties, who will inevitably assess the problem and its potential solutions from their respective positions within the social context of the problem.
- Every wicked problem is unique and novel, because even if the technical elements appear similar from one situation to another, the social, political, and moral features are context-specific.
- A wicked problem contains an interconnected web of sub-problems; every proposed solution to part or the whole of the wicked problem will affect other problems in the web.
- The only way to address a wicked problem is to try solutions; every solution we try is expensive and has lasting unintended consequences. So, although we have only one shot to solve this wicked problem, we will have plenty of opportunities to develop our skills as we deal with the

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<sup>82</sup> *Id.*

<sup>83</sup> See Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 160–69 (1973).

<sup>84</sup> See Christopher Honeyman & James Coben, *Navigating Wickedness: A New Frontier in Teaching Negotiation*, in VENTURING BEYOND THE CLASSROOM IN THE RETHINKING NEGOTIATION TEACHING SERIES 439 (2010).

wicked problems that we create with our attempted solutions.<sup>85</sup>

It seems to us that the kinds of problems raised by hybrid warfare situations are exactly what were contemplated by those who developed the term “wicked problem.” As those of us engaged in this project grappled to understand what we were talking about—and even debated whether to use the terms hybrid warfare or hybrid conflict management—it was clear that the problem was most definitely ill-defined and was not just a technical issue but one that often includes social, political and moral aspects. Further, how one chooses to define the problem to be addressed—i.e., warfare vs. conflict management—implies a particular solution with contested values. Thus, this situation meets the first feature listed above.

Second, solutions to this issue often cannot be labeled good or bad; they can only be considered better or worse, good enough or not good enough. Whether a solution is good enough depends on the values and judgment of each of the parties, who will inevitably assess the problem and its potential solutions from their respective positions within the social context of the problem. In fact, many of the negotiation experts gravitated to describing this project in terms of hybrid conflict management as opposed to hybrid warfare, for this very reason. Managing these issues is not like traditional “warfare” where there is a winner and a loser. Instead, it will be more typical for the issues to unfold over time and even a “win” in one area may lead to a “loss” in another aspect.

Third, every hybrid warfare problem is unique and novel, because even if the technical elements appear similar from one situation to another, the social, political, and moral features are context-specific.

Fourth, these problems contain an interconnected web of sub-problems; every proposed solution to a part or the whole of the problem will affect other problems in the web. This is especially true given that the world is so interconnected. Decisions made in one area or context will almost certainly have a ripple effect in another unrelated area. For example, when a nation’s government discovers a weakness in software, a decision must be made whether to reveal the weakness (to protect the nation’s industries) or not reveal it to be able to exploit it later for its own cyberattacks.<sup>86</sup>

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<sup>85</sup> *Id.* at 440.

<sup>86</sup> See e.g., Amy Gaudion, *It’s Time to Reform the U.S. Vulnerabilities Equities Process*, WAR ROOM – U.S. ARMY WAR COLLEGE (Sept. 2, 2021) at <https://warroom.armywarcollege.edu/arti->

Finally, we accept the last element in the definition of a wicked problem, which is that the only way to address it is to try solutions knowing that every solution is expensive and has lasting unintended consequences.

Of particular relevance to our current subject, Honeyman and Coben identified the need for creativity in addressing wicked problems along with “a stance of openness that facilitates continued learning and revision of our understanding of the problem and possible solutions.”<sup>87</sup> They also note the importance of monitoring “the ways our own actions reshape the problem and the context.”<sup>88</sup> Finally, they point out that “even within a ‘wicked’ problem, there may be subsets of issues that are relatively ‘tame.’”<sup>89</sup> In this context, the internal negotiations within a business or governmental unit represent one example of a tame subset within the broader wicked problem to be addressed with hybrid conflict management.

Expanding on the initial thinking on wicked problems, Peter Coleman and Robert Ricigliano have developed a framework that seems to be well-suited to our understanding of situations requiring hybrid conflict management. Coleman and Ricigliano divide problems into two categories, namely, clock problems and cloud problems, as we alluded to above. Clock problems are defined as “those, like clocks, that are of a more mechanical, knowable, controllable, and predictable nature.”<sup>90</sup> These problems can easily be understood, analyzed, and repaired.<sup>91</sup> In contrast, cloud problems are “more complex, murky, uncontrollable, and unpredictable. . .”<sup>92</sup> They “interact over time in unpredictable ways, and therefore evidence erratic behavior and outcomes.”<sup>93</sup>

Clearly, the types of issues we are discussing in this article are cloud problems. By definition, these issues are generally not predictable (we often are taken by surprise), not controllable (they have a life of their own which cannot be controlled by the entity subject to the attack), not knowable (we often are uncertain whether we are dealing with an act of hybrid warfare or something

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cles/vcp/; VULNERABILITIES EQUITIES POLICY AND PROCESS FOR THE UNITED STATES GOVERNMENT (Nov. 15, 2017).

<sup>87</sup> Honeyman & Coben, *supra* note 84.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 441.

<sup>90</sup> Peter T. Coleman & Robert Ricigliano, *Getting in Sync: What to Do When Problem-Solving Fails to Fix the Problem*, in *THE NEGOTIATOR'S DESK REFERENCE* 467, 470 (2017).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 471.

<sup>93</sup> *Id.*

less nefarious), and not mechanical (the issues are generally sophisticated in nature or embedded in a larger wicked context).

In order to manage cloud problems, Coleman and Ricigliano recommend that we use a “sync” framework.<sup>94</sup> In describing their framework, they acknowledge the prior work of two cultural anthropologists, Florence Kluckhohn and Fred Strodtbeck, who identified in 1961 three approaches to the relationship humans have with the world around them: mastery, submission, and harmony.<sup>95</sup>

Mastery is the belief that we have the capacity and responsibility to attempt to control nature, society and the world around us . . . Submission is based on the belief that the natural (and the supernatural) world is so immensely complex and mysterious that it is ultimately unknowable and unfixable . . . Harmony [is] the belief that humans can exercise partial but not total control of nature by living in balance with our surrounding social and environmental forces.<sup>96</sup>

Coleman and Ricigliano do not use the term “harmony” and reference instead a “sync” framework and then analyze three questions: what is the goal, where do we focus, and how do we engage?<sup>97</sup> They posit that in sync, the goal is not to solve the problem but to “improve the system dynamics.”<sup>98</sup> The focus is on “understand[ing] the evolving problem in context.”<sup>99</sup> And we should engage in sync by “work[ing] with the energy in the system; employ[ing] adaptive action; and enabl[ing] change.”<sup>100</sup>

In the interest of space, we focus on the latter two questions in the sync framework, which we believe are most helpful in this arena, namely, where do we focus and how do we engage? Coleman and Ricigliano explain that regarding where we focus, we need to:

Understand the evolving problem in context. Resist the tendency to prematurely oversimplify threatening problems by becoming familiar with the complex forces operating in the context

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<sup>94</sup> See *id.* at 472.

<sup>95</sup> *Id.*

<sup>96</sup> Coleman & Ricigliano, *supra* note 90.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (as opposed to “fixing the problem” in mastery or “doing no harm” in submission).

<sup>99</sup> *Id.* (as opposed to “zoom[ing] in on the problem” in mastery or “zoom[ing] out to see the chaos” in submission).

<sup>100</sup> *Id.* (as opposed to “impos[ing] control, implement[ing] solutions and ‘leading change’” in mastery or “relinquish[ing] control, minimize[ing] risk, and avert[ing] disaster” in submission).

of how they interact over time to create the problem of concern.<sup>101</sup>

They explain that to address these problems; we must become skilled at “seeing the problem in the context of time and space.” This means that we should “consider the many complex factors that are operating at different levels (people, groups, and institutions) and at different time scales (immediate effects, delayed effects, and trends over time) in the context which drive and constrain the problem— and only then focus on those aspects of the constellation of forces that are important, high-impact and actionable.”<sup>102</sup> They contrast this with the mastery approach, which would include analyzing, isolating, and focusing on the target problem with an eye on what we could change.<sup>103</sup>

In practice, this means that to engage in hybrid conflict management, we need to focus on the hybrid warfare attack as part of the more extensive system and be prepared to look not just at the presenting problem but how it is impacting and is impacted by the people involved and the international relations and business contexts.

In further explaining the question of how we engage, Coleman and Ricigliano suggest that the way to engage the system is by “locat[ing] and work[ing] with the energy that resides within the system.”<sup>104</sup> This means that we will not be able to fix or control the system, but we can “find those areas in the system where there are people, ideas, or other forces that are creating change in the system and then work with them to affect the direction of that change so that the system produces more of the outcomes we want.”<sup>105</sup>

One of the resounding refrains from the security experts involved with this project was the challenge they face in dealing with the egos of those in leadership positions who think they can somehow control the effects of a hybrid warfare attack— not “just” manage conflict. Learning how to work in sync with systems from a place of humility and recognizing that “cloud” problems cannot be easily contained or controlled seems especially important. Coleman and Ricigliano suggest that one look for ways to “harness the endogenous sources of energy in the system,”<sup>106</sup> “look for

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<sup>101</sup> *Id.* at 475.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 477.

<sup>105</sup> *Id.* at 478.

<sup>106</sup> *Id.*

what’s holding the system together,” or “identifying networks of effective action,”<sup>107</sup> and work upstream, away from the presenting problem.<sup>108</sup>

The guidance here suggests that first, prior to being confronted with a situation, we consider in advance the existing pre-conditions that would make an entity potentially subject to some type of attack. Second, rather than confronting the situation head on, Coleman and Ricigliano would suggest working on issues that surround the problem. For example, if there is a cyberattack to the email system, an entity should look at strengthening other aspects of the business that perhaps would lessen the reliance on email. It is important to note that one of the significant lessons from this analysis is that each situation is unique, and must be considered in context. While it is challenging to provide an example that would be applicable in multiple situations without providing a complete review of the context, it is similar to how insurers, companies and governments have recognized their inability to control things like weather. As a result of this awareness, entities may be required to employ mitigation efforts like finding an alternate site that would be less susceptible to flooding. The important concept here is the recognition that one cannot always control the dynamic, but one can control how one prepares in order to lessen one’s vulnerability.

Another guideline for addressing the question of how we engage the system is to employ adaptive action<sup>109</sup> by: “making more decisions,” in other words, set a course of action but then remain nimble, open to feedback, and prepared to alter course as needed;<sup>110</sup> acting in more diverse ways by taking a wider variety of actions while attempting to achieve the one goal; asking why more; and staying focused on addressing the central issue without developing a “single-minded preoccupation with one solution.”<sup>111</sup>

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 479.

<sup>109</sup> This is consistent with Jayne Docherty and Leonard Lira’s work developing teaching and training for graduate student in peacebuilding (Docherty) and the military (Lira). In their chapter *Adapting to the Adaptive*, in *EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN THE RETHINKING NEGOTIATION TEACHING SERIES* (2013), they write “[a]daptive problems, by definition, require that the parties change themselves in order to deal with the problem. . . the changing of self is. . . necessarily *group change* not just personal change by key players. This makes the relationship between at-the-table and behind-the-table negotiations more complicated than is usually understood” (emphasis in the original). The chapter includes examples of how they each teach wicked problems in their respective settings.

<sup>110</sup> Coleman & Ricigliano, *supra* note 90, at 480.

<sup>111</sup> *Id.* at 481.



Finally, Coleman and Ricigliano suggest that one should “enable change” by using one’s role (skills, relationships, and knowledge) to create the conditions for the system to change itself.<sup>112</sup> While this may not appear to be as helpful or relevant to the current issue, Coleman and Ricigliano reference the work of Michael Senge, who points out that “most leaders are rewarded for making things happen and creating results,” and this causes them to miss what is emerging. Specifically, Senge recommends being “mindful of your own beliefs, values, and proclivities . . . that might get in the way of attending more accurately to the evolving system.”<sup>113</sup>

This is one more example of how the humility of the leader or person in charge is critical to engaging in hybrid conflict management. It is a strong reminder that when faced with a crisis, our adrenaline prompts us to act quickly and decisively, and this may be exactly the wrong step. Rather than rush to take control, when working in adaptive systems, one needs to slow down and pay attention to what is emerging. Senge and colleagues refer to this as “presencing,” which “requires stillness (not thinking and acting) in order to enhance your capacity to attend to how the system surrounding you is in movement and where it may be headed.”<sup>114</sup>

Coleman and Ricigliano conclude with a reminder that the sync approach requires people of diverse backgrounds, skills, and thinking to work together, challenge each other’s thinking with respect and skill, have difficult conversations, and work constructively with their differences. Without the ability to do these things, we may be truly powerless to grapple with the most difficult problems we face.<sup>115</sup>

There are many lessons developed from the wicked problems literature. Probably chief among them is the importance of adaptability and humility. Because hybrid warfare issues are cloud problems, not clock problems,<sup>116</sup> they need to be considered systematically, as proposed in the sync model.<sup>117</sup> Specifically—and counter to the way of thinking that will make most c-suite executives comfortable—the sync model starts with the assumption that the system is in control.<sup>118</sup> The goal is to “find those areas in the system where there are people, ideas or other forces that are creat-

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 482.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 487.

<sup>116</sup> Coleman & Ricigliano, *supra* note 90.

<sup>117</sup> *Id.* at 472.

<sup>118</sup> *Id.* at 477.

ing change in the system and then to work with them to affect the direction of that change. . .”<sup>119</sup>

vi. Multiparty Facilitation and Consensus-Building Process

The final set of negotiation-related theories, concepts, and skills is drawn from the world of facilitation and consensus building. Lawrence Susskind explains that consensus building often is used to help public actors resolve complex disputes over policies, resource allocation, or the siting of NIMBY (not in my backyard) projects. In a nod to complexity, these processes are not limited to “named parties” or to pre-defined issues or questions. Unlike most of the other processes we have described thus far, they usually are conducted in public. They also nearly always involve a recognized or quasi third party who is made explicitly responsible for the communication and process management functions that can be so challenging to multiparty negotiations.<sup>120</sup>

There are several key steps in multiparty consensus building. The first is described as “convening all relevant parties.”<sup>121</sup> Importantly, however, this step also includes conducting a conflict diagnosis—i.e., assessing the potential for reaching an agreement, which necessarily involves assessing whether it is worthwhile to proceed with the consensus-building process or not. In general, a third party undertakes this step and does not begin with the assumption that the process will continue. Indeed, the entire process may end here if the third party concludes that agreement is so unlikely that engaging in the process is not worthwhile. On the other hand, if the third party concludes that agreement is indeed possible, this first step also includes identifying key stakeholders, which includes both those with the authority to enter into a binding agreement as well as those who have sufficient influence that they could effectively undo any agreement reached.

The next two steps— “clarifying the responsibilities of the participants and the *ad hoc* assembly as a whole” and “deliberating in a way that generates intelligently crafted ‘packages’ that meet the needs of all of the relevant stakeholders”<sup>122</sup>—are once again organized and facilitated by the third party. The third party also facilitates the group’s explicit consideration of and decision-making

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<sup>119</sup> *Id.* at 478.

<sup>120</sup> Lawrence E. Susskind, *Consensus Building and ADR: They Are Not the Same Thing*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 358, 364 (Moffitt & Bordone ed., 2005).

<sup>121</sup> *Id.* at 361.

<sup>122</sup> *Id.* at 362–63.

regarding the key issues of communication and process management. The participants clarify whether they have the authority and responsibility to make a decision or are instead making a recommendation or proposal that will go to a public decision-making body. The participants also explicitly recognize constituent groups and determine both the role that these groups will play and the processes that will be used to facilitate communication and coordination.

Coalitions almost inevitably develop during the consensus-building process, with all of the same considerations discussed earlier. However, the next step is “making decisions of a sort that generate near-unanimous agreement”<sup>123</sup> which makes it clear that there must be “sufficient consensus.” A mere majority will not be able to impose its will on the rest of the group. The final step involves “implement[ation] of agreements on all informally negotiated commitments.”<sup>124</sup> This may mean conveying a recommendation or proposal to the public body that has actual decision-making authority or it may mean actual enforcement of the decisions reached.

The convening step in facilitation and consensus-building processes seems most likely to have potentially useful application in the context of hybrid conflict management. There is value in a hard-headed assessment of the likelihood of reaching agreement and identification of those who should be included in the process. Also valuable is the use of a third party who has explicit responsibility for communication and process management. Finally, these processes provide a useful model for explicit consideration and appropriate incorporation of constituencies who will not be direct participants in the consensus-building process but will be in regular communication and coordination with that process.

There are many other group processes that exist to facilitate resolution, understanding, and/or communication that also may be useful for reaching out to constituents, communicating with them, educating them, and acknowledging or even incorporating their views. Just a few examples are capacity strengthening (strengthening the “radical center”), dialogue processes, listening projects, and back-channel negotiation.<sup>125</sup> Such tools may be especially helpful

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<sup>123</sup> *Id.* at 363.

<sup>124</sup> *Id.* at 363–64.

<sup>125</sup> Jayne Docherty, *Negotiation, One Tool Among Many*, in *THE NEGOTIATOR'S FIELDBOOK*, 565 (Schneider & Honeyman eds., 2005). (Other processes of this type include conciliation (consultation, coaching), conflict assessment, confrontation, focus groups, media campaigns, monitor-

for nations that fear that their population's polarization is becoming extreme enough to undermine the nation's cohesion and legitimacy or businesses that hope to connect more effectively with local governments and populations. Use of these tools thus has the potential to strengthen a nation's or business' legitimacy and deter or reduce the effectiveness of an aggressor's use of certain tools of hybrid warfare.

#### IV. CONCLUSION

As this Article has considered the application of negotiation theories, concepts and skills in response to hybrid warfare—in other words, as it has considered how these theories, concepts and skills might facilitate effective engagement in hybrid conflict management—the following have become clear: First, situations involving hybrid warfare are complex—not just complicated—and are only a component part of larger systems and dynamics. Second, these situations often trigger panic and a sense of crisis that can impede clear thinking. Third, both in anticipation of a hybrid warfare attack and after such an attack, these situations involve many potential players—i.e., internal and external constituents and coalition partners—not only the aggressor and the target. Fourth, working with those internal and external constituents and coalition partners before an attack can enable a potential target to develop more favorable BATNAs. Fifth and relatedly, preparation—which includes identifying internal and external constituents and coalition partners—is key.

This last point deserves additional elaboration. Hostage negotiation teams prepare for the crises that they know they will face, even though they do not know the specifics of what they will encounter. Firefighters similarly prepare, with the right equipment and with practice. Pilots use simulators and practice flights to prepare for all sorts of adverse conditions and emergencies they may face. In each of these instances, professionals are internalizing what they will need to do when a crisis emerges—as it inevitably will. In a sense, they are developing their “muscle memory” or their automatic response systems so that they will be able to fully attend to the larger context and situational specifics they will face.

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ing, evaluation and implementation committees, practical cooperation projects, shuttle diplomacy, back-channel negotiation, and visioning processes).

With practice, they can become “part of the flow,” just as the wicked problem theorists recommend.

A nascent form of such practice is already beginning to emerge. We have become aware that some corporations are conducting internal trainings to prepare for hybrid warfare attacks, using simulations, engaging different parts of their organizations, identifying teams, establishing lines of communication and authority. The negotiation theories we have examined here affirm the value of this sort of preparation and also suggest additional avenues for exploration and preparation. Among the most important is identifying external constituencies and potential coalition partners including insurers, government agencies, and even industry competitors.

The authors of this Article also have been struck that the advice to be gleaned from this exploration of negotiation theories varies for different groups of people and organizations affected by hybrid warfare. For businesses that have been the victims of hybrid warfare—or fear that they could be:

- Do not assume the ability to respond effectively “on the fly.” Be humble—and if we have not yet repeated this enough—prepare.
- Build internal teams and include outside advisors who work regularly with the business. Train/conduct simulations on responses. Understand lines of communication and authority. Identify and share interests, objective criteria, options, and BATNAs.
- Build networks of communication with industry peers and with appropriate government agencies. Share information on attacks and responses. Share information on training.
- Think broadly regarding relevant constituencies, identify influencers and begin reaching out and developing networks and coalitions.
- Slow down and pay attention to the system as a whole rather than rush to make an intervention in one area. Think about the presenting issue or example of hybrid warfare in the context of a system.

For governmental actors that have been the victims of hybrid warfare—or are assisting business or others who have been victims—these are some of the important lessons:

- Consider creating the hybrid conflict management equivalent of hostage negotiation teams, perhaps even by industry, to consult with and assist targets. And then, just as firefighter units provide backup to each other in the event of really huge and complex fires, these teams could provide backup to each other in the event of particularly widespread and complex examples of hybrid warfare.
- Develop expertise and collaborative relationships at all levels—federal, state and local—because all of these systems will also face attacks.

Last, the negotiation theories, concepts and skills discussed here suggest that the governmental actors responsible for preparing for or reducing susceptibility to hybrid warfare should:

- Start preparing early because many of the hybrid conflict management tools described here will require time and development.
- Promote laws that reduce the incentives to conceal attacks or blame others for an attack or fail to share information.
- Ensure that the agencies responsible for implementing diplomatic, informational, military, and economic tools of state power are in communication and coordination with each other.
- Network with other levels of government.
- Network with governments around the world facing similar threats to share best practices and build capacity.
- Identify citizens as important constituents and increase national awareness of hybrid warfare and its consequences—pointing out, for example, its impacts on social media, elections, supply chains—and train citizens to be ready to respond, just as many citizens are now trained in CPR to be ready to respond to an emergency until an ambulance arrives.
- Consider the larger system of which hybrid warfare is just one part. Perhaps governments around the world—many of which engage in some form of aggressive competition with other nations—could be interested in placing mutual limits on these competitive behaviors, negotiated and ratified through a treaty as has occurred with other powerful, mutually-destructive weapons.

As the authors of this Article noted at the beginning, this is just a start—but an important start. The phenomenon of hybrid warfare demands a thoughtful, coordinated response. We look forward to others' contributions as we all take up the challenge of developing a comprehensive set of tools for hybrid conflict management.