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INTRODUCTION: NEGOTIATION STRATEGIES FOR WAR BY OTHER MEANS

Chris Honeyman and Andrea Kupfer Schneider***

We are delighted to introduce the topic of hybrid warfare into the dispute resolution field, with the first symposium for a law audience focused on how hybrid warfare might be more effectively understood, and defended against, through negotiation theories.[1] In the last three-plus years we, along with three colleagues,[2] have enlisted a number of additional colleagues from a variety of fields in a very unusual project—how to engage with a type of conflict often called grey zone conflict (by some people) or hybrid warfare (by others).[3] Our conflict management experts have come from a wide array of disciplines, as well as geographically ranging from Europe to Australia, and are balanced with a multinational array of security experts.

In every case, our conflict management experts have started our conversations with the same question: What on earth does this subject have to do with me, and my practice or my scholarship? We believe that question has now been answered in detail. And the synthesis of our discipline with the security experts is reflected in the richness of the articles which follow.

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** Andrea Kupfer Schneider is a Professor of Law and Director of the Kukin Program for Conflict Resolution at Cardozo School of Law.

1 We have previously published a symposium for a military audience through the Canadian military journal ON TRACK, which is the official journal of the Canadian Conference of Defense Associations (CDA) Institute. *See* Chris Honeyman & Andrea Kupfer Schneider, *Hybrid Warfare: Fighting Back with Whole-of-Society Tactics,* 30 ON TRACK 7 (2023).

2 Along with this article's authors, security consultant Calvin Chrustie, business school professor Barney Jordaan and law professor Véronique Fraser constitute the Project Seshat steering committee. Additional biographical information can be found at *Who We Are*, PROJECT SESHAT, https://www.project-seshat.org/who-we-are.html (last visited May 31, 2023).

3 Some military experts distinguish these terms functionally, defining hybrid warfare as implying "a conventional army augmented by a complex cyber/disinformation capacity" and grey zone conflict as "small tactical gains made 'under the threshold' [of] war" (personal note to authors of this article, as editors of the ON TRACK symposium, from ON TRACK managing editor, Jan. 16, 2023). However, we have not yet seen a broad consensus distinguishing these terms, and have observed many writers using them interchangeably, so we will merely note that we are following the latter practice here.

GREY ZONE CONFLICT, HYBRID WARFARE, AND DELIBERATE CONFUSION

As we have described elsewhere, "grey zone conflict" and "hybrid warfare" are just two of multiple terms now in circulation to describe the same phenomenon[4] — attacks against a country and its private businesses and public and NGO sectors that may or may not have any military element, by actors who may or may not appear to be connected with another country's national security apparatus.[5]

These attacks continue to proliferate, and it is apparent that Western military, intelligence, police, and other security agencies are not (yet) well-structured to respond to such private sector actions in any strategic or coherent way. Furthermore, grey zone conflict / hybrid warfare campaigns change tactics frequently, coordinate activity by government, private and nonprofit entities, and use cyber tools, public and commercial corruption, transnational organized crime, and disinformation campaigns, along with a host of other methods. Deception and denial are standard elements of this type of conflict as well.[6] Reactions by the target are often unhelpful and ineffective, ranging from threats of retaliation to denying the fact of any attack. At the government level, some suggest increasing defense expenditures or even cutting off all dealings with those countries who mount these attacks. None of these responses has proven useful as a general rule. Therefore, it is necessary to develop a wide-ranging approach, such that grey zone conflicts will be better understood as a class and *managed* on an overall level.

There is a strong precedent for this view: our group, known as Project Seshat, is inspired by Cold War negotiation and conflict management studies of how the West and the Soviet Union, over

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4 *About Project Seshat*, PROJECT SESHAT, https://www.project-seshat.org/about.html (last visited May 31, 2023).

5 *See* Honeyman and Schneider, *supra* note 1; *see also Gray-zone Aggression: Countering a Growing National Security Threat*, AEI (Nov. 10, 2020), https://www.aei.org/events/gray-zone-aggression-countering-a-growing-national-security-threat/; MARK GALEOTTI, THE WEAPONIZATION OF EVERYTHING: A FIELD GUIDE TO THE NEW WAY OF WAR (2022); Scott Tait, *Hybrid warfare: the new face of global competition*, FINANCIAL TIMES (Oct. 14, 2019), https://www.ft.com/content/ffe7771e-e5bb-11e9-9743-db5a370481bc; QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (Beijing: PLA Literature and Arts Publishing House, Feb. 1999), available at http://redreform.com/unrestrictedwarfare.htm.

6 *See* Christopher A. Corpora, *How to Undermine a Nation-state in 120 Days: Mediation and Negotiation in a Hybrid Warfare World*, 24 CARDOZO JOURNAL OF CONFLICT RESOL. —- (2023).

decades, could and did maintain something approximating a working relationship (including avoiding a nuclear war) even at the height of their conflict. The project therefore uses a negotiation and conflict management perspective as its organizing principle.[7]

How Project Seshat Works

Project Seshat was organized starting in 2020 as a group of scholars and practitioners, for two main purposes: first, to *increase understanding* of a type of activity that is carefully designed to be as obscure as the attackers can make it; and then, to use that understanding to *help create methods* for averting attacks, and for mitigating harm when they occur.[8]

In a globalized economy, business and NGO executives, and critically, their lawyers, are routinely engaged in negotiations of all kinds, with suppliers, customers, municipalities, potential merger partners and more. These dealings do not have to be visibly cross-border transactions to have hybrid warfare connotations. For example, if an apparently domestic company a city government is contracting with—for water or other utilities, transport, its communication networks or a thousand other things—is in some hidden way influenced by an adversary government, the city might find itself on the wrong end of an attack without ever realizing the opponent's intention, or even its existence.

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7 We should note right away, though, that in one key respect the Cold War analogy can be misleading: the West-Soviet relationship was fraught and complicated, but compared to what exists now, it was somewhat structured. Hybrid warfare is much more related to the "complex" than the "complicated"—and these similar-sounding terms mask a huge difference, captured by theorists under terms such as "chaos theory" and admittedly hard to grasp for most people. A Project Seshat team is at work on this now, writing a series of papers that we hope will show how "chaos" and related theories operate in practice in hybrid warfare. *See also* Cynthia Alkon & Sanda Kaufman, *A Theory of Interests in the Context of Hybrid Warfare: It's Complex*, 24 Cardozo Journal of Conflict Resol. —- (2023) (discussing complexity v complication in more detail).

8 Participants in Project Seshat are invited specialists in either negotiation, conflict management or security. The project is led by the five-member Steering Committee, of which one member (Honeyman) serves as principal investigator. The initial working group of some fifty people come from nine allied countries, and a larger array of subject fields, though more are trained in law than in any other single field. *About Project Seshat*, *supra* note 4.

WHAT CAN WE DO?

We think Project Seshat can help set up parallel groups within some of society's main constituencies (including bar associations), specifically chartered to make collaboration across silos easier. "Silos" crop up even within a single corporation—think about the cultures in engineering vs marketing, for example—and proliferate across society in general. One result (for example) is in the often-observed difficulties of sharing expertise and information between a federal law enforcement agency and a state agency that theoretically has the same kind of role and strong shared interests. This pattern is even more prevalent between government agencies and the companies which might need that support, as Hinshaw, Borbély and Chrustie describe in their article in this issue.[9] We think we can help create structures that will foster continuing interchange among them, including across the particularly difficult division between "civil" and "military" spheres.[10] As we have outlined before,[11] such a network can, in the future:

- Provide lawyers, business executives and other practitioners with the *tools* needed to recognize when one is dealing—even

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9 Art Hinshaw, Adrian Borbély & Calvin Chrustie, *Where Is Negotiation In Hybrid Warfare?*, 24 CARDOZO JOURNAL OF CONFLICT RESOL. —- (2023).

10 We have long believed in the importance of civil-military collaboration around concepts of conflict management, and our work in this area now has a nearly twenty-year history. We started working with Leonard Lira, then a U.S. Army officer and a professor at the United States Military Academy (West Point) in the mid-2000s. Lira's initial contribution to our Canon of Negotiation Initiative (Leonard Lira, *The Military Learns to Negotiate* in THE NEGOTIATOR'S FIELDBOOK, 675 (American Bar Association ed., 2005)), along with our separate discussions with Calvin Chrustie (Canada's chief hostage negotiator then, and a current contributor to this issue) led to convening the "wicked problems team" in the Rethinking Negotiation Teaching project a few years later. The team rapidly grew to include military and police officers, a professor of peacebuilding at a Mennonite university, an ombudsman whose daily fare was disputes between 20,000 scientists (each of whom, he said, had "a direct line to Truth"), a London-based theater director, and a South American politician whose experience included serving as a big-city mayor, and later, as president of his country. *See e.g.*, Chrustie, Calvin, Jayne Seminare Docherty, Leonard Lira, Jamil Mahuad, Howard Gadlin, & Chris Honeyman, *Negotiating Wicked Problems: Five Stories*, in VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN THE RETHINKING NEGOTIATION TEACHING SERIES (2010). Together, their output laid the basis for understanding how "wicked problems" operate in conflict and its management, and what an intervenor — military or otherwise — might usefully do about it. For further discussion, *see* Nancy A. Welsh, Sharon Press & Andrea Kupfer Schneider, *Negotiation Theories Engage Hybrid Warfare*, 24 CARDOZO JOURNAL OF CONFLICT RESOL. —- (2023).

11 *About Project Seshat*, *supra* note 4; *see also* Andrea Kupfer Schneider and Chris Honeyman, *Advocates' and Neutrals' Roles in a New Type of Conflict — The Private and Public Crises of Hybrid Warfare*, 16 NEW YORK DISPUTE RESOL. LAWYER, No. 1, 2023, at 34-39.

indirectly—with a supplier, a customer, a possible merger partner or any of a lengthy list of other parties that may be, perhaps unknowingly, influenced by a hybrid warfare gambit.
- Help both advocates and neutrals develop improved conflict analysis *skills* such that they can better predict which situations are likely to expose them to hybrid warfare risks.
- Help academics develop both formal and "crash" courses to make such knowledge, understanding and competence *widely available* to all interested constituencies.
- Provide military and other security people with the access necessary to *use* their expertise in the broader society.
- Develop a support network of civil and military *partner organizations*, helping to build their capacity to address related needs in their membership and communities.
- Build and distribute *a knowledge base* of publications and available presentations, not just in writing but in a variety of media, to share the emerging knowledge and skills as widely as possible.

The articles in this issue are designed to bridge gaps of understanding and further build networks of experts to help manage this new type of warfare more effectively.

Articles in This Issue

In this issue, Anne Leslie[12] uses her own counterintuitive career to argue that to get any grip on something as elusive as hybrid warfare, professionals of many kinds will have to break out of our often self-limiting conceptions of our work and our organizational roles. All of us, she says, are now going to have to enlarge the bounds of what we might previously have considered our sphere of influence or concern.

Christopher Corpora[13] reviews the long history of nations' attempts to undermine perceived adversaries without actual combat. He argues that hybrid warfare, as the newest development in this long history, has become so much more effective (including cost-

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12 Anne Leslie, *Know Thyself—Embracing the Ambiguity of War By Other Means*, 24 Cardozo Journal of Conflict Resol. —- (2023); *cf.* Anne Leslie, *How Hybrid Warfare is Redefining Contours of 'Business as Usual' and the Potential Role of the Military*, 30 On Track 28 (2023) (reviewing the issue from a more technical perspective).

13 Corpora, *supra* note 6.

effective) than open warfare, especially for authoritarian governments, that we should expect its use to grow even further. In particular, he contends that Western concepts of rules and fairness are themselves seen as soft points by adversaries who are using a quite different set of principles to play the game.

Art Hinshaw, Adrian Borbély and Calvin Chrustie,[14] meanwhile, go into detail on how negotiation *works* in the grey zone. Unpacking some conceptual flaws—for this context, at least—arising from traditional training in negotiation, they show how a broader and more effective set of responses can be drawn from a combination of broader social-science-derived concepts of negotiation along with security expertise. They direct readers' attention particularly to the distinction between evidence-led responses and intelligence-led responses to an emerging situation.

Nancy Welsh, Sharon Press and Andrea Schneider[15] review the literature on negotiation and draw an important distinction between the "classical" sources, including the interest-based model of negotiation, and the literature that derives more from "wicked problems." The former can be quite useful for the targets of hybrid warfare, as they gather their team and conduct innumerable internal negotiations to drive their response. Yet the latter—negotiation theories for wicked problems—can be more broadly useful in conceptualizing how to respond to hybrid warfare. They propose a related move toward reframing this work as "hybrid conflict management." Such a shift, they argue, will make it easier to enlist every company, and other entities, such as NGOs and hospitals, in the long-term preparatory effort they find is now essential.

Cynthia Alkon and Sanda Kaufman[16] also assess the utility of classical negotiation advice in a hybrid warfare context and conclude that negotiators facing this context need a whole different mindset. Yet they also describe not only how all of the traditional training remains useful in the many negotiations between stakeholders within the defending side, but also that there is at least a subset of hybrid warfare attacks where direct negotiation with the attacker *may* occur. Examples include ransomware attacks and targeted kidnapping. For these situations, however, their advice is very different from what they recommend for the "internal" or "behind the table" negotiations.

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14 Hinshaw, Borbély & Chrustie, *supra* note 9.

15 Welsh, Press & Schneider, *supra* note 10.

16 Alkon & Kaufman, *supra* note 7.

Finally, Chris Honeyman and Ellen Parker[17] focus specifically on those "behind the table" negotiations, between players that are nominally all on the same side. They pick apart an existing slate of techniques, to analyze which can be usefully adapted to preparation for and responses to hybrid warfare attacks, and how these could be used.

To conclude: Among many groups across our society with whom we hope to develop ongoing partnerships to address grey zone conflicts, the kinds of people likely to read the *Cardozo Journal of Conflict Resolution* are naturally high on our list. If you are interested in exploring this subject further, we would like to hear from you. You can reach us at andrea.schneider@yu.edu and honeyman@convenor.com respectively.

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17 Chris Honeyman & Ellen Parker, *Thinking Ahead in the Grey Zone*, 24 CARDOZO JOURNAL OF CONFLICT RESOL. —- (2023).

ARTICLES

KNOW THYSELF—EMBRACING THE AMBIGUITY OF WAR BY OTHER MEANS

Anne Leslie

I. Upending our Origin Stories to Expand our Worldview

On paper, nothing predestined me for a career in cybersecurity. Much in the same way as nothing on paper predestined me for being involved in a multinational effort like Project Seshat to study and respond to the rising threats of 'hybrid warfare' and 'gray zone conflict', or to give a keynote address at the Cardozo Journal of Conflict Resolution Melnick Symposium themed "Negotiation Strategies for War by Other Means."

And yet today, in spite of theoretical probabilities and contextual inclinations, I have a career in cybersecurity, I am relishing the opportunity to collaborate with many great minds in Project Seshat, and I am being invited to contribute my thoughts to a premier academic journal on a topic of societal and geopolitical dimensions that feels urgent and important.

One of the immediate challenges we have faced in Project Seshat is the absence of conceptual clarity and an agreed definition when it comes to hybrid warfare and gray zone conflict. NATO, for example, defines it as entailing an "interplay or fusion of conventional as well as unconventional instruments of power and tools of subversion. These instruments or tools are blended in a synchronized manner to exploit the vulnerabilities of an antagonist and achieve synergistic effects."

The child in me is awe-struck, wondering how on earth I managed to find myself in a time and place where some exceptionally erudite individuals want to hear what I have to say on the topic. The adult me is smiling, practicing genuine gratitude, and doing her best to act as if it is all just in a day's work. The child in me whispers "are you sure we're meant to be here?" The adult in me shushes the child, preferring to listen to the experts around me who have invited me in and who are validating by their invitation and attention that I am indeed worthy and have something valuable to contribute.

You may be wondering what the purpose is of such meandering into my inner psyche in the context of an article in an academic journal about hybrid warfare in the gray zone. It might seem unnecessary, disconcertingly intimate, borderline inappropriate. All of those labels —and possibly others I haven't yet considered—are precisely the reasons why I believe we all need to first take a journey inside to examine ourselves, benevolently and critically, if we are ever to understand the individual contribution each of us can make in our daily lives to strengthen the collective cohesion that supports democracy, promotes peace and prosperity, and enables well-being.

"By knowing who you are and what you stand for, you come to life's choices with the most powerful tool of all: your full self."[1] – Susan David

We need to intentionally and consistently push beyond our natural psychological comfort zone to explore the beliefs we hold about ourselves and others, our hopes and our fears, our value systems, our affiliations and repulsions to certain groups and their doctrines, our relationship to time and uncertainty, and our predominant mental models and psychological biases, before we can have any chance of successfully deciphering, navigating, and positioning ourselves in the great power competition that is at play in the gray zone all around us. Whether we realize it or not.

II. Creating Optionality in the Liminal Space Between Certainty and Possibility

Looking back over the past decade, I realize now that the inner narrative I had running in my head about myself was that while I was immensely grateful to be welcomed into new professional domains in the company of very smart and distinguished subject matter experts, I couldn't quite manage to quieten the inner critic in me who intermittently had me wondering why anybody wanted me there in the first place or what I really had to contribute.

I was a very diligent student when I was younger. I did what I was told, toed the line, was never late with assignments, and voraciously read the recommended reading lists that nearly everyone else ignored. I sought absolutes as the antidote to my anxiety and staked my self-worth on the idea that academic excellence was

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[1] Susan David, Emotional Agility (2016).

the secret to being worthy of a good life. I played it safe, keeping life "tidy." I wore myself ragged in the process and had to learn a whole new way of being, that involved embracing ambiguity instead of railing against it and accepting that "good enough" would have to be enough when an absolute answer failed to materialize.

Certainty turned out to be a false friend and an impossible standard to maintain. My formal education, from pre-school through university—had taught me that there is a "right" answer to life's many questions and conundrums. But reality came calling and debunked that theory, teaching me that there is rarely an obvious solution.

What I have faced much more frequently are life events and situations that require decisions to be made with varying degrees of urgency from an array of imperfect alternatives; situations where there is often no "good" option, where "good" is synonymous with "comfortable" and "easy" and "low consequence."

That's when things get tricky. Because our education and training typically don't equip us with the mental models and psychological resilience needed to straddle the ambivalence and embrace the ambiguity between statements that are simultaneously seemingly conflicting and also potentially true.

We are conditioned to think in binary *either/or* mode; in reassuringly simplistic but ultimately unhelpful terms of right and wrong; striving in a Sisyphean quest for certainty and psychological comfort that, in my experience, often yields short-term gain and deleterious longer-term second-order effects.

While I hold education and educators in the highest regard, my observation is that in spite of their best intentions, our current education system and proclivity to value domain specialization over broad generalist instruction, critical thinking skills, and cross-domain curiosity, have an unintended tendency to compromise our ability to optimally position ourselves—individually and collectively—by constraining our frame of reference and blinkering our perspective.

Our bounded rationality eliminates options we might otherwise have had for reaching more favorable outcomes in response to changing circumstances, without us even realizing that they were options available to us, to begin with.

Where my inner child used to urge me to remain safely within the contours of familiar terrain, I have learned as an adult to nurture a counter-reflexive ability to overcome this tendency. I have managed to decouple myself from previously practiced restrictive

thought patterns and the rigid behaviors that come with them. I compel myself to consciously suspend what I believe to be the right answer and nudge myself to further inquiry, preferring to be part of the group that arrives at the best analysis or the best solution rather than relishing the ego boost of imposing a personally held version of 'the truth' about a given situation.

"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." ~ Mark Twain

When we challenge what we think we know to be true about ourselves, our capabilities, other people, and the world around us, we can find that not only is our existing "lane" more elastic and extensible than we realized; but we can also end up creating a whole new lane of unchartered possibility for ourselves and a realm of options to achieve an expanded set of more favorable outcomes at every level.

Today, I advocate for radical curiosity and intellectual humility which, when combined with ambition, grit, and hard work, combine to provoke unusual and exciting opportunities that I seize in the affirmative, even when there is no pre-defined path forward or a prescribed outcome known upfront. For aficionados of serendipity, I really can't recommend this approach too highly.

III. WHO AM I? WHO COULD WE BE?— EXPLORING SELF AND GROUP IDENTITY AS A CONTAINER FOR EXPLORING GRAY-ZONE CONFLICT

While I was reflecting on the chain of events and serendipitous encounters that colluded fortuitously to bring me to where I am today personally and professionally, it struck me that the concept of self and group identity could be an interesting angle to explore in this paper on gray zone conflict.

Why? Precisely because identity *isn't* often discussed in this context; and yet it seems to me that how we see ourselves, individually and collectively, and the narratives we tell ourselves about ourselves and about others are intimately linked to the relevance we accord (or not) to certain events in relation to the lives we lead, the roles we play and the perimeters of the "lanes" we find ourselves operating in.

Let's take me as an example. I graduated from business school with a dual degree in European business, spent several years working in banking, and the best part of a decade as a stay-at-home

mother to my three kids before returning to work in a succession of business development roles in technology companies.

I might have stayed on that track, had it not been for a decision to return to school to do an Executive MBA in 2014. That marked something of a watershed for me because it was the first time that I gave some really deep thought to the kind of work I wanted to do, the kind of people I wanted to work with, and the kind of company I wanted to work for. I realized that I wanted to be part of something bigger than myself, to work with people who are motivated by more than money.

Sometimes life throws us a bone by bringing people into our lives at the very moment we need them the most. A fortuitous encounter with a long-standing cybersecurity practitioner, who runs an initiative called CyberWayFinder that exists to increase diversity in the cybersecurity workforce, flourished into a friendship and mentorship. Soon after, I began looking seriously at the viability of cybersecurity as a future career option and I am happy to report that my "lane" is now public cloud risk and security, which is a professional field I never imagined I would be in, even a less a field I would be successful in.

What I want to illustrate with this example is that the labels we put on ourselves and the narratives we tell ourselves about ourselves have the effect of delimiting—rightly or wrongly—the contours of where we feel legitimate to show up. Up until recently, it had never occurred to me that I could have a role to play beyond the lanes of "parent," "partner," "friend," and "salaried employee" where I was an incumbent. I had certainly never considered a role that would involve me in a community of expert academics, negotiators, and mediators; a role that would expose me to stakeholder groups in the defense forces and national security arena where I would be invited to contribute my expertise on a topic of such wicked complexity and geopolitical importance as hybrid warfare.

Taking a step back and making the effort to infuse my observations about myself with a higher degree of objectivity than comes easily, I can say now that my former beliefs about myself were self-limiting and reductionist. It turns out that I am legitimate as a thinker, contributor, and influencer in more contexts than I gave myself credit for. I also have more agency and a higher capacity to self-direct than I realized.

And I can conceivably imagine that I am far from alone in this case.

> *[Y]ou can't connect the dots looking forward; you can only connect them looking backward. So you have to trust that the dots will somehow connect in your future. You have to trust in something—your gut, destiny, life, karma, whatever. This approach has never let me down, and has made all the difference in my life. ~ Steve Jobs*

My point is *not* that I am gifted with exceptional capacities that set me apart from my peers and fellow citizens—on the contrary. Rather, my point is that everyone has the agency (albeit to varying degrees) to build their awareness, direct their thought processes and decision-making, and drive their behaviors and consumption patterns in a manner that can either contribute positively to a liberal democratic outcome we qualify as desirable; or conversely, undermine the fabric of our societies through the slow burn of corrosive acts of attrition.

One such current example is the pervasive popular use of TikTok in western democracies: the potential threat that the platform represents only catches the attention of a small, informed minority, compared to the masses who are willing to cast a blind eye to the long-term toxic impact and influence of the app on its users and the societies in which they live.

Exploring identity—how we see ourselves and how we see others—is a useful endeavor in the context of hybrid warfare because our worldview and our self-view coalesce to condition our pre-disposition to wonder, question, analyze, and opine on how seemingly disparate actions, decisions, and events might be linked and could be contributing surreptitiously to an aggregate dynamic of great-power competition that far exceeds the bounds of what any of us might reasonably consider our sphere of influence or concern.

> 'It's essential to be geopolitical!' argues the case for situating geopolitics within everyday contexts and advocates an approach that does not fixate with territorially defined states, big powers, and particular agents like US presidents. Geopolitics is embodied, experiential, and impactful[2] ~ Klaus Dodds

To paraphrase Australian politician, Penny Wong, we can choose not to be interested in politics, but we can't choose to be unaffected by it. Indeed, we are not all equally endowed with the same level of ability and means to contribute to shaping and protecting what matters in our societies. However, there is nothing

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[2] KLAUS DODDS, GEOPOLITICS (2007).

stopping each one of us from being united in caring about what matters in our societies. Nothing, that is, except ourselves.

If there is one thing that each and every one of us possesses, it is the power to know ourselves and to change ourselves. For better, or for worse.

The choice is ours.

HOW TO UNDERMINE A NATION-STATE IN 120 DAYS: MEDIATION AND NEGOTIATION IN A HYBRID WARFARE WORLD

Christopher A. Corpora, Ph.D.

The original and admittedly provocative title for this essay was "How to Take Down a State in 120 days" and the original November 2022, 20-minute presentation at Cardozo Law School was so titled. The intention behind the provocations was to demonstrate the speed of growing investment in and multi-disciplinary nature of the current hybrid war threat. We have not yet witnessed many state takedowns through this form of warfare; but we have seen states significantly undermined and captured in timelines almost as aggressive as the title suggests. We have seen authoritarian states and criminal organizations significantly weaken more vulnerable states, allowing for a much less destructive force to be used to impose the will of one country over its adversary, or for a subversive force within one country to take over.

The results suggest that continued growth and investment in these Hybrid War strategies could become the majority of the coercive hegemonic effort, especially when coupled with cyber warfare to force the closure of an adversary's essential services, without a single soldier being deployed.

Events in Georgia (August, 2008), Yemen (2014-present) and most recently in Ukraine (2014-present) are all case studies in the use of hybrid warfare as an important strategy in these interventions.[1] The final result in Ukraine is not yet known, and appears to be turning away from the quick Russian wins in annexation of Crimea and instigating rebellion in the Donbas Region. However, those early victories were guided in large part through a hybrid war strategy.

Meanwhile (and very briefly), Iranian direct and indirect support to the Houthi militias successfully distracted Saudi Arabia and the United Arab Emirates, providing some breathing space for the

[1] This not to suggest the US and its allies do not employ forms of hybrid warfare. They certainly do use their own tactics, as established and sanctioned under their laws. The governing and legal authorities that shape hybrid war in Western democracies are very different than those used in authoritarian regimes, as discussed below. The focus of this essay, however, is on authoritarian hybrid war strategies and tactics.

Iranian regime and much needed fodder for their domestic propaganda efforts. And Russia pacified Georgia, took over two adjacent oblasts and toppled the President in roughly 30 days, after pursuing an aggressive Hybrid War strategy in the nine to twelve months leading up to their conventional military invasion.[2]

The Chinese Communist Party (CCP) plays a decidedly more economic, longer game in extending its influence—using their Belt and Road scheme as a means to economically "invade" vulnerable countries with long-term loans, in exchange for large-scale infrastructure and mining projects across Asia, Africa and South America. In many of these cases, states are predictably unable to meet the conditions of their loans and end up forfeiting large parts of their economic sovereignty to the CCP.[3]

In all this activity, there is an expanding and potentially existential risk to democratic nations that organize themselves under the rule of law. As the threats associated with authoritarian hybrid warfare strategies continue to mature and successfully destabilize democratic states, one should expect ever more emphasis on these tactics, as well as the development of new approaches to promote and extend the interests and influence of authoritarian states.

The battlefield in this type of warfare is the boardroom, courtroom and chatroom, making it imperative for a broader set of professionals beyond the world of security to fully understand the Hybrid War threat and how they may be entangled in it.

I. How Does Hybrid Warfare Actually Work?

As discussed in several other articles in this issue, Hybrid Warfare and Gray Zone Conflict are recent terms used to understand

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[2] Natia Seskuria, *Russia's "Hybrid Aggression" against Georgia: The Use of Local and External Tools*, CSIS (Sept. 21, 2021), https://www.csis.org/analysis/russias-hybrid-aggression-against-georgia-use-local-and-external-tools#:~:text=%E2%80%9CBorderization%E2%80%9D%20and%20Militarization%20of%20Occupied,stationing%20troops%20on%20the%20ground [https://perma.cc/KV87-YRHT]; Mark Galeotti, *Active Measures: Russia's Covert Geopolitical Operations*, George C. Marshall Center (June 2019), https://www.marshallcenter.org/en/publications/security-insights/active-measures-russias-covert-geopolitical-operations-0 [https://perma.cc/754F-QXTH].

[3] Shashi Asthana, *Dependency Trap: Chinese Strategy to Mute Global Response to its Multidomain Aggression*, Modern Diplomacy (Jan. 17, 2023), https://moderndiplomacy.eu/2023/01/17/dependency-trap-chinese-strategy-to-mute-global-response-to-its-multidomain-aggression/ [https://perma.cc/88PA-NFBV]; Dylan Gerstel, *It's a (Debt) Trap! Managing China-IMF Cooperation Across the Belt and Road*, CSIS (Oct. 17, 2018), https://www.csis.org/analysis/its-debt-trap-managing-china-imf-cooperation-across-belt-and-road [https://perma.cc/N9CR-8UJG].

and explain an age-old human social phenomenon—attaining dominance and influence without throwing a punch or firing a shot.[4] Versions of this strategic concept have existed throughout history, but they have been evolving more rapidly in the modern era. Asymmetric Warfare, Military Operations Other Than War (MOOTWA), Irregular Warfare and Active Measures are a few of the terms used over the past 50 years to describe non-conventional strategies and tactics for weakening an enemy, ideally limiting the amount of conventional force needed to win. Softening an enemy through psychological or physical deception led to many great classical victories in war—ranging from Egyptian fighters in baskets, through Alexander's famous deception in the conquest of Punjab, to the Trojan Horse. The price of war increasingly became a point of focus, as the costs rose, in terms of both blood and treasure, forcing policymakers to think carefully about direct combat as a viable option to gain power and pursue their interests.

Hybrid Warfare and Gray Zone Conflict are updated versions of this indirect aggression—using unconventional means and targeting a broader community outside the traditional combatant space and enabled largely through the internet (or cyberspace as some call it). The creation and growth of the internet over the past 40 years provided a new domain for contestation, joining air, land, sea and space[5] as places for international competition. It also is a space of easy intersection with the private sector, which is the domain where most Hybrid War actions occur—ranging from indirect manipulation through disinformation operations to cyber blackmail and denial operations. The locus of these Hybrid War activities purposefully targets "civilian" and "commercial" interests to instigate chaos and create unignorable disruptions, where scarce public resources must be expended to respond, and private legal actions are required to address the impact.[6]

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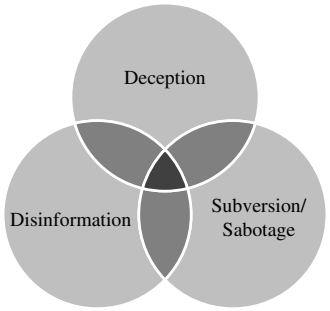
4 Sun Tzu

5 Steven Feldstein, *Disentangling the Digital Battlefield: How the Internet has Changed War*, WAR ON THE ROCKS (Dec. 7, 2022), https://warontherocks.com/2022/12/disentangling-the-digital-battlefield-how-the-internet-has-changed-war/ [https://perma.cc/49YH-GKWD]; Gavin Wilde, *Cyber Operations in Ukraine: Russia's Unmet Expectations*, CARNEGIE ENDOWMENT (Dec. 12, 2022), https://carnegieendowment.org/2022/12/12/cyber-operations-in-ukraine-russia-s-unmet-expectations-pub-88607 [https://perma.cc/8V9F-D3P6]; Bilyana Lilly & Joe Cheravitch, *The Past, Present, and Future of Russia's Cyber Strategy and Forces*, CCDCOE (Oct. 22, 2020), https://www.rand.org/pubs/external_publications/EP68319.html [https://perma.cc/9AW8-Z4YB].

6 Edward Segal, *The 6 Most Common Cyberattacks That Could Impact Companies In 2023*, FORBES (Jan. 2, 2023), https://www.forbes.com/sites/edwardsegal/2023/01/02/the-6-most-common-cyberattacks-that-could-impact-companies-in-2023/?sh=85e0590536af [https://perma.cc/WC9W-A8WG].

The Hybrid Warfare space is best understood as three intersecting areas of action to weaken or soften an adversary—Deception, Disinformation and Subversion (Figure 1). Each of these areas range in levels of hardness, depending on the context of the target.

FIGURE 1



For example, misperception or misinformation can render more useful results than wholesale deception or fabricated disinformation—exploiting identified points of weakness inside your adversary's system and using their own weight to make them lose balance. Thus, in many ways the repeated rumors in 2015 and 2016 of Russian attempts to influence the US election had more impact than the actual efforts to insert false information into the process. The Russians rightly perceived the growing polarization in the US political culture as an exploitable opportunity, creating an artificially heightened level of concern, conspiracy theories and even, in some places, chaos. Their efforts were phenomenally effective and continue to echo through the US and many of its allied nation-states. Similarly, the financial promotion of existing resistance movements in adversary nation-states is more cost effective and impactful than manufacturing a new insurgency.

Several recent cases demonstrate the variety of actions and their potential impact. Russian internet "trolling" and misinformation, targeted against US-funded activities to provide civil defense support to civilians in contested spaces of Northwest Syria, called into question the integrity of both the funding and the Syrian organizations on the ground—negatively impacting the level of funding

and trust in these organizations.[7] Similar disinformation tactics are used by the Russians to falsely contest war crimes allegations in Syria and Ukraine.[8] The high volume of continuous disinformation narratives through a variety of normally nonaffiliated sources creates a illusion of corroboration, often causing a pause in responses, and leading otherwise serious players into real consideration of the false information piped through so many channels.[9] Although such consideration often ends in debunking the spurious claims, by then the campaign's aims may have been effectively accomplished.

States also use disinformation to undermine legitimate investigative journalists and academics in order to discredit their reporting and research. In some cases, the hybrid war aggressor will use the legal system or another formal complaint mechanism to attack and undermine this research and reporting. This coupling of disinformation with false legal action is especially used by China. For example, recent legal actions instigated and funded by Chinese Communist Party (CCP) affiliates and cooperators weaponized the legal system against Sam Cooper, author of "Wilful Blindness"[10]—not only calling into question the veracity of the book's findings but discouraging others' further reporting.[11]

States also funnel disinformation through, and fund, third parties to slow and undermine legitimate, private economic activities that are perceived to threaten the interests of the Hybrid War aggressor. This type of information warfare provides resources to existing, small interest groups, amplifying and exaggerating their minority concerns to slow these private economic activities. This type of gambit often also includes a litigation track to further slow and reinforce false claims asserted through the surrogate organiza-

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7 Mona Alami, *Russia's Disinformation Campaign Has Changed How We See Syria*, ATL. COUNCIL (Sept. 4, 2018), https://www.atlanticcouncil.org/blogs/syriasource/russia-s-disinformation-campaign-has-changed-how-we-see-syria/ [https://perma.cc/73EN-M7YQ].

8 Adam Rawnsley, *Russian Trolls Denied Syrian Gas Attack – Before it Happened*, THE DAILY BEAST (Apr. 12, 2018), https://www.thedailybeast.com/russian-trolls-denied-syrian-gas-attackbefore-it-happened [https://perma.cc/4D37-A33L]; *see also Disinformation and Russia's War of Aggression Against Ukraine*, OECD (Nov. 3, 2022), https://www.oecd.org/ukraine-hub/policy-responses/disinformation-and-russia-s-war-of-aggression-against-ukraine-37186bde/ [https://perma.cc/GA2N-FPUM].

9 Christopher Paul & Miriam Matthews, *The Russian "Firehose of Falsehood" Propaganda Model*, RAND CORP.., https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE198/RAND_PE198.pdf [https://perma.cc/UE2A-QCCT] (last visited Apr. 3, 2023).

10 Sam Cooper, *Wilful Blindness*, CBC (Aug. 10, 2021), https://www.cbc.ca/books/wilful-blindness-1.6136088 [https://perma.cc/M5CK-GPG7].

11 Sebastian Rotella, *Talking to an Investigative Reporter Who Exposed Chinese Influence in Canada*, PROPUBLICA (Jan. 6 2023), https://www.propublica.org/article/sam-cooper-interview-china-canada-influence [https://perma.cc/W63D-7Q2W].

tions. Recent reports of these CCP hybrid war actions against private mining companies and large scale infrastructure activities show that they seek to slow economic and public policy progress in adversary states, lending to the large destabilizing effects sought by the CCP against their adversaries.[12] The push to develop non-Chinese sources of "rare earths" (critical minerals in which China currently controls the vast majority of the world's supply) has particularly suffered from this type of campaign.[13]

II. WHY HYBRID WARFARE

Hybrid warfare, as the latest term or euphemism for actions other than the use of conventional violence to advance national interests, has grown rapidly in importance since the end of the Cold War, coinciding with the advance of cyber and communications technologies. State and non-state actors now use the tactics associated with hybrid warfare to:

- Undermine an adversary's ability to pursue its own interests and/or thwart the attackers.
- Reduce public and market confidence in the adversary at all necessary levels—global, regional and local.
- Instigate confusion, chaos and internal conflict to deflect an adversary's attention, resources and self-confidence.
- Promote state and organizational interests in opposition to the adversary's potential gains.

Historically, the kinds of deception and sabotage described above resulted in eventual fighting. This strategy has always involved the strategic positioning to develop and leverage non-con-

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12 Niall McGee, *Chinese Bots Spread Disinformation About Canadian Rare Earths Company in Targeted Attack, Report Alleges*, THE GLOBE & MAIL (June 28, 2022), https://www.theglobeandmail.com/business/article-appia-rare-earths-mining-targeted-by-chinese-bots/ [https://perma.cc/DWK3-NZGB].

13 Annie Fixler & Louis Gilbertson, *China Consolidates Rare Earth Supply Chain*, FDD (Nov. 5, 2021), https://www.fdd.org/analysis/2021/11/05/china-consolidates-rare-earth-supply-chain/ [https://perma.cc/APX2-2MZT]; Albert Zhang, *The CCP's information campaign targeting rare earths and Australian company Lynas*, ASPI (June 29, 2022), https://www.aspistrategist.org.au/the-ccps-information-campaign-targeting-rare-earths-and-australian-company-lynas/ [https://perma.cc/X5BK-7GTU]; Jamil Hijazi & James Kennedy, *How the United States Handed China Its Rare-Earth Monopoly*, FOREIGN POLICY (Oct. 27, 2020), https://foreignpolicy.com/2020/10/27/how-the-united-states-handed-china-its-rare-earth-monopoly/ [https://perma.cc/N3SF-DRGN].

ventional means or tactics to weaken an opponent, preferably with little to no attribution—allowing for success by default, with tumult inside an adversary's camp. Sun Tzu makes one of the earliest mentions of this strategy, saying, "To subdue the enemy without fighting is the acme of all skill,"[14] and, "The supreme art of war is to subdue the enemy without fighting."[15]

Another long-respected military theorist, Carl von Clausewitz, said, "[t]he best form of defense is attack"[16] and, "[a]ll war presupposes human weakness and seeks to exploit it." Although his own intentions were literal, the broader application of this idea provided a theoretical space to spark more purposeful thinking about taking offensive actions in advance of direct conflict, either to soften the adversary or to sufficiently deter it from contesting an issue.

Clausewitz also recognized the relationship between politics and war, calling the latter an extension of the former. Hybrid Warfare occupies a space between conventional politics and war, which is why many of the tactics are shared across the domains. Deception, disinformation and sabotage are all important competencies for the modern political operator. The increased capability and public reliance on the internet have increased the span and effect of such techniques. The outcomes are seen daily across various media and polemic websites.

III. Hybrid Warfare And "Soft Power"

Joseph Nye's 1990 essay[17] in Foreign Policy set a new tone for the concept of "soft" power, arguing that with the end of the Soviet Union, and thus the Cold War, diplomacy, economics, and other non-lethal pillars of power would increasingly dominate international affairs. Yet the exercise of a harder form of "soft" power

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14 *Sun Tzu,* Oxford Reference, https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00010536 [https://perma.cc/X4AJ-4KKC]

15 *Sun Tzu Quotes*, BrainyQuote.com, https://www.brainyquote.com/quotes/sun_tzu_383158, (last visited Jan. 31, 2023) [https://perma.cc/CL27-BRM9].

16 Carl Von Clausewitz, On War (1989), https://www.usmcu.edu/Portals/218/EWS%20On%20War%20Reading%20Book%201%20Ch%201%20Ch%202.pdf [https://perma.cc/6B3N-WCUQ]; Brian Cole, *Clausewitz's Wondrous Yet Paradoxical Trinity*, 42 Joint Force Quarterly 96 (2020), https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-96/JFQ-96_42-49_Cole.pdf?ver=2020-02-07-150502-163#:~:text=Passion%20in%20unity.-,Clausewitz's%20Trinity,hatred%2C%20and%20enmity%20.%20.%20 [https://perma.cc/W5HS-9TUD].

17 Joseph S. Nye, Soft Power, 80 Foreign Policy 153—171 (1990).

was already a key theory from the end of World War II and gaining resonance throughout the Cold War. As diplomats engaged in negotiations around nuclear arms and free trade agreements, the military and intelligence components of states found opportunities to take indirect actions, advancing the negotiating power of a state at the expense of an adversary. Thus, in a contest for global hegemony, the Soviet Union advanced their interests and ideology through Active Measures and Agitprop,[18] while the US and its allies leaned heavily on economic advantages and media dominance.

This difference in how the Soviet Union and the West applied soft power has persisted with today's authoritarian states taking over and developing much of the Soviet playbook. This difference is a result of different interpretations of the social contract—an important concept for understanding how hybrid warfare is applied by different states and organizations. States (and nonstate actors associated with each) apply hybrid warfare differently, based largely on the fundamental values and ideologies associated with that state. The design and employment of such strategies and tactics is marked by an inverse relationship action constraint and political ideology (Figure 2).

FIGURE 2

States and organizations with liberal democratic values tend to be (relatively) transparent and institutionally accountable to an independent rule of law that serves the public interest—at least to a degree. States and organizations with authoritarian or autocratic values tend to be less transparent and are accountable primarily to the regime in power. Furthermore, the rule of law in such states is *organized to preserve that regime* as an instrument of power. One result is that liberal democracies are more constrained in the use of

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[18] Roy Godson & Richard Shultz, *Soviet active measures: Distinctions and definitions*, DEFENSE ANALYSIS (Oct.19, 2007), https://www.tandfonline.com/doi/abs/10.1080/07430178508405191?journalCode=CDan19 [https://perma.cc/VWM4-GLWT]; *see generally* RICHARD H. SHULTZ & ROY GODSON, DEZINFORMATSIA: ACTIVE MEASURES IN SOVIET STRATEGY (1984); THOMAS RID, ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE (2020).

hybrid warfare than authoritarian or autocratic regimes or organizations.

IV. Who Are Hybrid Warfare Actors?

Various actors conduct Hybrid Warfare under these different sets of rules (see Figure 2). Liberal democracies (such as the US and its allies) are founded on diffuse power, aggressive oversight, and public accountability. These elements created a set of rules separating and regulating key governance components to protect the public good from an abuse of power. These values also set the foundation for a rule of law that is above all individuals and institutions in the system. This democratic rule of law is in turn, fundamental for enforcing the liberal democratic social contract, focused on the protection of society through equal justice. "Justice" is meant to stand apart from the state, even as it is formed by the state's legislature. The institutional divide between security (and law enforcement) and intelligence in most liberal democracies demonstrates a particularly germane and purposeful limitation on power, but this separation is not shared by authoritarian or autocratic regimes.

Authoritarian and autocratic regimes operate mainly to serve the interests and preservation of the institution and are not deeply limited by oversight or accountability beyond efforts to preserve and advance the regime. The implied hierarchy in these values leads to an authoritarian rule of law, focused foremost on the preservation of the regime, and only secondarily on citizens and non-state institutions. In these states, justice is biased to favor the regime, and in extreme cases the state is the *embodiment* of the law[19] (Hannah Arendt's Totalitarianism) and therefore literally beyond reproach. It follows that authoritarian states see security, intelligence and law enforcement as blended mechanisms, to be used as necessary to preserve and advance the interests of the state.

State intelligence and security agencies, often associated with the military, became the principal actors in the proto-hybrid warfare space, as World War II promoted the advancement of intelligence beyond complex reconnaissance and into a perpetual practice. However, the rise of the multi-national corporation (MNC) and Transnational Criminal Organizations (TCO)

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[19] Hannah Arendt, The Origins of Totalitarianism (1951).

presented a challenge to formal state dominance, with each such organization acting as a quasi-state with its own international interests to promote—sometimes aligned with formal states but driven by the organization's autonomy and distinction from the regime.

V. Information And Expertise As Power

The dynamism of (mostly) private, but well-financed and multinational actors, has led to profound changes in the types of power available over the past 50 years. In one resulting analysis, Alvin Toffler recognized changes in war and power projection throughout the Cold War, using his unique form of predictive analysis. In his 1990 book Powershift,[20] Toffler described the rapidly advancing shift in power from the material conventions of money and weapons, towards information, knowledge and specialized expertise. A part of his thesis was that the capabilities associated with super-computing, especially through satellite, cellular and internet technologies created the growing prominence of information as a primary pillar of power. Information and knowledge had always been important, but they were elusive and unwieldly until the advent of super-computing and enhanced global communications. Toffler predicted that advances in the next generations of information and communications sciences and technologies would make knowledge a dominant principle of power, making the activities *before* conventional warfare more important and even decisive in struggles and conflicts between states and within the global marketplace. Furthermore, he suggested that a growing amount of future investment in technology would focus on this knowledge generation, shaping the future of war and corporate conflict.

VI. What Is The Hybrid Warfare Process?

Many hybrid warfare tactics exist. As noted above, their actual use is predicated on the technology available at a given time, as well as the values and laws of the acting state (or non-state actor.) However, a high-level framework consistent with traditional military planning can be useful for understanding the processes associated with the conduct of hybrid war (Figure 3).

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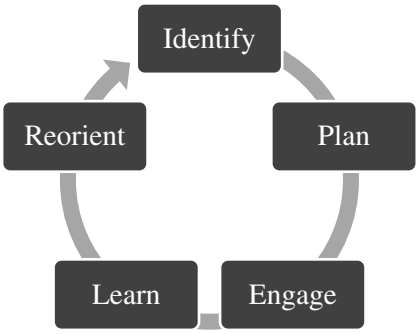
[20] Alvin Toffler, Powershift: Knowledge, Wealth and Violence at the Edge of the 21st Century (Penguin Random House, 1990).

FIGURE 3



This cycle captures the general approach to hybrid warfare, starting with the identification of an adversary's weaknesses, habits and assumptions. These tendencies provide the context for shaping the plans and proposed activities for achieving the desired outcomes and effects of the acting or non-state actor. The most useful targets are often those that are institutional pillars— such as democratic elections, public procurement and intellectual property.

Continuing from the earlier example, Russia's hybrid war efforts against the 2016 US elections exemplifies solid identification, targeting and planning to disturb confidence in a critical US institution, through exploiting and metastasizing the growing political polarization. Engagement of the multi-tiered plan to create the necessary disturbance occurred through various tactics now publicly well known— ranging from the use of Cambridge Analytica or Facebook to direct financial contributions to candidates and pressure groups assessed as capable of promoting further polarization, political destabilization and ultimately, an overall weakening of the US. Russia's initial expected effect could have been a significant US distraction and a possible 2016 (and 2020) victory of Donald Trump, correlating with an outcome of less US direct involvement in the growing Russia-Ukraine conflict.

Hybrid warfare actors are in a near constant process of identifying, planning and acting. Learning and reorientation serves to improve and adjust efforts to continue and extend the desired effects and outcomes. Hybrid warfare actors must learn from the effects of their tactics and use that knowledge to reorient their efforts, in order to sustain and further the intended outcome. In the 2016 US election case, although many of these earlier tactics were exposed and closed off quickly, the effects were clear. It would be foolish to expect the Russians to stop acting in further-

ance of their desired outcome, even as their targets and tactics were adjusted.

VII. What Are Hybrid Warfare's Impacts On Mediation And Negotiation?

As noted above, many of these hybrid threat activities purposefully trigger legal actions, requiring victims and stakeholders to secure legal counsel to defend against both the attack and attacker.[21] These hybrid war actions target weaknesses in democracies' legal and dispute resolution culture and system— exploiting what Leonard Riskin calls the "Lawyers' Standard Philosophical Map".[22] Common law systems are especially open to exploitation by hybrid war aggressors, leveraging the due process standards and the purposeful slowness of deliberation to their strategic and economic advantage. Transnational criminal organizations use similar tactics to undermine and slow law enforcement actions and can be witting or unwitting surrogates in a state's hybrid war strategy, buying time and driving up the cost to public and private actors. Additionally, the hybrid war aggressor often has access to someone on the inside of the system—again, not always a witting accomplice—blending more traditional espionage activities with hybrid war tactics. The corrupt or corruptible actors help steer the hybrid campaign from the inside, allowing for a level of precision in more sophisticated attacks.[23]

VIII. How To Counter Hybrid Warfare?

The unconventional, non-kinetic tactics used to promote and advance hybrid war strategies directly affect and exploit the principles of fairness and justice, undermining the trust and confidence of democracies' citizens and organizations in their institutions of governance. Not least in this extended list of hybrid war targets

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21 Chrustie, Borbely and Hinshaw.

22 Leonard L. Riskin, Mediation and Laywers, 43 Ohio St. L.J. 29, 43 (1982).

23 '*A Deadlier Peril': The Role of Corruptionin Hybrid Warfare,* Multinational Capability Development Campaign (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795222/20190318-MCDC_CHW_Info_note_7.pdf [https://perma.cc/A75T-5RT9].

and domains are the jurisprudential and formal negotiation/mediation spaces.

Lawyers, mediators and negotiators, thus play an increasingly important role in the conduct of hybrid warfare. (For more detail on their roles, *see* Chris Honeyman & Ellen Parker, *Thinking Ahead in the Grey Zone*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023)). It is essential that this community understand the risk at hand and develops new tactics, procedures and training to identify and take action on occasions where hybrid war may be at play in a given litigation or negotiation. (For more on how this might be done, see the Honeyman and Parker article in this issue.) Additionally, it is important for the broader conflict management community —including business and NGO leaders, diplomats and politicians, together with the legal community— to objectively assess the hybrid war threat and account for their respective domains' potential vulnerabilities to an adversary using these tactics.

IX. CONCLUSION

In these cases, rules and assumptions of fairness are seen as soft points by an adversary that is using a different set of rules to play the game. A complicating factor in these assessments is that in this hybrid war context, the predicate or stated reason for the action—when there even is any statement—is rarely the actual reason behind the intended effect. A higher strategy is probably involved and is kept as obscure as possible. Often the real players are not present on the supposed "other side of the table", and adversaries may well be represented inside one's own sphere in a proceeding, providing secret feedback to the attacker. To actors seeking to use a legal, negotiating, or other commercial venue as a means to advance their own interests by means other than direct warfare, all of the methods described are just parts of a large toolkit.

Yes, hybrid warfare is distinguishable from "kinetic" warfare; yet the end result may be the same.

WHERE IS NEGOTIATION IN HYBRID WARFARE?

Art Hinshaw, Adrian Borbely, Calvin Chrustie

I. Introduction

The question of what negotiation has to do with hybrid warfare was the starting point for Project Seshat[1], a project gathering a global group of academics and practitioners from many walks of life. Their shared interest is in exploring what the fields that fit generally within the concepts of "security" and "dispute resolution" have to offer each other in the context of hybrid warfare / grey zone conflict, and how these two "sets" of fields interconnect. In trying to better understand what hybrid warfare is, how it works, and how best to respond to it, negotiation and dispute resolution academics have been led to question some of the core assumptions and theories they generally rely on.

These reflections, we believe, raise a set of specific questions when we consider, as a focus point, how lawyers consider and practice negotiation. Calvin Chrustie is a critical risk management expert for a private firm specializing in asymmetrical problem-solving in crisis negotiations, conflict management, intelligence, security, and acute risks management. He often intervenes in hybrid warfare settings.[2] In a recent discussion with the head of the cyber response group for a global law firm, that person told Mr. Chrustie that they "never negotiate with cybercriminals." When asked whether this stance was short-sighted resulting in missed opportunities, the lawyer refused to move off his/her no-negotiation stance as if negotiation was incongruent with the means of handling these situations. Mr. Chrustie's experience is discordant with the responses from the "cyber lawyer" and many other individuals he has encountered in his professional career dealing with corporate

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[1] *Project Seshat*, https://www.project-seshat.org/ [https://perma.cc/S88J-22B5] (last visited Feb. 26, 2023).

[2] Among the hybrid conflict matters that Mr. Chrustie regularly consults on are cyber-crime matters, foreign nation-state interference, suspicious mergers and acquisitions, and suspicious activities of business leaders, political leaders, and lawyers. *See generally* Calvin Chrustie, TisaMayo Int'l Consultancy, https://tisamayo.com/calvin-chrustie [https://perma.cc/GC77-SM8U] (last visited Feb 23, 2023).

board rooms, legal offices, senior government, and, at times, diplomats. His continued practical experiences of engaging in negotiation in these contexts has resulted in positive outcomes and is one of several reasons the authors wish to explore the idea of negotiation in hybrid warfare in a more thorough and comprehensive way that includes practice and academia.

This led us to consider this no-negotiation stance in the perspective of both hybrid warfare and negotiation. The fact that targets of hybrid warfare attacks refuse to negotiate with their attackers does not mean that negotiation, as a process and as a set of skills, does not play a central role, as we will demonstrate in this essay.

Lawyers are trained to assess legal risk, which for the purposes of this essay we can oversimplify as determining or predicting the potential liability associated with certain courses of action in issues presented to them. It leads them to offer insight as to how real or potential adversaries can resolve their real or imagined dispute(s) through the application of law by a third party.[3] Lawyers understand the law and counsel clients on the risks associated with different situations. One regular course of action lawyers recommend and assist clients with is negotiation. But when presented with hybrid warfare[4] scenarios (including but not limited to cybercrimes, illicit finance, espionage, mergers, and acquisitions including adversarial State actors, State kidnappings and illegal detentions), where the aggressor/attacker (at least the true decision-maker) may be unknown, how can one negotiate? Is it off the table since there is no apparent negotiation partner?

We submit that Mr. Chrustie's experience is not unusual and flows from what Leonard Riskin calls the "Lawyers' Standard Philosophical Map," a cognitive system that leads lawyers to see the world through a specific lens and encourages certain types of actions.[5] The Lawyer's Standard Philosophical Map is based on two underlying assumptions—disputants are adversaries, and their disputes should be resolved according to the application of law to

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[3] Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO L. J. 29, 44 (1982).

[4] The terms "hybrid warfare" and "grey-zone conflict" are often used interchangeably. *See* Project Seshat homepage at https://www.project-seshat.org/. *See also* Anne Leslie, *Know Thyself–Embracing the Ambiguity of War by Other Means,* 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023); Nancy A. Welsh, Sharon Press & Andrea Kupfer Schneider, *Negotiation Theories for Hybrid Warfare*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023); Christopher A. Corpora, *How to Undermine a Nation-State in 120 Days: Mediation and Negotiation in a Hybrid Warfare World*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023).

[5] Riskin, *supra* note 3, at 43–44.

fact.[6] Using strong cognitive capabilities, lawyers put people and actions into legally relevant categories and think in terms of legal rights and duties established by rules.[7] And when it comes to negotiation, the Lawyers' Standard Philosophical Map does not fade away, it simply moves into a different space, what Robert Mnookin and Lewis Kornhauser identified as "bargaining in the shadow of the law."[8] In other words, bargaining based on predicted potential legal outcomes.

In Riskin's eyes, the Lawyers' Standard Philosophical Map leads to standardized reasoning methods, not only within lawyers' core business (contracts and disputes) but in everything they get involved with: "The lawyer's standard philosophical map is useful primarily where the assumptions upon which it is based—adversariness and amenability to solution by a general rule imposed by a third party—are valid . . . The problem is that many lawyers, because of their philosophical maps, tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers."[9]

One of the most difficult issues in the lead-up to writing this paper has been understanding the concept of hybrid warfare—at least for those of us to whom the idea is new. It is hard to define in a concrete and judicious manner, which means that when most lawyers are presented with a hybrid warfare situation, they spend a lot of time trying to understand the concept. Once they have some grasp on it, they start doing what lawyers do—assess risk. In other words, if a hybrid warfare attacker is unknown, most lawyers would focus on mitigating potential losses resulting from the attack. Social science calls this cognitive bias "the law of the instrument," summarized with the popular saying: "If the only tool you have is a hammer, it is tempting to treat everything as if it were a nail."[10] Thus, the Lawyers' Standard Philosophical map appears to be unproductive when it comes to hybrid warfare.

The rest of this essay will address traditional legal negotiation theory and how it may fail lawyers in hybrid warfare situations, leading them to believe that there is no place for negotiation in

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6 *Id*. *See also* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 155 (2001).

7 Riskin, *supra* note 3, at 45; *see also* Guthrie, *supra* note 6, at 155.

8 *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L. J. 950, 950 (1979).

9 Riskin, *supra* note 3, at 45.

10 ABRAHAM MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE x (1966).

such situations. We will point out that this belief is unfounded, ultimately leading to the conclusion that we need to move on from the Lawyers' Standard Philosophical Map and take a better look at concepts like conflict management where the negotiation action is taking place when hybrid warfare is involved.

II. The Failure of Traditional Negotiation Theory

Negotiation theory has remained relatively static for the last forty years, in part because the classic negotiation book *Getting to Yes: Negotiating Agreement Without Giving In*[11] ("GTY") has offered several concepts that have become part of the negotiation cannon. They have proven time and time again to be an excellent guide to negotiation preparation and strategy leading to success or failure of the negotiation and the implementation of the negotiated outcome. Yet, these theories do not hold within the hybrid warfare context.

A. *Classic Negotiation Theory*

There are many negotiation concepts, such as information exchange and reservation points, to name a few, that are undoubtedly important in negotiation. However, there are four that serve as the foundation of negotiation theory—the negotiator's dilemma, interests and positions, objective criteria, and best alternative to a negotiated agreement. We will touch on each briefly.

i. The Negotiator's Dilemma

The Negotiators' Dilemma, at its essence, is the inescapable fact that negotiators engage in two separate but complimentary tasks in every negotiation. Before any negotiation, negotiators need to recognize that an exchange has the potential for a better result than doing nothing at all.[12] And once together, the negotiators endeavor to determine the value the negotiation opportunity presents including uncovering more value than initially met the

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11 *See* Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In (3d ed. 2011).

12 *See* James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 Mgmt. Sci. 18, 28 (Jan. 1992).

eye.[13] This is called creating value. Creating value requires openness, communication, and listening.[14] The other side of the coin is claiming value, determining who gets what from the negotiation. Claiming value involves shaping others' impressions of the bargaining range, manipulating alternatives and aspirations, and engaging in other kinds of dissembling.[15] The dilemma results in the tension between these two tasks as the approaches that tend to be effective for claiming value tend to be harmful to its creation, causing negotiators to be protective of information for fear of exploitation.[16] In other words, distributive actions (and fear of distributive actions) keep parties from engaging in value creation.[17]

ii. Interests and Positions

The book *Getting to Yes* may be best known for its advice to focus on interests instead of positions. Positions are what negotiators say they want or need.[18] Interests are the motivations underlying the position.[19] They define the problem that the negotiation is attempting to solve, the conflict between the parties' respective needs, desires, concerns, and fears.[20] When reconciling interests, there may be several possible means of solving the issue at hand, and some that may meet both parties' respective interests.[21] Yet, this simple advice is more difficult than anticipated, as most parties negotiate through offers and counter-offers—the trading of positions.

iii. Objective Criteria

Objective criteria are best understood as independent external standards that help negotiators exhibit and determine reasonableness in the distributive phase of negotiations.[22] They help negotiators create offers when determining targets and reservation points as well as counteroffers, thereby determining the parties' bargaining range. Examples of objective criteria include market value, precedent, professional standards, costs, moral standards, and tra-

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13 *See id.*
14 David Lax & James Sebenius, The Manager as Negotiator 154 (1986).
15 *Id.*
16 *See* Sebenius, *supra* note 12, at 30.
17 *See id.*
18 Art Hinshaw et al., Negotiation and Lawyers 15 (2021).
19 *Id.*
20 Fisher et al., *supra* note 11, at 40.
21 *See id.*
22 *Id.* at 84

dition.[23] Oftentimes, negotiations can be described as a battle of which objective criteria will control in forming the basis for a deal.[24]

iv. Best Alternative to a Negotiated Agreement

A negotiator's best alternative to a negotiated agreement (BATNA) is essentially the best option the negotiator has going forward if the negotiation fails.[25] In other words, what is the negotiator's plan B? That, according to *Getting to Yes*, is the standard against which any proposed agreement should be measured.[26] Parties should reject offers that are less favorable than their BATNAs and should seriously consider offers that are better than their BATNAs.[27] BATNA is closely associated with leverage in negotiation, as the more attractive one's BATNA is, the less they need to reach an agreement.[28]

In dispute settings, the parties' BATNA may be the outcome of the trial minus the associated costs of the trial.[29] Hence, the parties will assess the quality of their negotiation outcome, as well as the favorableness of their position at the table, with what their lawyers say would be the outcome of the trial, should they decide to go through with it. For most lawyers, negotiation is about finding solutions that would be less expensive or more financially rewarding than trial.

B. *Engaging with Hard Bargaining*

The extremely adversarial negotiation style is known as "hard bargaining," and those who engage in it are known to use extreme value-claiming negotiation strategies and tactics, including potentially unethical conduct, to ensure that they can walk away, claiming that they have won the negotiation. The difficulty with hard bargaining is that it restricts the ability to create value, typically by hiding information or taking advantage of information asymme-

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[23] *Id.* at 86.

[24] *See* MARTIN E. LATZ, GAIN THE EDGE: NEGOTIATING TO GET WHAT YOU WANT 140–41 (1st ed. 2004).

[25] FISHER ET AL., *supra* note 11, at 105.

[26] *Id.* at 102.

[27] *Id.*

[28] *Id.*

[29] *See* HINSHAW ET AL., *supra* note 18, at 26 (discussing what constitutes a BATNA in the litigation framework).

tries, thereby restricting one's responses to walking away from the negotiation or playing the distributive game, feeling one step behind.[30] It makes sense that when faced with hybrid warfare, negotiators would instinctively look for strategies for dealing with hard bargaining. Some tactics for negotiating with hard bargainers, like relying heavily on objective criteria, are discussed earlier in this essay and therefore, will not be addressed further here.

The classic strategy for dealing with hard bargainers is mostly doubling down on the basics of good negotiation practice. For example, Professor Peter Reilly has suggested that negotiators focus on creating a personal relationship with the hard bargainer, as people are generally less inclined to take advantage of those with whom they have relationships.[31] Furthermore, he suggests spending a lot of time asking questions to seek information and confirm the information provided, as hard bargainers are known to take advantage of information asymmetries.[32] Other suggestions include working on changing the specific negotiation counterpart or the structure of the negotiation, like using mediation. Among the best suggestions in this realm is working on improving one's BATNA, as leaving the negotiation for one's BATNA is one way to avoid entering a bad deal.[33]

Two important books have added to these strategies. William Ury's *Getting Past No: Negotiating Your Way From Confrontation to Cooperation*[34] provides a clear framework for reframing hard bargaining tactics into value-creation tactics. Most notably, this strategy focuses on keeping one's own emotions in check, understanding the other's needs, and framing offers in ways that appeal to their interests.[35] It also focuses on educating the other side about the impact of a failed negotiation as opposed to escalating any conflict,[36] in other words reframing their tactics in terms of engaging with value creation. Robert Mnookin's *Bargaining with the Devil: When to Negotiate, When to Fight* adds to this literature by bringing the moral issues of engaging with hard bargainers or

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30 *See generally id.* at 99–100.

31 Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RES. 481, 527–28 (2009), https://kb.osu.edu/bitstream/handle/1811/76898/OSJDR_V24N3_481.pdf?sequence=1&isAllowed=Y [https://perma.cc/S3EV-E72D].

32 *Id.*

33 FISHER ET AL., *supra* note 11, at 100, 103–05.

34 *See generally* WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1991).

35 *Id.* at 11–13, 31–105.

36 *Id.* at 130–56.

bad faith actors into the equation, but it still emphasizes leaning into negotiation.[37]

C. *The Problem with Traditional Negotiation Theory in Hybrid Warfare Situations*

There are several issues that prevent the application of such traditional negotiation theory in hybrid warfare situations. First, traditional negotiation theory works under the assumption of a bilateral negotiation, where the negotiating parties are clearly identified and "meet." Traditionally, negotiation always took place face-to-face, through emissaries, and/or via an exchange of letters; information technology has made it possible for negotiation to take place at a distance through phones, emails, texts, and videoconferencing. Hybrid warfare settings are characterized by the fact that the head of the attacking party acts in the shadows and may not even be known of the attacker.

Second, in hybrid warfare, negotiations can only take place after the attack has occurred. Targets tend to learn late in the game that they are being targeted and may not even know who the attacker is. Without an adversary, the Lawyers' Standard Philosophical Map fails because the precondition of knowing with whom to negotiate is not met. Thus, as the lawyer mentioned in the introduction, lawyers often think negotiation is not available to them. However, one exception to the adversary precondition must be noted. In ransomware cases, a small minority of hybrid warfare cases and maybe the most well-known, parties have some idea of who the aggressor is and may be able to engage in negotiation with them. We will discuss in the following sections what the object of such negotiations may be.

Third, the traditional view of interests is that they can be communicated (usually if the right question is asked). This may not be the case when we are dealing with criminal enterprises. When the objective of the attacker is to block essential services to destabilize a government, the attacking party may be reluctant to state what their true purpose is, and if they reveal it, this may not prove to be useful material in the exchanges with the target. Either the true purpose is clearly stated (e.g., collect a ransom), or it is hidden (the

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[37] Robert H. Mnookin, Bargaining with the Devil: When to Negotiate, When to Fight 264-266 (1st ed. 2010).

ransom request is a diversion from darker motives): in both cases, these rarely are sources of value creation for the target party.

Fourth, the theory of the ratio of forces based on the parties' respective BATNAs suggests some form of balance in the distribution of power at the table. For negotiation to take place, both parties must retain at least a small portion of decision capability. Classical negotiation theory has been vague, at best, about what can be done when one party holds the existence of the other in his palm. Hybrid warfare offers a specific scenario here: the attack has already taken place, and the target has suffered a severe blow. The attacker may not have other goals than see the attack succeed – which may mean they have already attained their objective. The target may not have another option than to give in to the demands of the aggressor. In other words, this conduct is on the very edge of what constitutes negotiation and what is not negotiation.

Finally, "it takes two to tango." We may here be in a situation where the other party, the attacker, is just not interested in negotiating at all, once again because the success of the attack is the only thing they want. The attack may even be a diversion to hide their true purpose. Discussing interests and objective criteria may, therefore, not be on their agenda and will never be.

Traditional negotiation theory, therefore, hits its limit if applied, through the Lawyers' Philosophical Map, to hybrid warfare negotiations between the target and their attacker. The rest of this essay will change perspective and state how, through a different lens, negotiation has a central role to play in hybrid warfare situations.

III. Negotiation Theory in the Social Sciences

One way to break the legal profession's traditional approach to negotiation may be to adopt a broader vision of what negotiation is. It may therefore be interesting to look toward the social sciences. Over time, negotiation has become a major focus of research in the social sciences, especially in the field of organizational behavior. There, negotiation is commonly defined as "a form of decision making in which two or more parties talk with one another in an effort to resolve their opposing interests."[38] With such a broad definition, the social sciences view negotiation to include

[38] Dan Pruitt, Negotiation Behavior XI (1981).

many activities that lawyers might not consider to be negotiation, such as conflict management and its processes and strategies,[39] social dialogue,[40] sales and purchasing,[41] as well as everyday decision-making (both in management and at home within one's family).[42] Applied to hybrid warfare, this enables us to loosen the traditional lawyer's assumptions toward negotiation in three different yet complementary ways.

A. *The Parties in a Negotiation*

Lawyers tend to traditionally conceptualize negotiation as taking place between the parties in the dispute and through their attorneys acting as their agents.[43] Therefore, for a simple dispute involving two parties, it makes it a four-player game: two attorneys and two clients, resulting in six possibly negotiated relationships.[44] A broader view of negotiation allows for more complexity, with the addition of both a macro and a micro perspective.

The micro perspective is about disentangling the notion of "client" into different people with potentially different perspectives on the issue. One such effort leads to assessing the specific role of the General Counsel as a bridge between the C-suite and the law firm.[45] This vision exhibits the fact that within a party in negotiation or conflict, the various people coming from different areas of the firm with different functions may have different perspectives, interests, and priorities. For example, in a cyber ransoming setting, individuals from information technology, public relations, internal communications, and production may see the event differently and have different interests, such as limiting public exposure, restoring operations quickly, ensuring data confidentiality, etc.

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39 *See* STEPHAN PROKSCH, CONFLICT MANAGEMENT (2016).

40 *See* RICHARD WALTON & ROBERT MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (1965).

41 *See, e.g.*, NEIL RACKHAM, SPIN SELLING (1988); GLENN EISEN AND WAYNE BARLOW, PURCHASING NEGOTIATIONS (1983).

42 *See generally* ROY LEWICKI ET AL., NEGOTIATION (2019).

43 ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69–92 (2000).

44 *See id*. at 5.

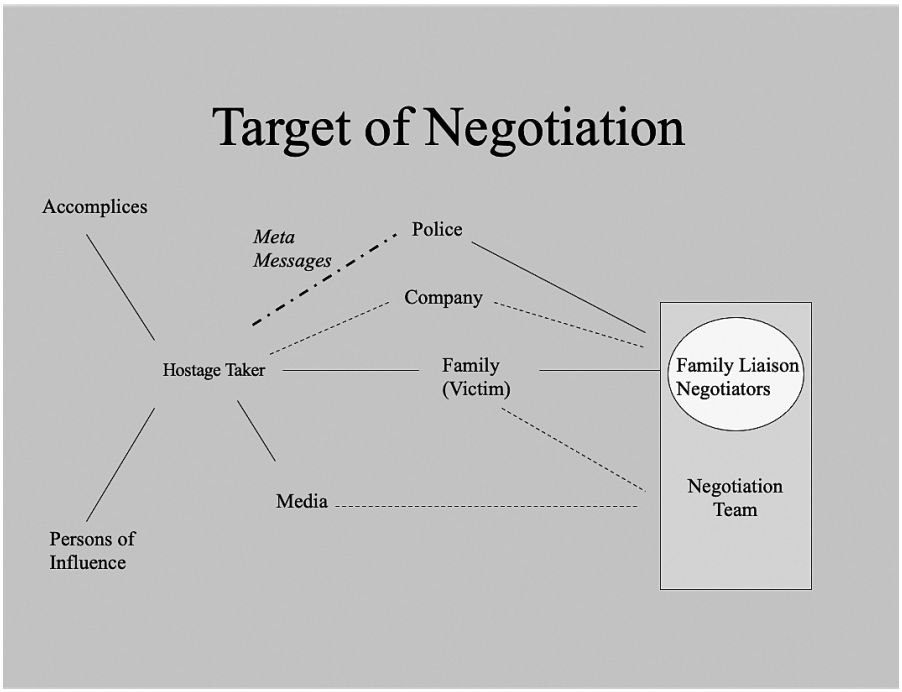
45 Adrian Borbély, *Agency in Conflict Resolution as a Manager–Lawyer Issue: Theory and Implications for Research*, 4 NEGOT. & CONF. MGMT. RSCH. 2, 129 (2011).

This is even truer in crisis situations, which is a good characterization of hybrid warfare events. Crisis response may require organizations to break traditional hierarchies and put people at the forefront who are not used to working together. Legally speaking, a hybrid warfare act is often *force majeure*, i.e., an event people could not anticipate and hence fully plan for. While one may engage in some preparations in case of an attack, it is rare that targets are fully prepared; even worse, most of the time, attackers will target the least prepared organizations (e.g., hospitals). Therefore, new relationships will be created in such events. For example, this may be the first direct interaction between a CEO and the head of cybersecurity, and they may have never met before. Although the CEO may be the ultimate decision-maker, the traditional chain of command has been set aside, and the different actors will try to influence decisions the best they can, usually through internal negotiations.

From a macro perspective, there may be more "stakeholders" or "constituents" than just the parties involved. Law enforcement, in their will to help solve the issue, may position themselves on the target's side without falling within the same hierarchical chain. Politicians, NGOs, and competitors may play similar roles. External consultants may be hired to help respond to the crisis. Insurance companies may also get involved. All these (potentially new) relationships will need to be managed efficiently, despite the crisis setting.

Since traditional notions of a negotiation counterpart do not fit into hybrid warfare, we need to look elsewhere for help. One place is a simplistic map illustrating the complexity of negotiating parties in a kidnap situation that Mr. Chrustie uses in practice. In this rendering, the hostage taker is negotiating with several parties—the police, the victim's employer (typically a company with deep pockets), victimized family, and the media. The negotiation team is working with all of these groups. See Figure 1 below.

FIGURE 1



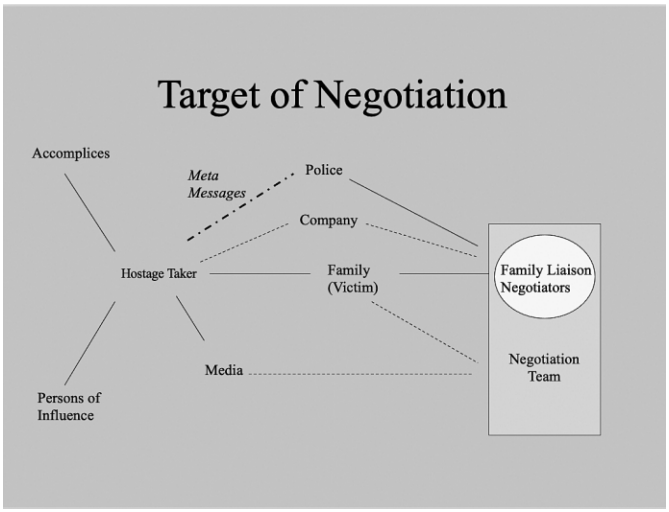
Some of what this illustration is describing is akin to what in negotiation theory is known as "behind-the-table negotiations." This concept has been popularized in conjunction with principals negotiating through agents, where the principal and the agent must negotiate all kinds of things relating to their working relationship for a successful outcome for the principal.[46] Here there are a number of entities or groups on the target's side of the equation with whom the target company and its CEO will have to negotiate. No matter the means of attack, the target's information technology team is likely to be key in working on the issue, as are the target's in-house counsel, insurers, customers, and maybe various others such as the FBI or other governmental agencies or diplomats, all of whom may be critical in addressing the situation.[47] Additionally, the executives within the C-Suite will likely be negotiating amongst themselves about what to do next, all the while looking for scape-

46 *See* MNOOKIN ET AL., *supra* note 43, at 69–92.

47 MotyCristal, NEGOTIATION WITH CYBER CRIMINALS, YOUTUBE, https://www.youtube.com/watch?v=ZK0vuDaPVco [https://perma.cc/25ZW-G7M4] (last visited Feb. 16, 2023).

goats to blame for the attack. To illustrate this concept, see Figure 2 below.

FIGURE 2



This is what is commonly known as a "stakeholder map," a graphic representation in which the obvious parties are placed in the middle, with all other stakeholders positioned around.[48] In this diagram, A is the attacker, and T is the target. The arrows in both directions from the target with the groups mentioned above symbolize the back and forth of the behind-the-table negotiations.

This micro perspective may also lead to constructing a second stakeholder map, with the aim of fluidifying information circulation and decision-making. Who knows whom? Who has already worked with whom? Who are the bystanders, and how could they help? Such behind-the-table interactions are complex but key to success. They often trigger a series of negotiations: for resources, expertise, personnel, and information, to name a few. Together, these relationships constitute the team and its internal processes, all of which are necessary to carry one's negotiation strategy to fruition.

Another interesting aspect of the behind-the-table negotiation is thinking about what is going on with A. Presumably, there are behind-the-table negotiations going on within that side of the equa-

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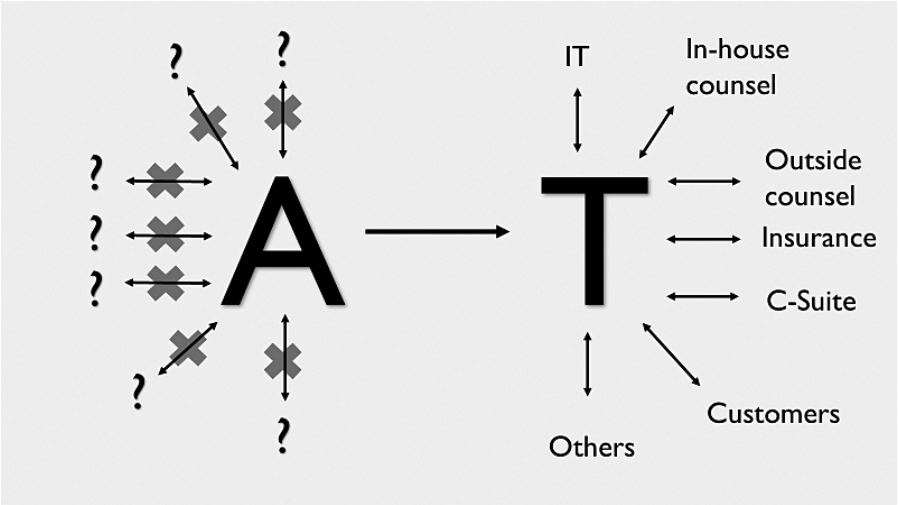
[48] LEMPEREUR & COLSON, THE FIRST MOVE: A NEGOTIATOR'S COMPANION (2010).

tion as well. For example, a Nation-State actor may be funding the A's organization, or there may exist a complex web of business-like relationships among different dark and hidden organizations.[49] Figure 1 suggests this very phenomenon with reference to "Persons of Influence" and "Accomplices." Although it may not be easy to identify these parties when one is not sure who an attacker is, might it be possible that T can somehow interfere with or otherwise disrupt such relationships? To illustrate this concept, see Figure 3 below.

FIGURE 3



This diagram builds on Figure 2 by adding question marks for the entities engaged in behind-the-table negotiations with A, and their negotiations are illustrated by the arrows in both directions from A to the question marks. The Xs on the diagram indicate places where T may be able to disrupt A's behind-the-table negotiations if it were able to identify or correctly guess which groups or entities are working with A.

Additionally, some actors may stand in between the aggressor and the target; one may want to approach these people and try to lobby them to become allies. This may be the case for the Government of the country where the aggressor is located if this is not the attacking country. For example, when Iran uses resources based in

[49] *See* MotyCristal, *supra* note 47.

Pakistan to destabilize the peacebuilding efforts in Afghanistan, the US may try to entice Pakistan to assist them in their efforts to neutralize the threat.

B. *Communication in Negotiation*

Lawyers usually consider negotiation as the series of formal communications that take place between the parties through their attorneys. There is therefore, only one communication channel (between attorneys), and communication moves can be formally identified: a phone call, a videoconference, emails, or letters, etc. The social sciences, on the other hand, consider other activities to be part of negotiation. Much like a chess game where every move needs to be taken into consideration, in negotiation we are not talking about "moves" per se, but things like actions taken to secure an advantage at the negotiation table (such as making our BATNA more attractive). These activities are observed and analyzed by our negotiation partners, which makes them part of the negotiation. In other words, we not only negotiate through words, but we also negotiate through deeds. Ertel gives the example of a Chilean electricity company negotiating for transmission capabilities. Fearing its dependence on the national electricity carrier, they very publicly developed their own plans for transmission lines. This move was meant to affect the balance of power at the negotiation table and to impact the other party's position.[50]

Hence, the target organization communicates its actions in response to the attack through actions such as moving assets around, deciding to move to its data backup system, giving up on its new data system, or publicly firing its head of cybersecurity. The number of examples is endless. Any such actions will be analyzed and interpreted by the attacker, as well as those who pull the attacker's strings in the shadows. Thus, all subsequent actions must be carefully planned to impact the negotiation in accordance with the objectives one pursues. In brief, public relations actions and pronouncements, as well as attack response strategies, impact the "main" negotiation with the attacker.

Negotiation takes place before and after the formal negotiation moments; also, in parallel to it. When a company hires a consultant to help them, someone that the attacker knows, at least

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[50] Danny Ertel, *Turning Negotiation into a Corporate Capability*, HARV. BUS. REV. 69 (May-June, 1999).

from reputation, it sends a signal that will color the exchanges to come. The negotiation strategy is not only about the message to be delivered to the other side but how our behaviors will change going forward. All of this needs to be embedded within "negotiation" as a whole.

C. *Topics of Discussion*

Lawyers tend to restrict the discussion to the sole elements of a legal claim and their financial consequences. Their focus is on the dispute and the way to solve it. The Lawyers' Standard Philosophical Map may lead them to only consider money as a negotiation variable and to fail to look at all of the conflict's variables. In hybrid warfare, with such a vision, topics would be restricted only to rescinding the attack and limiting its financial impact (the amount of the ransom, for example).

However, there are other elements that could be negotiated across the table. First, to decide on a course of action, the target needs to know the exact extent of the attack or the exact capabilities of the attacker if only at threats level. Here, the negotiation is about information. In a cyberattack scenario, before considering paying a ransom, the target may want to ascertain which information has been collected and whether it has been deciphered (so that it may be sold to a third party). The target may therefore request for file trees or samples of the seized files (much like requesting a proof of life in a hostage-taking situation). Furthermore, one may want guarantees that paying the ransom (or freeing the prisoners) will have the full promised effect (e.g., destruction of the seized data or the compromising photos in case of a kompromat).

Such information may also serve to identify the threat actor, who may, until then, act undercover. This information would be most helpful, especially when outside experts are involved, including government actors. As repeat players, they may have dealt with this group in the past, know how they function, and which arguments may have an impact on them. For example, cyber criminality may be the actions of lay people or true professionals. Such threat actors may be private capitalistic enterprises or armed groups functioning much like an army (with ranks, orders, and sanctions to undisciplined agents). Knowing the "counterpart" is valuable information for strategizing one's response.

One may also want to negotiate for time. The threat actor may want to keep deadlines short to prevent the target from organizing its defense or counterattack or to move on to the next attack. The target may want to gain time to diagnose the situation properly and collect the ransom money from their own cash flow or from their insurance company. With more time to respond, more responses become possible. For example, the target may want to give their public relations team as much time as possible to organize a cogent messaging strategy before the target goes public with the breach.

Finally, and more traditionally, the target may be able to negotiate what most people think of in a negotiation of this sort—a discount on the ransom amount. In cyber-criminality cases, it has sometimes been possible to reduce the amount of the ransom request to liberate the target's computer systems.

When including behind-the-table negotiations, numerous other topics may also be negotiated beyond those mentioned earlier in this section. Examples include the allocation of the necessary resources to the technical line of response, overtime payment promises for the people involved in the crisis response, the involvement of experts, rapid and proper contribution from the insurer, just to name a few. Another critical negotiation will be whether to include risk advisors, intelligence and research expertise, or government-law-enforcement, which may require a subsequent negotiation about the extent of their involvement and the limits to their infringement on the organization's decision sphere.

It is important to note that most of the discussion up to this point has been about negotiating urgent actions in response to the attack. For example, amid the crisis, do we divert resources toward trying to understand how the attack was made possible in the first place? There are long-term items to negotiate as well. Mr. Chrustie has observed a host of diverse questions, induced by hybrid warfare, where negotiation and conflict management approaches were of significant relevance. Examples include a mining company's exploratory project met with protester resistance, which may be fueled by disinformation or bad information from foreign actors; foreign hostile actors using proxies to enter sensitive natural resource sectors such as rare earth minerals, technology, or energy through a merger and acquisition process. These common ongoing situations require acute negotiation and conflict management approaches. While preventing further attacks is an integral element of the response to hybrid warfare, most issues are outside the arena

of crisis situations. The most pressing issues may not be considered a priority until the immediate threat has been resolved. Once the crisis has passed, executives may want to unveil the weak links in their organization's security and act to resolve them. These would be topics of numerous subsequent negotiations: purchasing the right technical solutions, reinforcing personnel on key issues, spreading awareness training to the whole staff, renegotiating insurance policies, etc.

D. *Negotiation Permeates Hybrid Warfare*

Such a broader view of negotiation leads to the conclusion that hybrid warfare intervenes in a web of relationships that may be subject to negotiation on various topics. We propose that hybrid warfare be considered "negotiation situations," meaning situations that may require negotiation efforts, where conflict needs to be managed through negotiations with third parties, especially within certain relationships and on some specific topics. Whether negotiation takes place or is replaced by another form of decision-making (an authoritarian unilateral decision or a neutral's decision), negotiation skills remain useful. Therefore, we invite lawyers involved in hybrid warfare events to employ a set of negotiation skills (individual and organizational), which will improve the quality of the response.

IV. The Response: A Skills-Based Approach

In the web of relationships induced by the hybrid warfare situation, there will be negotiations here and there, some with the attacker but mostly behind the table. Whether formal across-the-table negotiations will take place or not, negotiation skills will be of the utmost importance. In other words, hybrid warfare requires victims and responders to be good negotiators in order to respond to the crisis in a cogent and strategic manner. We choose to split what we mean by negotiation skills into two broad categories: individual skills and collective abilities. We will address each in the coming sections.

A. *Individual Negotiation Skills Necessary to Survive a Hybrid Warfare Attack*

There are a number of negotiation skills that come into play in the hybrid warfare environment. In this section, we will provide brief descriptions of the ones we believe to be most important in this space: empathy, situational awareness, regulating emotions, and understanding and prioritizing interests. While these skills are often characterized as leadership skills, they are generally taught in negotiation courses, especially in business schools.

i. Empathy

Among the skills we teach in negotiation class, empathy may be key. Empathy is the ability to see the situation from the other party's perspective and is also described as simply understanding a counterpart.[51] The attacker is an agent, usually embroiled in a complex web of relationships that hides the true master pulling the strings. The attacker(s) have personal interests that are at play. In the case of a ransom for example, those interests may be satisfied through a small cut of the requested sum. They may be seasoned professionals or scared amateurs, but if we can make an educated guess as to their interests and motivations and get confirmation of it, then the target's response will be more efficient.

Furthermore, experienced negotiators can humanize the situation, i.e., demonstrate the human consequences of the attack and act upon the human aspects on the attacker's side. A bizarre incident in Canada supports this: Toronto's Hospital for Sick Kids was hit by a ransomware attack in December 2022. Noticing this, the organization that provided the software used in the attack made the decipher software available for free to the target and severed their links with the attacker.[52] This would not happen if one actor on the "dark side" did not acknowledge the human consequences of the attack–and deemed them unethical enough to act upon them.[53]

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51 Mnookin et al., *supra* note 8, at 46-47.

52 Andrea Fox, *LockBit Ransomware Group "Apologizes" for Children's Hospital Attack*, HEALTHCARE IT NEWS (Jan. 4, 2023), https://www.healthcareitnews.com/news/lockbit-ransomware-group-apologizes-childrens-hospital-cyberattack [https://perma.cc/KU9D-DZD2].

53 Talking about ethical behavior on the part of an agent of hybrid warfare may sound out of place; however, this example demonstrates the fact that people within the attacker organization are human too; in this case, they had felt that this attack went too far.

This event also illustrates the "business" approach that some of the attackers may have. One may notice how they function as a business and rely on a vocabulary that is close to what we would be used to in regular business organizations, speaking of "business associates" and "bottom line." Once we know they function more as a business than an army corps, we can adapt to their language, their reflexes, to build rapport (if possible) or at least to increase our understanding of their strategic choices.

ii. Situational Awareness

Another set of negotiation skills have to do with situational awareness, defined as the ability to perceive elements from our environment, make sense of them and their implications.[54] Simply put, the ability to take a broader perspective on an issue. William Ury's first advice, when hitting a hurdle in a negotiation, is to "go to the balcony".[55] This simply means watch the events unfold before you as if you were watching a performance.[56] It helps create distance with the matter and helps negotiators reflect on what is happening and what it means. The ability to diagnose a situation in its full complexity is a key capability to plan for and be efficient in negotiation.

In order to see the big picture, negotiators should map all of the stakeholders, like in Figures 2 and 3, and identify the different terrains for negotiation and how they impact one another. Larry Crump coined the term "linkages" to point at the possible impacts one negotiation may have on another.[57] The most classical link is when one negotiation is used as the best alternative to a negotiated agreement for a different negotiation.[58] In other terms, if I fail in my negotiation to purchase this car, I can simply negotiate with another seller. Or, I may engage in parallel negotiations for the car and ultimately go with the better deal. In hybrid warfare settings, the negotiation with the target's insurer may impact the negotiation efforts toward the attacker. If the insurer is not willing to contribute to the ransom, the stakes for the negotiation with a bank to borrow the ransom money will be higher and maybe lessen the target's willingness to pay the full ransom.

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54 A term coined by Mika Endsley. *See* Mika Endsley, *Toward a Theory of Situation Awareness in Dynamic Systems*, 37 HUM. FACTORS 1 (1995).

55 Ury, *supra* note 34, at 37-39.

56 *Id.*

57 Larry Crump, *Strategically Managing Negotiation Linkage Dynamics*, 3 NEGOT. & CONFLICT MGMT. RSCH. 3–27 (2010).

58 Fisher et al., *supra* note 11, at 103–04.

In short, this is one of the most critical skill areas, one that Mr. Chrustie refers to as "the analytical requirements of negotiations." In hybrid warfare contexts, where information is used as a primary influencer through misinformation, disinformation, and malign information, analytical or situational awareness may require significantly extra effort to research, verify and clarify information and facts. This includes the possibility of involving experts and using tools such as artificial intelligence, big data, and machine learning in the negotiation process to guide and assist in mitigating risks and developing corresponding strategies.

iii. Emotional Regulation

Another negotiation skill has to do with regulating emotion. Negotiators are trained to control their emotions while involved in conflict-prone conversations, which is very difficult to do. Discussions do not always go smoothly–especially when the parties are in crisis-management mode. Hybrid warfare situations qualify as intractable negotiations, defined as situations that are divisive, intense, pervasive, and complex.[59] As the stakes are very high (a ransomware attack can lead to bankruptcy for a company), they put people under tremendous pressure. People may therefore not control their emotions and act brutally, making communication tense, sometimes even impossible. Some people will later be blamed for letting the incident happen but need to be at their best to control the consequences of the attack and prepare for restoring operations.

iv. Prioritizing Interests

Finally, the target of a hybrid warfare effort needs to be able to prioritize their interests. Working on the relative importance of different and sometimes conflicting interests and how to make trade-offs between different types of interests is a key element in negotiation preparation. When hit with a ransomware, does the target choose to prioritize a quick recovery, or saving on the ransom? What if the ransom has been negotiated down by 50%: is it better to keep negotiating it down, at the risk of losing time, or to settle in order to resume operations swiftly?

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[59] Linda Putnam and Julia Wondolleck, *Intractability: Definitions, Dimensions, and Distinctions*, MAKING SENSE OF INTRACTABLE ENVIRONMENTAL DISPUTES (Island Press ed. 2003).

B. *From Individual Skills to Organizational Capability: Experience and Structure*

There is little in the law and social science literature discussing organizational capacity with respect to negotiation, as these disciplines remains mostly centered on the negotiator as an individual. However, negotiation should also be viewed as an organizational capability,[60] particularly in hybrid warfare situations. From other professions' point of view (e.g., law enforcement), negotiation is mixed with crisis and high intensity conflict management. This perspective has produced a significant number of the crisis management experts that now sell their service to targets of hybrid warfare efforts (either once they have been hit, or in prevention). This mix of sources has led Mr. Chrustie to consider the organizational response capability as detrimental in scenarios involving cyber-attacks and counter foreign intelligence influence operations.

Developing an organization's response capability comes through anticipation. If we follow Mr. Chrustie's 3-S model,[61] one issue he speaks of is "structure": the negotiation team that is charged to engage in what is expected to be harsh negotiation circumstances.[62] The right team must be assembled with the necessary expertise, and they must create efficient communication and decision channels among team members. Creating such teams during a crisis is difficult, although common. In an ideal world, potential targets would build such a structure before the hybrid warfare situation develops. Through his interaction with States and agencies on the frontline of global conflicts and disputes and his work with academia, Mr. Chrustie has found huge value in various theorical models including Systems Theory, Complexity Theory and Chaos Theory. While the scope of this paper will not allow for a meaningful exploratory discussion on these topics, the authors hope to explore these in further writings.

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60 Adrian Borbely and Andrea Caputo, *Approaching Negotiation at the Organizational Level*, 10 NEGOT. & MGMT. RSCH. 4, 306–323 (2017).

61 The Negotiations Podcast, *A Systems Approach to Negotiations: The 3 S's*, Negotiations Ninja (June 24, 2019), https://negotiations.ninja/podcast/a-systems-approach-to-negotiations-the-3-ss/ [https://perma.cc/Y4YZ-ZH2K].

62 *See* Calvin Chrustie, Jayne Seminare Docherty, Leonard Lira, Jamil Mahuad, Howard Gadlin & Christopher Honeyman, *Negotiating Wicked Problems: Five Stories*, THE NEGOTIATOR'S DESK REFERENCE (Christopher Honeyman & Andrea Schneider eds., 2017).

One of the highly interesting training methods for crisis negotiation is called "red teaming."[63] It consists of splitting a negotiation team into two groups: the blue team must respond to the threat, while the red team plays the attacking party's role. Red teaming enables participants to experience the role of the threat actor, which develops empathy for and understanding of the attacker from seeing the situation from the other party's perspective. This perspective helps the team gain understanding about how the attacker may function, and therefore provide insight for how best to respond. This practical training should also mix substance expertise with interpersonal (i.e., negotiation) skills, so that the behind the table structure is ready when an attack materializes. Doing so enables participants from the same organization to start building a response structure: assign roles for who will do what, build strategic alliances, determining which subject matter experts and negotiation consultants to engage, and determine how behind the table exchanges will take place, how resources will be collected, and who will handle which stakeholder, to name a few. The focus is displaced from the individual negotiator to the team. It is no longer about how good the negotiator is, but what structure she benefits from to carry out her mission. Some crisis negotiators, much like the military, place logistics and operations at the heart of their thought processes; for them, the structure enables the response strategy, including negotiations, to be operationalized.

Since structure may not be a topic that organizations want to invest in, the role of crisis response experts becomes even more critical. Most victims of hybrid warfare are like people in disputes: they do not have real-life experience with what they are experiencing. This is one of the reasons why they turn to attorneys: not only because of their knowledge of the law, but also because of their experience (real or perceived) in such situations. The same is true for security, risk, and intelligence experts. The fact that they are repeat-players in cyberattacks, or hostage-taking, makes their intervention highly valuable. More importantly, because they are familiar with low trust interactions, polarized engagements, and deceptive tactics as well as with research, analysis, and other critical intelligence capabilities, they can assist and support lawyers, business leaders and politicians to first "identify" and then navigate this increasing popular disputes and situations in society.

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63 Mike Fenton, *Restoring Executive Confidence: Red Team Operations*, 11 NETWORK SEC. (2016).

V. Conclusion

This paper has argued that hybrid warfare is a ripe source of negotiation, especially when one thinks in terms of conflict management, but is outside the norm for legal negotiators. The blinders provided by the Lawyers' Standard Philosophical Map keep them from seeing those interactions as negotiations. Much of the internal negotiations we have identified will be about designing and coordinating a response to an attack, including creating a decision-making system (since it will rarely be preexistent). For example, how much involvement would an insurer have in the response to an attack? How much legal work is done in-house or through outside counsel, and who gets to do which work? These are items to be negotiated. Efficiency should be at the forefront for all of the behind the table negotiations as the target is likely playing catch-up and needs to design a decision-making framework.

We did not spend much time in this essay discussing the negotiations that should be taking place now, before a potential target is attacked or clients find themselves in the subtleties of a hybrid warfare-related situation, as they most often are disguised and difficult to distinguish without experience and expertise. These *a priori* behind the table negotiations should be about staging defensive exercises such as stress-tests and simulation-based training on how to address an attack beforehand. Particular attention should include building teams and capabilities to identify these situations and to build the expertise on how to navigate them and mitigate their associated risks and threats. The importance of intelligence-led strategies and decision making is not something most legal professionals Chrustie has met view as a common approach, as the legal community generally prefers "*evidence-based"* approaches. Unfortunately, as a former senior Israeli security official years ago shared with Mr. Chrustie during his work, *"if we relied on evidence for our decisions, we would not exist beyond 1949"*. In a society like many *NATO* and *5 Eye*[64] countries, where peace and security has been a staple for decades, the luxury of the culture of "evidence-based decisions" may need to be complemented or replaced with "intelligence-based decisions". One that has more uncertainty but one that often is more effective in predicting, avoiding, and managing threats. Including more planning and exercises should

64 *See generally* Five Eyes Intelligence Oversight and Review Council (FIORC) at https://www.dni.gov/index.php/ncsc-how-we-work/217-about/organization/icig-pages/2660-icig-fiorc [https://perma.cc/R9Z2-XVHA] (last visited Apr. 23, 2023).

lead to more efficiency, less stress, and fewer conflicts among the behind the table players when a real encounter occurs.

Above all, to make responses to hybrid warfare threats efficient, the different actors, especially the risk and security advisors and the lawyers, need a congruent vision of what negotiation is, and how it works within a conflict management strategy. This compatibility will facilitate working together so negotiators and lawyers do not act like ships passing in the night, much like Mr. Chrustie's experience with the law firm detailed in the introduction of this essay. The different language that these experts use and the different things they see as negotiation may result in real world consequences for clients, both financial, legal, and reputational. Even if "one should not negotiate with threat actors," this stance is a public deterrent, not as a pragmatic advice.

NEGOTIATION THEORIES ENGAGE HYBRID WARFARE

Nancy A. Welsh, Sharon Press and Andrea Kupfer Schneider[1]

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,[2] 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[3] or a hospital's operations,[4] these may be examples of hybrid warfare. When trolls increase the spread of disinformation[5] and social polar-

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[2] *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).

[3] *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].

[4] 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].

[5] 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-

ization on social media,[6] 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[7] or a large number of casinos in the same region are doing surprisingly well,[8] 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."[9] 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."[10] 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].

6 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].

7 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].

8 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].

9 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].

10 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-DQGJ].

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,"[11] 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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[11] *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.[12] 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."[13] 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.[14]

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12 Roger Fisher et al., Getting to Yes: Negotiating Agreement without Giving In (1991).

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

14 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."[15]

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.[16]

Anyone who has read a John LeCarre novel has entered the morally ambiguous netherworld of political warfare between nations.[17] 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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15 Hoffman, *supra* note ??? at 34.

16 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://perma.cc/5RG2-XXSF].

17 *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:[18]

- 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.[19]
- 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.[20]
- 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.[21]
- 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.[22]

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18 *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).

19 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].

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

21 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-phoenix-mercury-wnba-detainment/ujlwbp8kivgkx1plja8mhxwv [https://perma.cc/H6FY-SH6K].

22 *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.[23]

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.[24] This is incredibly important.[25] 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

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[23] Braw, *supra* note 9.

[24] 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.

[25] 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, DISSENT, 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 *war*fare can "feed a dangerous tendency to confuse war and peace"[26] 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.[27]

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.[28] Surely, there

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[26] 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).

[27] *Id.* at 31.

[28] *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,[29] 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.[30] Thus, it is increasingly problematic to define an individual actor solely by her nationality.

Gale Miller suggests, in "Codes of Culture in Negotiation,"[31] 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."[32] 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).

29 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].

30 *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.

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

32 *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.[33] 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).[34] 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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[33] 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. Herrman ed., 2006); ROY J. LEWICKI ET. AL., MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES (4th ed. 2003).

[34] 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.[35]" 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[36] 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.[37]

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35 *See also* Cynthia Alkon & Sanda Kaufman, *A Theory of Interests in the Context of Hybrid Warfare: It's Comple*x, 24 Cardozo J. of Confl. Resol. —- (2023).

36 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. Failinger, *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).

37 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.[38] 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.[39] Value creating, or trying to integrate the parties' interests or needs,[40] 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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[38] *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 COOPERATION AND COMPETITIVE GAIN (1986); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

[39] *See id.* (explaining the division of negotiation tasks between "zone definition" and "surplus allocation").

[40] PAULINE GRAHAM, MARY PARKER FOLLETT PROPHET OF MANAGEMENT (2003).

more about the final amount, even if paid out over time).[41] 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*,[42] 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[43] or

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41 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 MARQ. L. REV. 697 (2004); Michael L. Moffitt, *Disputes as Opportunities to Create Value*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 173 (Michael L. Moffit & Robert C. Bordone eds., 2012).

42 FISHER ET AL., *supra* note 12.

43 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.[44]) The four main concepts of *Getting to Yes* are as follows:[45]

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,[46] 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).

44 GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 47–54 (3rd ed. 1982).

45 FISHER ET AL., *supra* note 12, at 11.

46 *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.[47] 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.[48] In a

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[47] *Id.* at 102.

[48] 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.[49] 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.

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

[49] 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.[50] 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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[50] *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://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.[51] 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.[52] 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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51 *See* Volpe et al., *Negotiating with the Unknown, in* THE NEGOTIATOR'S DESK REFERENCE 297, (Honeyman & Schneider eds. 2017).

52 *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,[53] and governmental actors are exploring insurance-related "backstops."[54]

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).[55] 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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53 *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").

54 *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").

55 Taylor & Donohue, *supra* note 52, at 314–16.

ment, and using all of the negotiation skills outlined above in terms of internal team negotiations[56] 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"[57] 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.[58] This element will be different in hybrid warfare where there generally is no personal relationship between the aggressor and target.[59] 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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56 *See* Discussion *supra* Part IV.

57 Taylor & Donohue, *supra* note 52 at 317.

58 *Id.* at 316.

59 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*.[60] 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."[61] 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"[62]—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."[63] 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,[64] 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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60 S*ee also* Alkon & Kaufman, *supra* note 35 (discussing complication and complexity in conflict).

61 Burgess et al., *supra* note 37 at 359.

62 *Id.* at 359.

63 *Id.; see also* Alkon & Kaufman, *supra* note 35.

64 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:[65]

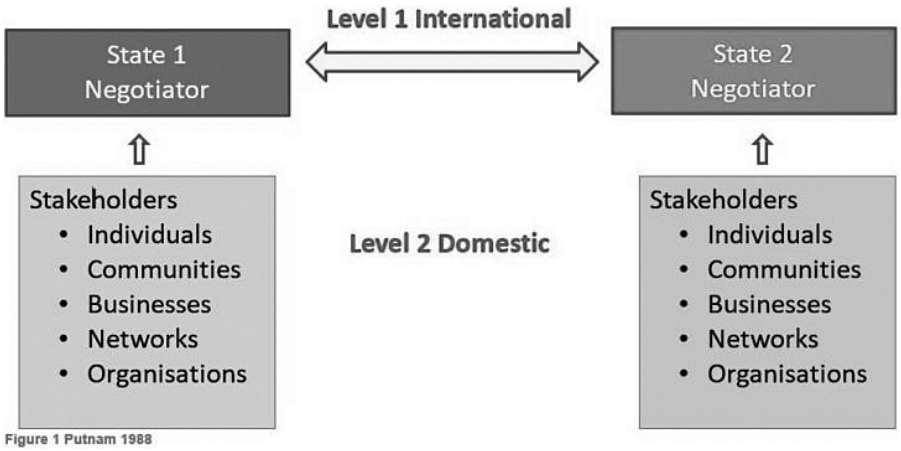

Figure 1 Putnam 1988

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

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65 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-brexit-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."[66] 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."[67]

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.[68] 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.[69]

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

67 *Id.* at 396.

68 *Id.*

69 *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.[70] This suggests the value of thoughtful sequencing to increase the likelihood of creating effective and stable coalitions.[71] 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.[72] 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.[73]

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.[74] 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.[75] 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.[76]

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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70 *Id.*

71 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 Arthmetic, 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).

72 Sebenius, *supra* note 71.

73 *Id.*

74 Braw, *supra* note 10.

75 *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].

76 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.[77]

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.[78] 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.[79] 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.[80] 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.[81]

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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77 Sebenius, *supra* note 71 (discussing information sequencing).

78 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).

79 *Id.*

80 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://perma.cc/EH5M-RXD6].

81 *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.[82] 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 Rittell and Melvin Webber in 1973.[83] Chris Honeyman and James Coben picked up the term in 2010[84] 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 subproblems; 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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82 *Id.*

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

84 *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.[85]

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.[86]

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[85] *Id.* at 440.

[86] *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."[87] They also note the importance of monitoring "the ways our own actions reshape the problem and the context."[88] Finally, they point out that "even within a 'wicked' problem, there may be subsets of issues that are relatively 'tame.'"[89] 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."[90] These problems can easily be understood, analyzed, and repaired.[91] In contrast, cloud problems are "more complex, murky, uncontrollable, and unpredictable. . ."[92] They "interact over time in unpredictable ways, and therefore evidence erratic behavior and outcomes."[93]

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

87 Honeyman & Coben, *supra* note 84.

88 *Id.*

89 *Id.* at 441.

90 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).

91 *Id.*

92 *Id.* at 471.

93 *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.[94] 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.[95]

> 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.[96]

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?[97] They posit that in sync, the goal is not to solve the problem but to "improve the system dynamics."[98] The focus is on "understand[ing] the evolving problem in context."[99] And we should engage in sync by "work[ing] with the energy in the system; employ[ing] adaptive action; and enabl[ing] change."[100]

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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94 *See id.* at 472.

95 *Id.*

96 Coleman & Ricigliano, *supra* note 90.

97 *Id.*

98 *Id.* (as opposed to "fixing the problem" in mastery or "doing no harm" in submission).

99 *Id.* (as opposed to "zoom[ing] in on the problem" in mastery or "zoom[ing] out to see the chaos" in submission).

100 *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.[101]

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."[102] 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.[103]

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."[104] 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."[105]

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,"[106] "look for

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101 *Id.* at 475.
102 *Id.*
103 *Id.*
104 *Id.* at 477.
105 *Id.* at 478.
106 *Id.*

what's holding the system together," or "identifying networks of effective action,"[107] and work upstream, away from the presenting problem.[108]

The guidance here suggests that first, prior to being confronted with a situation, we consider in advance the existing preconditions 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[109] 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;[110] 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."[111]

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107 *Id.*

108 *Id.* at 479.

109 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 that is usually understood" (emphasis in the original). The chapter includes examples of how they each teach wicked problems in their respective settings.

110 Coleman & Ricigliano, *supra* note 90, at 480.

111 *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.[112] 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."[113]

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."[114]

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.[115]

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,[116] they need to be considered systemically, as proposed in the sync model.[117] 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.[118] The goal is to "find those areas in the system where there are people, ideas or other forces that are creat-

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112 *Id.*
113 *Id.* at 482.
114 *Id.*
115 *Id.* at 487.
116 Coleman & Ricigliano, *supra* note 90.
117 *Id.* at 472.
118 *Id.* at 477.

ing change in the system and then to work with them to affect the direction of that change. . .."[119]

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.[120]

There are several key steps in multiparty consensus building. The first is described as "convening all relevant parties."[121] 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"[122]—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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119 *Id. at* 478.

120 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).

121 *Id.* at 361.

122 *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"[123] 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."[124] 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.[125] Such tools may be especially helpful

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123 *Id.* at 363.

124 *Id.* at 363–64.

125 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.

A THEORY OF INTERESTS IN THE CONTEXT OF HYBRID WARFARE: IT'S COMPLEX

Cynthia Alkon[1]
Sanda Kaufman[2]

I. Introduction

In the 2020 British TV series *The Undeclared War*, the Russians launch a series of attacks against the United Kingdom that destabilize key sectors in the UK and (spoiler alert) almost end in a full-scale conventional war.[3] In this fictionalized account, the UK only considers fighting back against cyber warfare with cyber warfare. There is no negotiation. Despite knowing who is responsible for these attacks (the Russian government), negotiation is never even considered.

In real life, can or should negotiation be considered in a hybrid warfare context? Take the example of an oil company executive kidnapped by members of an insurgent group. They send a ransom demand to the oil company. How should the oil company handle this demand? Should they meet with the insurgents to understand their interests behind the ransom demand and specific amount? Should the lawyers and oil company executives try to negotiate a reduced ransom? Classical[4] negotiation theory would suggest that there should be a meeting of some kind and an attempt to gather information to understand the underlying interests of the insurgent group and to come to a resolution that meets their interests while also meeting the oil company's interests in securing the release of their employee and, presumably, not paying too much. But what if the insurgent group was acting on orders from another insurgent group or entity who got its orders from operatives of a foreign government? It is likely the oil company will

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[3] *The Undeclared War*, Imdb, https://www.imdb.com/title/tt7939800/ [https://perma.cc/5J5M-7URQ] (last visited Mar. 22, 2023); *see The Undeclared War*, Wikipedia, https://en.wikipedia.org/wiki/The_Undeclared_War [https://perma.cc/U4H7-PV9F] (last updated Feb. 26, 2023).

[4] *See* Nancy A. Welsh, Sharon Press & Andrea Kupfer Schneider, *Negotiation Theories for Hybrid Warfare*, 24 Cardozo J. Conflict Resol. — (2023).

never know who might have been behind the order to kidnap their employee. It is also possible that the insurgent group who did the kidnapping does not know who is behind the insurgent group who issued the order. And, they may not be aware that the foreign government is continuing to monitor the negotiation and actions of both insurgent groups and to dictate the outcome.

This is just one hybrid warfare scenario that illustrates the complex negotiating environment which legal professionals and others (such as professional hostage negotiators) may confront.

There are no templates for how to handle such situations and, as we will discuss in this article, negotiators need to be careful to not assume that classical negotiation theory—specifically, interest-based negotiation theory—applies in this context. We will begin with a discussion about how the hybrid warfare context is different from other conflict contexts. We will describe some complexity aspects that make hybrid warfare challenging to negotiators. We will then discuss whether classical negotiation theory prescriptions apply to a hybrid warfare context, especially regarding interests. We will argue that these prescriptions related to classical negotiations are unlikely to work in this context. We will focus our analysis on a subset of hybrid warfare attacks, consisting of short-term, time-sensitive, high-risk crises, where negotiations are possible and necessary, such as ransom demands, rather than on hybrid warfare situations which state actors, diplomats, or security professionals are called to manage.[5] We will explore how negotiators can better deal with such negotiable crises. We note that such events are likely part of a broader hybrid warfare strategy, and therefore their negotiated conclusion is not the same as the end of hybrid warfare hostilities. Nevertheless, the costs and risks to human life make engagement necessary. We will conclude with suggestions about how negotiators might handle such hybrid warfare crisis situations and that most classical interest-based advice does not help. We hope that our thoughts on how individual negotiators can approach hybrid warfare will contribute to a growing understanding of how to defend our interests in this complex environment.

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[5] An example of the latter is the "spy balloon" trek over the United States territory in January 2023. Another state recognized ownership but made no demands and the response (not a negotiation) came from federal entities including the President, and the Departments of State and Defense. *See* Katharina Buchholz, *The Chinese Spy Balloon's Path Across North America*, STATISTA (Feb. 6, 2023), https://www.statista.com/chart/29242/chinese-balloon-flight-path/ [https://perma.cc/QTH7-AP5W].

II. Background

A. *How is Hybrid Warfare Different Than Other Conflict Contexts?*

Negotiation is conducted in a variety of contexts. Legal disputes range from traditional to contract negotiations to starting or ending a business relationship. Negotiation is also the means by which we arrive at public decisions and resolve conflicts in planning, policy, public administration, and environmental conflicts. International conflicts also involve negotiations.

For the purposes of our discussion, hybrid warfare is "covert subversion, disinformation, cyberattacks" and various illicit ways of collecting information about opponents.[6] A number of possible hybrid warfare scenarios fit this broad definition. One example is cyber-attacks that include ransom demands to release databases frozen by malware.[7] Hybrid warfare attacks could (and do) target key public services such as electricity or water supplies, or other municipality operations,[8] with profoundly disrupting effects (which can be similar to those caused by natural disasters) on targeted communities. Another example is kidnappings—often of people in key organizational positions or believed to have access to resources.[9] To contrast hybrid warfare to other negotiation contexts, we will examine scenarios where the direct parties making de-

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6 Mark Galeotti, The Weaponisation Of Everything: A Field Guide to the New Way of War 10 (Yale University Press, 2022); *see also* Welsh, Press & Schneider, *supra* note 4, for an in-depth discussion of the nature of hybrid warfare.

7 *See, e.g.*, Apurva Venkat, *Massive Ransomware Attack Targets VMware ESXi Servers Worldwide*, CSO U.S. (Feb. 6, 2023, 10:44 AM), https://www.csoonline.com/article/3687095/massive-ransomware-attack-targets-vmware-esxi-servers-worldwide.html [https://perma.cc/S67V-SLY2] (reporting that over 3200 servers have been impacted in France, Germany, Finland, the United States and Canada); *see also Hackers Target Israel's Technion Demanding Huge Sum in Bitcoin*, I24 News (Feb. 12, 2023, 5:40 AM), https://www.i24news.tv/en/news/israel/technology-science/1676198299-hackers-target-israel-s-technion-demanding-huge-sum-in-bitcoin [https://perma.cc/W3M4-6EBT].

8 *See, e.g.*, Ellen Cranley, *8 Cities That Have Been Crippled by Cyberattacks—and What They Did to Fight Them*, Business Insider (Jan. 27, 2020, 10:24 AM), https://www.businessinsider.com/cyberattacks-on-american-cities-responses-2020-1#:~:text=1%20Ransomware%20attacks%20have%20become%20a%20worryingly%20common,trend%20that%20governments%20must%20prepare%20for.%20More%20items [https://perma.cc/MUR5-GN5P]; Stefanie Schappert, *Two California Cities Hit with Ransomware in Two Days, Police Forced to Patrol Using Handheld Radios*, Cybernews (Feb. 11, 2023), https://cybernews.com/news/oakland-modesto-ransomware-attack-old-school-policing/ [https://perma.cc/K82Y-GE22].

9 *See, e.g.*, Aine Cain, *11 Times Kidnappers Targeted Millionaires and High Profile Executives Around the Globe,* Bus. Insider (Apr. 5, 2019, 3:18 PM), https://www.businessinsider.com/

mands are identifiable, their actions go beyond simple criminal behavior, and they may have some kind of state actor or larger political group behind the action.[10] We include cases where the identity of the attackers may not be fully known, as is common in cyber-attacks, but they have made a demand, such as to pay a certain amount of money to secure deblocking a computer system. In a traditional negotiation context, the counterparts are known, as are most or all parameters of the conflict or dispute. In hybrid warfare instances, such as a ransomware attack, we may not have the name, address, or role of the counterparts, or ways to reach out to them outside the parameters they specify. Therefore, at times, victims cannot act in ways beyond those dictated by their attackers and are forced to work within their timeline. Negotiators need to be aware of what to look for, both to realize when they might be in a hybrid warfare context and to devise better strategic decisions about how to handle hybrid warfare negotiations.[11] For our comparison of classical versus hybrid warfare negotiations, it is useful to discuss the classical negotiation context.[12]

i. Classical Negotiation Context

A classical negotiation, regardless of its specific context, has a number of hallmark characteristics for which negotiation theory offers prescriptive advice and strategies. We will discuss these characteristics to contrast them with what is, or could be different in a hybrid warfare context.

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kidnappings-millionaires-and-business-executives-2019-4 [https://perma.cc/6QP2-7J89] (it is impossible to know whether any or all of these kidnappings were examples of hybrid warfare).

10 *See, e.g., Hackers Target Israel's Technion, supra* note 7 (The ransomware attack on the Technion, Israel's largest scientific research institution, seemed to have political, not simply criminal motives as it was reported that the hackers "punished us for the 'apartheid regime'" when they demanded eighty bitcoins to "free the computers from the ransomware.").

11 Giving clear advice about how to identify a hybrid warfare context is beyond the scope of this article. *See generally* GALEOTTI, *supra* note 6 (describing how war has moved beyond physical confrontation to a wide array of other actions including cyber warfare).

12 Although there is no standard negotiation process, we will use this term to refer to negotiations conducted according to norms operative in most settings, including legal, which can (more or less) stand sunshine, and are the object of negotiation theory and its prescriptions. *See* Roy J. Lewicki, Bruce B. Barry & David M. Saunders, ESSENTIALS OF NEGOTIATION (McGraw-Hill Education 2016) (a textbook that refers to such standard negotiation processes).

1. Two or More Identifiable Parties

A classical negotiation context involves two or more identifiable parties.[13] Once a (legal or other) dispute arises, there are clear parties to the action and those seeking remedies (mostly[14]) know whom to talk to.[15] The parties can often gather information about each other to aid in reaching a better settlement.[16] While it is always possible that there are players behind the main parties ("behind the table"),[17] such as a family member or interest group who holds great influence with a particular party, negotiation theory suggests that through information gathering, those influencers can mostly be discovered and managed.[18]

2. Rules are Known/Jointly Agreed Upon

Legal disputes happen in a highly defined context with rules that can guide the process and are generally known.[19] Lawyers know when the mandatory settlement conferences are scheduled.[20] They also know (or should know) what the law demands in differ-

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13 *See, e.g.*, CARRIE MENKEL-MEADOW, NEGOTIATION: A VERY SHORT INTRODUCTION, 39, 91–112 (Oxford University Press, 2022).

14 In some public disputes, such as community or environmental, aggrieved parties may not know with whom to negotiate. For example, in the train derailment incident of February 3, 2023, New Palestine, Ohio residents had trouble at the outset in identifying their negotiation counterparts as state and federal agencies each declared quickly that it was not their purview.

15 We note that in other situations, e.g., community and public disputes, we may know who the key parties are, but are advised to scan for stakeholders who belong in the negotiation (either because their interests are affected, or because they can foil agreements). *See, e.g.,* LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Sage Publications, 1999).

16 *See generally*, ROGER FISHER ET. AL., GETTING TO YES 19–41 (Penguin Group 3d ed. 2011) (advising to "separate people from the problem.").

17 *See, e.g.,* James K. Sebenius, *Level Two Negotiations: Helping the Other Side Meet Its "Behind-the-Table" Challenges*, 29 NEGOT. J. 7 (2013).

18 *See, e.g.*, Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RESOL. 481, 533 (2009) (". . .negotiation is about protecting sensitive information of one's own (to prevent oneself from being exploited) while extracting information from other parties. Good negotiators must therefore learn how to conduct extensive background research, to engage aggressively and relentlessly in asking questions and digging for answers, and to take other proactive steps to unearth or extract the most (and most accurate) information possible from all parties at the table.").

19 *See, e.g.,* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) ("We see the primary function of contemporary divorce law not as imposing order from above, but rather *as* providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.").

20 *See, e.g.*, *Settlement Conferences*, SUPER. CT. CA. CNTY. SACRAMENTO, https://www.saccourt.ca.gov/civil/settlement-conference.aspx [https://perma.cc/4H63-HJWM] (last visited Mar. 19, 2023) ("Mandatory Settlement Conferences are set during the Trial Setting Process. These conferences are scheduled approximately 30 days prior to trial. . .").

ent contexts—for example, mandatory child support payments at a certain level based on income in a divorce case.[21] Disputes arising out of contracts often have already-agreed-on rules which govern, for example, which state law will control both procedures and possible outcomes.[22] Contracts may also specify which process, such as arbitration, will be used in the event of a dispute.[23] In these kinds of disputes, while there may be arguments about exactly which rules will apply, there is a general understanding of what the rules are and/or an agreement about what the rules will be. Further, there is a general understanding about how disagreements will be settled—by a judge or arbitrator, or through a negotiation or mediation process. Some rules also govern other contexts, but in their absence the parties are advised to negotiate them at the outset of their negotiation process.[24]

3. The Time Horizon is Limited and Known

In most cases, the time horizon of a classical negotiation is either limited or known. For example, once a legal case is filed, the lawyers know, at least in general terms, when to expect particular court appearances, when to expect discovery to be compelled, when motions are due, and when settlement conferences, and, if applicable, when mandatory mediation may be ordered.[25] Legal disputes can drag on for years, but once a process begins, the general time horizon is limited, at least in the United States.[26] All the parties generally know what the time horizon is, what the expected process is, and generally what to expect, although it could be within broad parameters. In other situations, there may be indications of expected timelines—they may be imposed by circumstances, rules, or sometimes negotiated at the outset of the process.

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21 *See, e.g.*, *Child Support*, N.Y.C. BAR, https://www.nycbar.org/get-legal-help/article/family-law/child-support/ [https://perma.cc/7PMQ-WGRA] (last visited Mar. 19, 2023).

22 *See, e.g.*, *Governing Law Sample Clauses*, L. INSIDER, https://www.lawinsider.com/clause/governing-law [https://perma.cc/995N-QL24] (last visited Mar. 19, 2023).

23 *See, e.g.*, Christopher R. Drahozal & Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010) (examining the reasons businesses put arbitration clauses in contracts and previous studies on pre-dispute arbitration clauses).

24 SUSSKIND ET AL., *supra* note 15.

25 *See, e.g., supra* note 20.

26 It can take decades for cases to be heard in other countries. For example, India suffers from serious case delays and continuing calls for reform, Vidhi Doshi, *India's Long Wait for Justice: 27m Court Cases Trapped in Legal Logjam,* THE GUARDIAN (May 5, 2016), https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam [https://perma.cc/2UUT-YV32].

4. Expectations

In the traditional negotiation context, if there are agents (such as lawyers), there is a standard set of assumptions about their role. The parties know what to expect these agents will do (even if agents do not always live up to these expectations). This includes the understanding that agents are charged with (and if they are lawyers, ethically bound to) representing the principals' interests.[27] Agents and parties alike also expect, in general, that parties want to resolve the conflict and will act, at least broadly, in good faith to move towards resolution.[28]

5. Intervenors Could be Available

In a traditional negotiation context, intervenors, such as mediators, could be available. The dispute may start with negotiation and then move to mediation which may be, depending on the context, mandatory. Parties often know that they will have other process options that may include neutrals, who can help move the dispute toward resolution.

6. Negotiation is a Way to Gather Information

The negotiation process itself is often described as an information-gathering and exchange process.[29] Parties come into the negotiation with the goal of learning more about their counterpart—what they know or don't know, what they care about, and how and why. Underlying this is the idea that gathering more information will help negotiators understand each other's interests beyond their expressed position, which in turn will help them move towards resolution by identifying mutually acceptable agreements.[30]

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[27] *See, e.g.*, MENKEL-MEADOW, *supra* note 13 at 118-120, 122-123.

[28] This is not to suggest that there is no unethical or dishonest conduct in negotiations, *see generally*, Russell Korobkin, *Behavioral Ethics, Deception, and Legal Negotiation*, 20 NEV. L. J. 1209 (Spring 2020) (examining behavioral ethics literature to "better understand, predict, and potentially combat unethical behavior in legal negotiation."); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 117-18 (2011) (finding that a fifth of their sample of practicing lawyers would not divulge that their client was not ill when they were suing for transmitting a communicable disease); CHARLES CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 409 (7th ed. 2012) (lawyers should assume the lawyers they are negotiating against are not truthful because it is so common).

[29] *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754, 834 (1984); Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76, 100 (1984).

[30] Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 778, 806 (1984) (noting that "adversarial negotiation

7. Preparation Matters

In a classical negotiation context, negotiators are advised to be well-prepared. They should have done their research to learn as much as possible about their case, the law that supports (or not) their claims, the other sides, and their interests.[31] The classical thinking is that negotiation preparation makes for better negotiation outcomes and that better negotiation preparation is possible.

ii. Hybrid Warfare Context

Hybrid warfare presents several challenges, in part because the classical or expected negotiation conditions are unlikely to be present.

1. Parties

In a hybrid warfare situation, the attacked targets are unlikely to know the decision-making parties and their proxies. For example, the anonymous contact behind a ransomware attack may never become known. In an early 2023 ransomware attack targeting servers in multiple countries, the ransomware note said "Security Alert! We hacked your company successfully . . . send money within 3 days otherwise we will expose some data and raise the price."[32] The initial request was for $23,000 to be paid to a bitcoin wallet.[33] Reportedly, the bitcoin wallet was different in each attack, and there was no website for the group.[34] Under these circumstances, it is nearly impossible to find out who the attacker is. What country are they operating from? Is it just one? Are they part of a hacking group in Russia operating with full Russian governmental support, or are they rogue criminals in some other location or locations?[35] In a kidnapping, it may be impossible to know

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processes are frequently characterized by arguments and statements rather than questions and searches for new information").

31 There are numerous tools to help negotiators to be better prepared, including negotiation preparation forms. For one example, *see* ROGER FISHER & DANNY ERTEL, GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK: A STEP-BY-STEP GUIDE TO PREPARING FOR ANY NEGOTIATION (Penguin Group 1995); to prepare for a specific type of negotiation, such as a criminal plea bargain, *see* Cynthia Alkon & Andrea Kupfer Schneider, *How to be a Better Plea Bargaine*, 66 WASH. UNIV. J. OF LAW & POLICY, 65 (2021).

32 Venkat, *supra* note 7.

33 *Id*.

34 *Id.*

35 *See, e.g.,* Kari Paul & Dan Milmo, *Russian-backed Hackers Behind Powerful New Malware, UK and US Say*, THE GUARDIAN (Feb. 24, 2022), https://www.theguardian.com/world/2022/feb/23/russia-hacking-malware-cyberattack-virus-ukraine [https://perma.cc/3B5Q-DT4L].

who is behind the kidnappers themselves if the operation seems highly resourced. Who provided their weapons, their safehouses, and their transportation? There may be more than one responsible party or entity, and the relationships may be so layered that it is difficult or impossible to fully, or even partially, unwrap them.

In addition, in hybrid warfare, even when negotiators believe they have built a relationship with their counterparts, the relationship is illusory or unreliable due to the absence of expectations on either side that they will meet again and will be able to retaliate if deceived. An anonymous ransomware attacker may never be found. Even when the kidnappers have faces or names, negotiators can't trust any relationship they think they are building.[36]

2. No Engagement Rules

Unlike in a classical negotiation environment, there are no engagement rules. Hybrid warfare happens across borders and legal systems and largely outside the protections that legal systems can provide, at least in terms of classical rules of engagement. There is no guarantee or way to enforce an agreement. For example, once a ransom is paid, there is no assurance that the attackers will release the data from a frozen computer system[37] and no recourse if they do not. The cyber attacker could decide to double the demand or take the money and not release the key to unfreeze the system.[38] The lack of rules particularly plagues cases where attackers succeed in remaining anonymous.[39]

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36 Rachel Monroe, *How to Negotiate with Ransomware Hackers*, THE NEW YORKER (June 7, 2021), https://www.newyorker.com/magazine/2021/06/07/how-to-negotiate-with-ransomware-hackers [https://perma.cc/B3FA-PB8G] (describing how kidnapping negotiation specialists helped to reduce costs and increase success rates through establishing set expectations around kidnapping).

37 *The State of Ransomware: Findings from an Independent, Vendor-Agnostic Survey of 5600 IT Professionals in Mid-Sized Organizations Across 31 Countries*, SOPHOS (Apr. 2022), https://assets.sophos.com/X24WTUEQ/at/4zpw59pnkpxxnhfhgj9bxgj9/sophos-state-of-ransomware-2022-wp.pdf [https://perma.cc/3ZD6-79L7] ("While paying the ransom almost always gets you some data back, the percentage of data restored after paying has dropped. On average, organizations that paid got back only 61% of their data, down from 65% in 2020. Similarly, only 4% of those that paid the ransom got ALL their data back in 2021, down from 8% in 2020.").).

38 *Id.*; *see also* Andrew Dalton, *Ransomware Hackers Get Their Money, Then Ask for More*, ENGADGET (May 24, 2016, 8:28 AM), https://www.engadget.com/2016-05-24-ransomware-hackers-get-paid-ask-for-more.html [https://perma.cc/EU6N-SUGZ].

39 Although there might be growing knowledge about standard approaches by, for example, ransomware attacks. *See, e.g.*, *The State of Ransomware*, *supra* note 37; *but see* Moty Cristal, *Negotiating in a Low-to-No Trust Environment*, NEGOTIATOR'S DESK REFERENCE 231, (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) (discussing the importance of building rap-

3. Time Horizon Unknown and Layered

If the attackers are unknown, then their ultimate goals are unknown, which means the time horizon is also unknown. Hybrid warfare operates with an unknown time horizon which may be layered—part of a broader, longer-term scheme—in unknown ways. A cyber-attack on a water treatment plant could be a first step in such a scheme, testing vulnerabilities and responses that will be foiled in later attacks on other utilities, municipal or state government websites, or databases.[40]

4. Agents May Represent Their Own Interests

Negotiations in a hybrid warfare context may include agents and sometimes self-appointed agents. A known go-between for an insurgent group may negotiate on behalf of kidnappers or cyber-attackers.[41] But are go-betweens fully, or even partially, representing the interests of their principal and guaranteeing that the principal will come through on commitments the agents promise? Or are they benefiting themselves? Duplicitous middlemen in ransomware attacks are so common that attackers have been known to warn their targets against using them.[42] There are no ethical codes binding the attackers and no organizations such as bar associations to protect principals and to ensure that agents are working on their behalf. They may be, or they may just as well have an

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port and respect in an environment where trust is not possible and where there may not be standard rules).

[40] *See e.g.*, Kevin Collier, *50,000 Security Disasters Waiting to Happen: The Problem of America's Water Supplies*, June 17, 2021, NBC NEWS, https://www.nbcnews.com/tech/security/hacker-tried-poison-calif-water-supply-was-easy-entering-password-rcna1206; Cybersecurity & Infrastructure Security Agency, *Cybersecurity Advisory, Tactics, Techniques, and Procedures of Indicated State-Sponsored Russian Cyber Actors Targeting the Energy Sector*, March 24, 2022, https://www.cisa.gov/news-events/cybersecurity-advisories/aa22-083a ("The threat actor used the compromised third-party infrastructure to conduct spearphishing, watering hole, and supply chain attacks to harvest Energy Sector credentials and to pivot to Energy Sector enterprise networks. After obtaining access to the U.S. Energy Sector networks, the actor conducted network discovery, moved laterally, gained persistence, then collected and exfiltrated information pertaining to ICS from the enterprise, and possibly operational technology (OT), environments. Exfiltrated information included: vendor information, reference documents, ICS architecture, and layout diagrams.").

[41] Rachel Monroe, *How to Negotiate with Ransomware Hackers*, NEW YORKER (May 31, 2021), https://www.newyorker.com/magazine/2021/06/07/how-to-negotiate-with-ransomware-hackers [https://perma.cc/27WJ-J5EU] (describing how private kidnap intermediaries helped to bring about "ransom discipline" to limit the ransom demands of kidnappers of wealthy individuals and corporate executives in the 1970s).

[42] *Id.* ("[T]he middlemen would secretly negotiate with the hackers [in ransomware attacks] before offering the decrypted files at a mark-up.").

entirely different agenda. The uncertainty and risks can be overwhelming. However, professional hostage negotiators can be trustworthy agents for the victims.

5. Intervenors Not Available/Reliable

In a ransomware attack or kidnapping by an insurgent group, there may be no option other than direct negotiation under conditions dictated by the attackers. The anonymous ransomware attacker issues a take-it-or-leave-it offer which excludes engaging the services of a mediator (whose work usually depends on the ability to identify the parties' interests—not an option in hybrid warfare) or moving into an arbitration process[43] (which also relies on conditions unavailable in hybrid warfare). Intervenors may be available, for example, in a kidnapping by a local insurgent group. But, as with concerns about who agents really work for, those representing themselves as mediators for a kidnapping negotiation may or may not be reliable. They could have an entirely different agenda.

6. Assume Deception, Not Good Faith

Hybrid warfare has the opposite characteristics of good-faith negotiations. It may be difficult or impossible to know what the attackers' final goals are, and they may include intangible elements such as destabilizing a government. In contrast, researchers have found Somalian pirates engaging in criminal kidnapping (for money rather than for larger political goals) could, and reportedly do, rely on "mutual assumption of good faith" as the kidnappers get an "expected rate of return."[44] Likewise, in criminal ransomware attacks, there might be an increasing regularization of the practices; hacker groups, in response to criticism, have even promised not to target schools, hospitals, or non-profits.[45] But whatever "standard" practices may emerge around some of these criminal practices, negotiators cannot rely on them holding true in every case when these same acts (kidnapping or ransomware attacks) are actually acts of hybrid warfare. Just as there are no ethical rules, codes, or licensing bodies to enforce rules in hybrid warfare scenarios, there should be no expectation that parties will operate in good faith. Instead, negotiators should prepare for and assume their counterparts are likely to be deceptive and are not bound by

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[43] *Id.*
[44] *Id.*
[45] *Id.*

concerns about trust or reputation that could temper behaviors in other contexts.

7. Preparation Possibilities are Limited

Due to all the unknowns—counterparts, rules of engagement, time horizon, agent and intervenor trustworthiness—negotiators cannot expect that they can prepare for a hybrid warfare negotiation as well as they might in classical negotiations. Moreover, in many hybrid warfare situations, negotiators have to assume deception and bad faith from their counterparts. All combined, this is a negotiation environment that does not lend itself to traditional preparation since the information which skilled negotiators usually seek (such as indications of the counterparts' interests) is mostly unavailable. This does not mean that negotiators shouldn't fully prepare, but the information they should seek will be different. They should strive to be as prepared as possible to face these kinds of situations.[46] They should know their objectives, what they can agree to (i.e., the real monetary limits to ransom pay-offs), and bottom lines, if any. For example, in a ransomware attack, there might be a point at which the demands exceed the value of the blocked data or the cost of functional recovery by other means. Negotiators should also know as much as possible about the decision factors under their control. Negotiators should know the full range of options available to them, as well as what is out of their reach. However, they face serious limitations in terms of how prepared they can be going into a hybrid warfare negotiation regarding their counterparts and anyone beyond themselves and the party they are representing. And since each hybrid warfare attack is different, negotiators cannot draw on precedent or best practices as they can more reliably in classical negotiations.

Having compared traditional and hybrid warfare negotiations, we now turn to a discussion of the reasons why the latter are so challenging and resistant to analysis and preparation.

III. Hybrid Warfare is Complex

Hybrid warfare is not complicated but rather complex. Although it might seem like a distinction without a difference, *com-*

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46 *See* Nancy A. Welsh, Sharon Press, and Andrea Kupfer Schneider, *Negotiation Theories for Hybrid Warfare*, 24 Cardozo J. Conflict Resol. --- (2023).

plicated and *complex* are not interchangeable terms for describing social systems, situations, and actions. The distinction is meaningful in general and also in the specific case of hybrid warfare.

Social systems have numerous multidimensional interactive components (for example, economic, political, and cultural), which we frequently consider separately for conceptual tractability, although they are intricately interrelated. Individuals, public and private organizations, and governments at all levels of such systems have agency: they can make and implement decisions seemingly independently in the physical and social space. However, outcomes of these decisions accrue jointly to many or all members of society. We observe and experience the joint outcomes of all such moves over time. We also observe that similar decisions at different locations and times result in different outcomes, reducing predictability.[47]

The complexity of social systems is a key contributor to obstacles to effectively addressing hybrid warfare situations, and in particular to using classical negotiation prescriptions. Complexity enables hybrid warfare and makes responses to it difficult. To understand why complex is the right term to describe the nature of hybrid warfare, it is useful to first understand the differences between what is complicated and what is complex. Then, we describe in more detail the hallmarks of complex situations and argue that hybrid warfare fits firmly under this definition. Finally, we discuss why it is important for negotiators to understand that hybrid warfare is complex and not simply complicated.

A. *Complicated*

Complicated entities have direct, clear cause-and-effect relationships, although not everyone may necessarily understand them. For example, the average person doesn't understand spaceships as well as rocket scientists do. However, we trust that the scientists do since we have seen these vehicles function as designed because their components interact in ways predictable to their designers and transport astronauts into space. Mechanics and computer scientists, as well as those less skilled, can solve even some difficult

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47 *See, e.g.,* SANDA KAUFMAN, *Complex Systems, Anticipation, and Collaborative Planning for Resilience*, RESILIENT ORGANIZATIONS: SOCIAL LEARNING FOR HAZARD MITIGATION AND ADAPTATION, 61-98, MIT Press (2011).

(mechanical) problems by following rules and processes after a rational assessment (or running a trouble-shooting program).

A complicated system is controllable; even if we don't understand its workings. In our modern lives, we regularly interact with complicated systems that can only be understood and managed by professionals in the area. For example, laws and administrative rules may be complicated in their structure and application to various cases, but they can be understood by law and regulatory professionals who specialize in these areas. These examples share a commonality: complicated objects have components lacking agency, which function predictably. Moving from a complicated to a complex mindset is a rather difficult paradigm shift.[48] We need to go there even when conducting classical negotiations in complex situations and perhaps even more so in dealing with hybrid warfare. Not doing so corresponds to what Dörner [49] has called "a logic of failure," which entails focusing on fixing only some components of a complex system (as if it were merely complicated) and drawing faulty cause-effect conclusions on which we base responses that fail.

B. *Complex*

Complexity is a feature of systems whose elements (even when few and when making simple moves) interact dynamically, so their cumulative outcomes cannot be predicted with any degree of certainty from looking at their rules. Complexity characterizes social, political, and economic systems and does not necessarily increase with a system's scale; however, construed—as the number of people affected or participating, territory, number and size of organizations involved, or duration. For example, environmental conflicts are complex across scales, from the smaller community level to the larger national level. So are intranational and international conflicts.

A few examples might be helpful to highlight the difference between complex and complicated: assembling a bowl of fish is (not even) complicated, while the movements of fish inside it are complex; an airplane engine is complicated, while air traffic control

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48 *See generally* AARON DIGNAN, BRAVE NEW WORK: ARE YOU READY TO REINVENT YOUR ORGANIZATION? (2019).

49 Dietrich Dörner, *The Logic of Failure*, 327.1241 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON. SERIES B, BIOLOGICAL SCI. 463 (1990).

is complex; designing and building a hospital is extremely complicated, while the functions inside a hospital are complex.

A term used to describe complex social systems and the problems they generate is *wicked*.[50] A wicked problem or system is unpredictable, and it may be nearly impossible to unequivocally[51] link causes—such as plans and decisions—to their effects. By the time we observe some changes, so many system elements and relationships may have shifted that we cannot be sure what caused the changes and whether, if we took the same actions, we would obtain the same outcomes again.[52]

One challenge posed by wicked systems is that they undermine our ability to learn what works and what doesn't, thereby undermining our ability to develop best practices. In part, this is because even simple interactions among components can quickly yield chaotic, unpredictable, unintended, and at times irreversible outcomes.[53] For example, in the 1960s, urban renewal projects aimed to clear derelict housing in poor neighborhoods and replace them with livable homes or apartments. However, instead, these projects destroyed communities and the relationships which sustained them—an unintended and unpredicted consequence from which many cities are still trying to recover.[54] Brownfield redevelopment has stringent National Environmental Policy Act (NEPA) environmental rules which impede infill development[55] in cities. As a result, developers turn to so-called green fields (pristine unde-

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50 Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4.2 POL'Y SCIS. 155 (1973).

51 The need for strong causal links between actions and outcomes derives from the moral imperative to use limited resources wisely. This requires some degree of certainty that expending them will yield at least some of the results we seek, with minimal negative side effects. For example, when implementing costly policies to mitigate climate change—the epitome of a complex system—we need to expect with a fair amount of certainty that they will work in the long term, with negative consequences relatively smaller than the problem we are trying to prevent.

52 Dörner, *supra* note 49, has warned against the widespread tendency to address complex problems by seeking "one cause-one effect" (and then responding with one solution) which also contributes to the logic of failure.

53 Nigel Goldenfeld & Leo P. Kadanoff, *Simple Lessons From Complexity*, 284 SCIENCE 87 (1999).

54 Isabella M. Lami, *The Context of Urban Renewals as a 'Super-Wicked' Problem, in* 1 NEW METROPOLITAN PERSPECTIVES: LOCAL KNOWLEDGE AND INNOVATION DYNAMICS TOWARDS TERRITORY ATTRACTIVENESS THROUGH THE IMPLEMENTATION OF HORIZON/E2020/AGENDA 2030–VOLUME 1 (Francesco Calabrò, Lucia Della Spina & Carmelina Bevilacqua eds., 2019).

55 Infill development consists of reusing vacant city land between buildings, with several beneficial effects. *See, e.g.*, Annette Steinacker, *Infill Development and Affordable Housing: Patterns from 1996 to 2000*, 38.4 URB. AFF. REV. 492 (2003).

veloped locations), taking open spaces and agricultural lands—hardly the intent of the NEPA rules.[56]

While complexity has been understood for decades, handling it in human affairs has remained a challenge due to how we think and how we tend to separate the inseparable in order to analyze and predict.[57] For example, research in social disciplines such as economics and social psychology and negotiations often examine changes in one factor, *ceteris paribus*[58] (all else being equal)—something which never occurs in complex systems. Increasingly, scholars are developing tools for researching complex social systems in a non-*ceteris paribus* manner.[59]

i. Network of Interacting Entities Across Scales

Complex systems consist of interacting elements. The linkages exist horizontally, within an organization, as well as between organizations, and with entities at higher/larger scales, such as state and federal government agencies. With highly developed communication technologies, organizations can even link with partners or compete across continents. The linkages are dynamic and adaptive, altering the parties' incentives and affecting their interests across the scales. If a system could start out repeatedly at the same point (initial conditions), it would likely result in unexpected and different patterns and outcomes in time. That is because the elements in the system are in flux over time, affecting each other and the outcomes at each turn in different ways.

Like fractals,[60] social systems and their conflicts are different from each other and complex from organizations to communities and states to countries. In organizations, the terms *volatility, un-*

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56 *See, e.g.*, Michael E. Lewyn, *How Environmental Review Can Generate Car-Induced Pollution: A Case Study*, 14 SUSTAINABLE DEV. L. & POL'Y 16 (2014).

57 We tend to quickly reach cognitive overload when dealing with several factors, as we must, and are prone to numerous judgmental biases. *See, e.g.*, Dörner *supra* note 49; *see, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

58 *See, e.g.,* Daniel M.Hausman, *Ceteris Paribus Clauses and Causality in Economics*, 1988.2 PSA: PROC. OF THE BIENNIAL MEETING OF THE PHIL. OF SCI. ASS'N 308 (1988).

59 *See, e.g.*, Calin-Adrian Comes, *Analysis of the Quality of Life Through Caeteris Non Paribus Methodology*, 32 PROCEDIA ECON. AND FIN. 56 (2015); Miron Kaufman, Sanda Kaufman & Hung T. Diep, *Statistical Mechanics of Political Polarization,* 24.9 ENTROPY 1262 (2022).

60 *See* Marat Akhmet & Milad Alejaily Ejaily. *Abstract fractals*, ARXIV PREPRINT ARXIV:*1908.04273* (2019): "Fractals are class of complex geometric shapes. . . One of the main features of the objects is self-similarity. . . the property whereby parts hold similarity to the whole at any level of magnification." A frequent example is a snowflake.

certainty, complexity, and ambiguity (VUCA[61]) describes not only intra-organizational controlling difficulties but also an organization's relationship with its environments—national and international clients and competitors along the supply chains, markets, regulatory structures, and social concerns. Accordingly, those who manage organizations should not think/strategize in the same ways for VUCA systems as they did in the past when organizations were viewed as static systems. The claim is that businesses whose managers are able to make the mental switch to complexity (aka VUCA) tend to be more successful.[62]

Interestingly, a key prescription regarding VUCA systems—not to chase targets[63]—is quite similar to what social-ecological systems scholars have proposed: do not chase (long-term) objectives with zero probability of their attainment. Such objectives are often no more robust than wishful thinking (e.g., the climate change target of a two-degree Celsius increase in temperature 75 years from now; or the zero-carbon target by 2050, which has come and gone—it is now impossible).[64] Instead, say the social-ecological scholars, we need to act to avoid bad outcomes on the way to the far future.[65]

VUCA is an apt description for hybrid warfare too. It tends to be *v*olatile—nimble and quickly shifting modalities to avoid detection and attain objectives; it actively seeds *u*ncertainty, especially through covert activities; it is *c*omplex, as we hope to have made the case so far; and it thrives on ambiguity, leaving victims in doubt about source, methods, and objectives in order to defeat any opposition. Arguably, it is the complexity that gives rise to volatility, uncertainty, and ambiguity, which should be expected in any complex situation, including hybrid warfare. In our ransomware and kidnapping examples, victims are uncertain about their attackers' motives, means, real intent, and the likelihood that, when their de-

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61 *See, e.g.*, Nathan Bennett & James Lemoine, *What VUCA Really Means for You,* HARV. BUS. REV. 92.1/2 (2014); *see also* Sathiabalan Murugan, Saranya Rajavel & Amarjett Singh, *Volatility, Uncertainty, Complexity and Ambiguity (VUCA) in Context of the COVID-19 Pandemic: Challenges and Way Forward,* INT'L J. HEALTH SYS. & IMPLEMENTATION RSCH. 4.2: 10-16 (2020).

62 DIGNAN, *supra* note 48.

63 *Id.*

64 *See, e.g.*, Roger Pielke, *The Biden Administration Abandons RCP8.5*, THE HONEST BROKER (Feb. 17, 2023), https://rogerpielkejr.substack.com/p/the-biden-administration-abandons [https://perma.cc/V8Y8-PR4L].

65 Brian Walker, Lance Gunderson, Ann Kinzig, Carl Folke, Steve Carpenter & Lisen Schultz, *A Handful of Heuristics and Some Propositions for Understanding Resilience in Social-Ecological Systems,* ECOLOGY & SOC'Y 11.1 (2006).

mands are satisfied, they will uphold their side of the bargain. There is ambiguity in attacker-victim communications. Each situation is volatile in the sense that external factors and events can quickly alter the attackers' plans even while negotiations seem to unfold relatively smoothly. There may be a change of plans or a sudden loss of resources for those sponsoring the attacks, or strife may occur among the direct attackers—just some examples of what could cause quick changes and foil the negotiations.

Do the VUCA/social-ecological systems prescriptions regarding the vain pursuit of specific objectives apply to hybrid warfare situations such as ransomware and kidnappings? We propose that they do, in the sense that negotiators involved in the short-term resolution of crises should focus on the immediate tasks rather than concern themselves with any long-term consequences of their tactics or of the agreements they are able to secure. The former are concrete achievements, while any long-term ramifications are volatile, uncertain, complex, and ambiguous (VUCA) and, therefore, tantamount to a high-stakes gamble.

ii. Unpredictable

Within complex systems, small actions can yield huge and unpredicted reactions, while great interventions may end up making no difference or going in unintended and different directions. As Aaron Dignan observed, "every 5-year plan, every annual budget, and every fixed target is a public confession that we don't understand the nature of our organizations [here we can substitute hybrid warfare]. Our desire for control blinds us to the truth."[66] Complex systems confound the best forecasts. Their problems cannot be solved—at most, they can be managed.[67] Often the best we can do is to positively influence these systems and avoid some pitfalls or, as Donella Meadows of "Limits to Growth" fame put it, learn to dance with them.[68]

C. *Hybrid Warfare is Complex*

The first challenge of hybrid warfare can be recognizing that we are dealing with hybrid warfare. It is conducted in ways that

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66 DIGNAN, *supra* note 48.

67 Roberto Poli, *A Note on the Difference Between Complicated and Complex Social Systems,* CADMUS (2013).

68 Donella Meadows, *Dancing with Systems*, 13 SYSTEMS THINKER 2-6 (2002).

may make attacks seem to be accidents, simple crimes, or individual initiatives of the moment rather than intentional moves against an opponent.

All interactions—such as negotiations—occur within social systems, which are complex. However, not all situations are plagued by acute VUCA. In hybrid warfare, complexity means that traditional negotiations are not possible or likely to succeed, but preparation is still necessary in different ways. It may have different objectives, such as determining if an attack is hybrid warfare or some isolated rogue criminal action. If it is hybrid warfare, because of the complexities, negotiators should expect extreme VUCA features: an acute lack of information, ambiguity, and deep uncertainty about who is behind the action and what objectives they are pursuing. As we have discussed, negotiators may be able to identify some actors, but even these actors may not know whom they serve. Even if there is a negotiation "table" or forum, several layers of invisible actors are apt to be behind it. [69] Those posing as agents may play their own game—along with pursuing the principals' objectives or not—as may any self-appointed interveners.[70] In this context, deception replaces good faith. Negotiators should prepare accordingly and withhold the trust they might place in their counterparts in classical negotiations.

Time matters, but differently than in traditional negotiations. As already mentioned, in hybrid warfare, some play a very long-range game and may position themselves mostly covertly until they choose to deploy their capabilities, which, however, they may have developed and positioned for years and even decades. This strategy makes it difficult to go back in time and link various past incidents to the opponents who caused them. For example, the Chinese government's acquisition of cobalt mines in Africa[71] can be a shrewd economic move ahead of an expected large-scale conversion to electric cars (whose batteries depend on cobalt and other rare metals), or it can be a slow hybrid warfare positioning to strangle transportation in the Western World[72] by refusing to sup-

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[69] *See, e.g.*, James K. Sebenius, *Level Two Negotiations: Helping the Other Side Meet its "Behind-the-Table" Challenges,* 29.1 NEGOT. J. 7-21 (2013).

[70] SANDA KAUFMAN & ERIC BLANCHOT, THE NEGOTIATOR'S DESK REFERENCE (C. Honeyman & A. Schneider eds.) Ch. 45, Vol. 1, 621-643 (2019).

[71] *See, e.g.*, Andrew L.Gulley, Erin A. McCullough & Kim B. Shedd, *China's Domestic and Foreign Influence in the Global Cobalt Supply Chain*, 62 RES. POL'Y 317, 317–323 (2019).

[72] European countries are debating the wisdom of switching to electric cars rapidly, e.g. Nathalie, Ortar & Marianne Ryghaug, *Should All Cars be Electric by 2025? The Electric Car Debate in Europe,* 11(7) SUSTAINABILITY 1886 (2019).

ply the metals they own once the conversion is completed. Other countries already involved in armed conflicts, such as Russia and Iran, may engage in more short-range hybrid warfare attacks, for instance, by using social media and cyber means to support their ongoing conventional wars.

Context matters in hybrid warfare, [73] as it does in all conflict situations. Some of the difficulties in dealing with hybrid warfare can be traced to the complexity of the contexts in which hybrid warfare is waged. For example, the same conflict situation in terms of actors plays out differently in good and bad economic times, or in peaceful times versus moments when global hostilities are rising. Hybrid warfare actors can destabilize countries more quickly when internal strife is already raging, as did in France over the past years.[74]

For these reasons, those who engage in negotiations over hybrid warfare attacks where specific demands are made need to discard classical negotiation prescriptions. Instead, they need to assume wickedness (aka complexity), and recognize the acute VUCA characteristics. This is more difficult than it might seem. Not only are classical negotiation prescriptions well entrenched through training and practice, but they also fit with our shared moral and ethical principles. Abandoning them means, for example, admitting that transparency is not a virtue but a liability in hybrid warfare, and that promises negotiators make can be breached. It amounts to becoming more like the attackers than like the negotiators we would like to be. It also means that negotiators need clarity about their objective and whether it is worth trading some cherished principles to attain them—whether saving a human life or enabling the functioning of vital systems for a community (which also saves lives).

IV. Classical Interest-Based Negotiation Theory and its Usefulness in a Hybrid Warfare Context

Classical negotiation theory posits that negotiators who understand both their own interests and the interests of their counterparts arrive at better agreements in a negotiation.[75] The idea is

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[73] Kaufman, *supra* note 70.

[74] *E.g.*, Peter Wilkin, *Fear of a Yellow Planet: The Gilets Jaunes and the End of the Modern World-System,* 26 J. World-Sys. Rsch. 70, 70–102 (2020).

[75] *See generally*, Fisher et al., *supra* note 16.

that negotiators will do better if they move beyond positions and instead understand their counterparts' underlying interests and attempt to accommodate them in order to obtain what they seek. In contrast to zero-sum or "fixed-pie" bargaining, this approach "expands the pie" by enlarging the space of possible options to satisfy the underlying interests.[76] In this section, we will start by discussing the basic ideas regarding the role of interests in classical negotiations and why they matter. Next, we will examine why hybrid warfare is different in terms of interest-based negotiations and why classical negotiation theory is, therefore, less than helpful in this context.

A. *Getting To Yes and the Importance of Uncovering the Interests Behind Positions*

Getting to Yes starts by claiming that negotiators should not "bargain over positions"[77] because positional bargaining "produce[s] unwise outcomes,"[78] specifically less satisfying than they could be. *Getting to Yes* prescribes what negotiators should do instead and cautions that an approach insisting on positions locks negotiators in for the following reasons: "The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position."[79]

Getting to Yes gives additional reasons why negotiators should not argue over positions: doing so is inefficient (it leads to suboptimal outcomes compared to what could be obtained) and can undermine ongoing relationships.[80] Instead, the authors argue that negotiators should adopt a four-point approach to what they call principled negotiation. One of those points is to focus on interests rather than positions.[81] This is a parsimonious framework, and interests are central to it.

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[76] *Id*.

[77] *Id.* at 3–15.

[78] *Id*. at 4.

[79] *Id*. at 4–5.

[80] *Id.* at 6–7.

[81] FISHER ET AL., *supra* note 16, at 11. The four points are People, Interests, Options, and Criteria.

Getting to Yes suggests ways for negotiators to ferret out and understand the interests of their counterparts. For example, negotiators should ask their counterparts questions about the "why" and "why not" behind their demands. There are optimistic underlying assumptions to this approach, including that interests are discoverable/disclosable, that negotiators can understand their counterparts, and that their counterparts will share information. The theory is that it is up to the negotiators themselves to understand the importance and task of discovering underlying interests and that they should take the time and have the skill, to do so.[82]

According to *Getting to Yes*, once a negotiator moves beyond positional bargaining and understands the underlying interests of their counterpart and themselves, the negotiators can move on to "invent options for mutual gain."[83] This entails generating ideas about other ways of meeting the interests than the initially stated positions or demands. This becomes possible precisely because of the understanding of the parties' interests and their relative priorities. *Getting to Yes* posits that this approach will lead to better negotiation outcomes because moving away from positions to the underlying interests will better address the needs and wants of all parties through mutually beneficial tradeoffs.[84]

B. *Focusing on Interests in a Hybrid Warfare Context is Problematic*

There are a number of reasons why adopting an interest-based approach to negotiations in the context of hybrid warfare is less useful and may, in fact, put negotiators at a disadvantage in high-stakes situations where lives might be in play. These include the challenge of not knowing who all the parties are, not being able to discover the underlying interests, and the challenging international dimension. In addition, some classical negotiation assumptions may not apply in the hybrid warfare context.

Since we may not know who all the parties or decision-makers are in a hybrid warfare context, we need to adopt strategies that take this into account. Those who present themselves for negotiation may not know the full extent of who is actually sitting behind the table and pulling the strings. Take the example of an oil com-

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82 *Id.* at 45-57.

83 *Id.* at 58.

84 FISHER ET AL, *supra* note 16, at 42–57, 72–77.

pany executive who has been kidnapped by an insurgent group. The insurgent group may have the leadership to whom it reports within the country, and they may or may not know about other foreign actors who may, in fact, be controlling the decision to kidnap and release the executive. The local cell that executed the kidnapping task may want to keep their true identity secret due to concerns about what will happen if they are later captured or if there is a later peace agreement. The insurgent group may use false names and disguise their faces and identities.

If negotiators do not know whom they are negotiating with, they are unlikely to be able to find out the interests behind the positions. In the oil executive kidnapping example, negotiators may never find out why the insurgent group has selected a ransom of $5 million US Dollars. Is it to purchase a property? Is it to buy more weapons? Is it to feed the local village? Is it a combination of all of these? And, if negotiators want to conceal their true identity, they are unlikely to answer truthfully the prescribed "why" or "why not" questions when posed. They may, instead, react badly to being pushed to reveal information they do not want to reveal, which they might think puts them in danger. Simply knowing the identity of who is in an insurgent group could put that person's family in danger in addition to the insurgents themselves. Hybrid warfare can be a dangerous context, and all parties may seek to preserve their anonymity to protect their lives. In this context, it is unlikely that asking a few good open-ended questions, as classical negotiation theory proposes, will result in gaining a deeper understanding.

Hybrid warfare is, by definition, international and often involves state actors. This reduces even more the ability to know exactly who negotiators are facing and to engage in the discovery of underlying interests. North Korea has had numerous semi-conventional negotiations for the release of westerners whom they have detained and imprisoned.[85] This deeply closed society, led by three generations of dictators from the same family, challenges even skilled negotiators with experience in the country to understand what is going on in North Korea.[86] There is no free flow of

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[85] Bill Richardson, *Bill Richardson: America's Hostage Negotiation Strategy is Broken*, THE WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/06/22/bill-richardson-americas-hostage-negotiation-strategy-is-broken/ [https://perma.cc/83SE-QYT4].

[86] *Bill Richardson: 'It's Difficult to Deal with North Korea'*, CNN.COM (Jan. 11, 2003, 6:59 PM), https://www.cnn.com/2003/US/01/11/richardson.cnna/ [https://perma.cc/4TK4-JWAR].

information in North Korea, and the population understands the serious consequences, including multi-generational punishment, that can come from divulging information.[87] In authoritarian countries, information is a dangerous commodity. People learn from an early age to be careful about what they say and to whom. These are not countries or cultures with a penchant for sharing and revealing anything about themselves or the internal situation. Moreover, in such places, usually ruled by dictators, sharing even seemingly innocuous information can be extraordinarily difficult and can be punishable. Additionally, hybrid warfare's covert nature makes it difficult for negotiators to even know whether they are in a hybrid warfare situation. It may be impossible to figure out which state actor is behind a particular attack—or if it is rogue elements within the foreign state conducting the operation.[88]

C. *Moving Beyond Classical Negotiation Theory Assumptions*

Classical negotiation theory advises that we should try to take an interest-based approach to negotiation in hopes that we will arrive at better agreements. However, the assumptions underlying this advice do not match the hybrid warfare context. They are:

- Negotiations are conducted in settings where all parties want to reach mutual-gain solutions;
- Whether a dispute involves two or more parties, it is possible to know who they are;
- Through thoughtful information exchanges, it is possible to improve understanding of the other parties and their underlying interests;
- Parties' interests are discoverable and mixed-motive, making mutually advantageous tradeoffs possible;
- Interests remain relatively stable during most negotiations.

Since these assumptions do not apply to the context of hybrid warfare, negotiators should adopt what we might call a different *hybrid warfare mindset*. In such a situation, they should check the validity of their thinking about what they can and should do and

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87 U.S. DEP'T OF STATE, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 2021 HUMAN RIGHTS REP. 1, 2, 15 (2021), https://www.state.gov/wp-content/uploads/2022/03/313615_KOREA-DEM-REP-2021-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/7JCA-VQ6N].

88 For example, in the incident of the Chinese spy balloon overflying the United States, analysts have debated the possibility of a military initiative which took the Chinese government by surprise.

their expectations about what is possible. This includes rethinking the classical advice about the importance and role of interests, the objectives, the time frames, and whether it is necessary, possible, or useful to look to the root causes of a dispute in order to arrive at durable agreements.

In hybrid warfare interactions, only positions may be apparent. An insurgent group engaged in kidnapping or ransomware may only communicate a ransom demand and the channels through which ransoms are to be paid. The hackers may demand payment within a short time frame to release data or a server. They may refuse to discuss terms or to meet face-to-face. If they give any names, these are likely fictitious. This leaves the entities under attack—companies, utilities, municipalities—with few options: pay the ransom or risk having their executive killed or their data inaccessible, publicly released, or destroyed.

Unlike in classical negotiations, in hybrid warfare, negotiators need to understand that they are operating in an opaque environment with lots of unknowns, many of which may remain unknowable, as well as knowns that are not what they seem to be. No matter how skilled they might be in other contexts in following classical negotiation prescriptions, such as building rapport and asking open questions, these skills are unlikely to work in hybrid warfare. In this context—even more than others—negotiators should be aware that counterparts could be familiar with the prescriptions and the classical negotiation language and approaches and may adopt them appearing to be "nice" or to seek a "win-win" resolution. Such deceptive devices should not be trusted: hybrid warfare remains adversarial.

In hybrid warfare contexts, negotiators need to understand the consequences of working with limited information. The temptation may be great to add assumptions and beliefs where information is sorely lacking. This is perilous. However, having limited information about the other side doesn't mean that negotiators shouldn't fully understand their own side—a classical negotiation prescription that remains valid. Negotiators should have clarity about their own interests and should be careful about falling into the ego traps which can happen during positional bargaining, as *Getting to Yes* warns. They should also keep an unwavering eye on their own objectives (for example, saving the life of their oil executive) as well as their bottom line when even without a BATNA, they need to walk away. The difference in hybrid warfare negotiations is that, just like their counterparts, negotiators should be prepared to ad-

just and shift strategies and tactics in response to the opponents' moves rather than follow a fixed plan. This may also be necessary for classical negotiations, but perhaps not in the same way or at the same speed.

Just as it may not be possible to learn the opponents' underlying interests or even who they all are, it may not be possible to understand their real time frame. For example, is the kidnapping really about the one oil executive, or is this one of many attacks that could stretch out over years or decades? After all, there are still American citizens held for years in countries that use kidnapping to create exchange currency for their demands. Particularly in the United States, however, we tend to work with relatively short time frames for several reasons, including our attitude towards time and the nature of our democratic political system and management style, and because key decision makers change their positions in organizations and government agencies frequently. Perhaps with the exception of climate change, where the time horizon exceeds 75 years,[89] we do not tend to plan over the longer term, and certainly not multi-generationally.[90]

In contrast, those engaging in hybrid warfare may be playing a long game, perhaps because they tend to have lifetime positions in dictatorships. Russian hackers posting on Facebook and Twitter with the goal of stirring up resentment and undermining trust in western governments and western elections are playing the long game, as are other dictatorial governments. How long does it take to destabilize democracy? Hybrid warfare attacks are not one-off acts but rather part of a long-term strategy. Therefore, negotiating for the end of one attack may not solve the long-term problem if that one attack was only a component of the entire plan.

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89 *See* Roger Pielke, *The Biden Administration Abandons RCP8.5*, SUBSTACK: HONEST BROKER BY ROGER PIELKE JR., (Feb. 17, 2023), https://rogerpielkejr.substack.com/p/the-biden-administration-abandons [https://perma.cc/V8Y8-PR4L] (displaying EPA scenarios of projected net annual global emissions of carbon dioxide run to the year 2300). Our complexity discussion should alert readers to how implausible such projections are, and how easily they can be invalidated by even current events, let alone future ones at a closer time range.

90 This is not unwise, as it might seem, since we do not know what the future might bring for future generations. To see this, check what technologies we would not have guessed to be possible even 30 years ago. The first smart phone, for instance, was made only in 1994, and the first iPhone came about in 2007.

One common approach in attempts to end terrorism,[91] human trafficking,[92] homelessness,[93] and even drug addiction[94] is to seek the root causes of each problem in hopes that addressing it will fix the current problems we believe they have generated. In all these complex situations, however, as in hybrid warfare, this quest is less useful. Although root causes make sense to many of us, they are illusory due to complexity of the systems they affect. We cannot reliably link causes from the past to current problems, even if the links appear to make sense. Even if we believe that we understand how what factors from the past caused the problems, enough was different that fixing the past will not work. Therefore, we need to address the problems where they are now. Although there may be a desire to look for wider-ranging causes and solutions, negotiators need to be cautious with this approach because it may not be realistic in hybrid warfare, where even the opponents themselves are not known. Instead, negotiators need to accept that they may never know or be able to know the underlying interests, causes, timeframes, and parties to any given negotiation. As we will discuss below, this means the negotiators need to think differently about their tactics, strategy, and even goals.

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91 *See e.g.,* Bekir Çinar, *The root causes of terrorism.* (2009); Alex P. Schmid, *Root causes of terrorism: Some conceptual notes, a set of indicators, and a model.* Democracy and Security 1, no. 2: 127-136 (2005); Tore Bjørgo & Andrew Silke, *Root causes of terrorism.* In Routledge Handbook of Terrorism and Counterterrorism, pp. 57-65. Routledge (2018).

92 *See e.g.,* Kevin Bales, *What predicts human trafficking?* International J. Of Comparative And Applied Criminal Justice 31, no. 2 269-279 (2007); Elaine J. Alpert & Sharon E. Chin, *Human trafficking: Perspectives on prevention.*" Human Trafficking is a Public Health Issue: A Paradigm Expansion in the United States 379-400 (2017); Farhan Navid Yousaf, *Forced migration, human trafficking, and human security.* Current Sociology 66, no. 2 209-225 (2018).

93 *See e.g.*, Anne B.Shlay & Peter H. Rossi, *Social science research and contemporary studies of homelessness.* Annual Review of Sociology 18, no. 1 129-160 (1992); C. James Frankish, Stephen W. Hwang, & Darryl Quantz, *The relationship between homelessness and health: An overview of research in Canada.* Finding Home: Policy Options for Addressing Homelessness in Canada 1: 21 (2009); Doug A.Timmer, & D. Stanley Eitzen, *The root causes of urban homelessness in the United States.* Humanity & Society 16, no. 2 (1992): 159-175.

94 *See e.g.,*, Alexander, Bruce K. *The roots of addiction in free market society*. Canadian Centre For Policy Alternatives (2001); Dimy Fluyau & Thomas E. Charlton, *Drug Addiction.* (2019); R. J. Lamb, Haidyn G. Stark & Brett C. Ginsburg, *Implications of there being many paths to addiction and recovery*. Pharmacology Biochemistry and Behavior 211: 173299 (2021).

V. Making the Switch to a Hybrid Warfare Mindset

We hope we made the case that negotiators need to switch to a hybrid warfare mindset and move away from the assumptions underlying classical negotiation theory prescriptions, especially about the role of interests, which do not apply smoothly or at all to hybrid warfare. Negotiations conducted during hybrid warfare attacks need to adapt some of the classical prescriptions and/or rely on new prescriptions, tailored to several specific kinds of attacks. For example, ransomware situations are meaningfully different from hostage situations, though both are conducted under severe time pressures either to save endangered lives or to restore function to some vital network. Prescriptions, if any, have to take into account context specifics in addition to all the characteristics of hybrid warfare we have described. We need to abandon some cherished values and tenets of classical negotiation theory, such as expectations of honesty, (building) trust and relationships, fairness, keeping promises, respect, or regard for precedent.

We might call hybrid warfare *multi-issue zero-sum conflict*, a contradiction in terms since in most other contexts, multi-issue conflicts have integrative potential while in hybrid warfare integrative outcomes may not be possible and probably should not be sought. Instead, hostile moves are the norm, as opponents aim for damaging each other or even dominating each other. Even if the root causes of a conflict were known, there is no time to address them in the midst of hybrid warfare, and it would likely not make a difference, since the context has shifted and is constantly in flux. Instead, negotiations may need to be conducted in a protection/defense mode.

Hybrid warfare requires us to switch away from the negotiation prescriptions we usually teach and use, often to the exclusion of adversarial strategies. But how? Negotiation scholars and teachers have been quite successful in persuading ourselves and others about the merits of seeking integrative outcomes and ways to increase the likelihood of reaching them. This may make hybrid warfare negotiations even more difficult for us than they already are. Not only do we have to negotiate under serious time constraints and avoid ruinous agreements, but we also have to act differently than much of what we have been taught.

In hybrid warfare, mutually hostile parties position themselves to attack or respond to attacks or to send a message about capabilities to inflict losses. That is the equivalent of threats, possibly fol-

lowed by demands in other fora. These moves can occur even while parties negotiate traditionally to covertly undermine possible agreements. Examples in which various hostile acts occur in parallel to ongoing negotiations efforts include Iran attempting to kidnap a writer living in the U.S.,[95] Russia sending an American basketball player to a labor camp,[96] Russia and the United States trading accusations of sabotage of the Nord Stream pipeline,[97] North Korea firing ballistic missiles over Japan,[98] China aircraft circling Taiwan,[99] Russia and China conducting joint war games in South Africa,[100] and Russian airplanes recently flying perilously close to the Alaskan air space.[101]

Negotiations in a classical mode can still be conducted, among those on the same side having shared interests, within and between interrelated networks: government and private, professional communities, service networks (utilities), and allied countries. These networks are now linked intricately, so failures can cascade through them. At times when hybrid warfare attacks are difficult to recognize as such, the responses can be delayed, especially when they need to be coordinated among several parties, which may lead to irreversible damage. Therefore, we need to figure out our own

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95 *See* Benjamin Weiser, *Iranian Operatives Planned to Kidnap a Brooklyn Author, Prosecutors Say,* N.Y. TIMES (July 13, 2021), https://www.nytimes.com/2021/07/13/nyregion/iran-masih-alinejad-kidnapping.html [https://perma.cc/6LMZ-NCM8].

96 *See* Travis Caldwell, *Basketball Star Brittney Griner is the Latest American to be Detained in Russia as Supporters Work Desperately to Free Them,* CNN (Mar. 17, 2022, 9:56 PM), https://edition.cnn.com/2022/03/09/world/brittney-griner-russia-arrest-trevor-reed-paul-whelan/index.html [https://perma.cc/T9BK-E5NV].

97 *See* Lindsay Isaac & Sophie Tanno, *Explosive Traces Found at Nord Stream Pipeline Indicate 'Gross Sabotage,' Sweden says,* CNN (Nov. 18, 2022, 2:43 PM), https://www.cnn.com/2022/11/18/business/nord-stream-explosive-traces-sweden-intl/index.html [https://perma.cc/E8J4-FQXD].

98 *See* Hyonhee Shin, Josh Smith & Kantaro Komiya, *North Korea Conducts Longest-Range Missile Test Yet Over Japan,* REUTERS (Oct. 4, 2022, 5:44 PM), https://www.reuters.com/world/asia-pacific/nkorea-fires-missile-towards-east-skorea-military-2022-10-03/ [https://perma.cc/QLV6-H9KN].

99 *See* Eric Cheung, Jessie Yeung & Emiko Jozuka, *China Carries Out Military Exercises Near Taiwan and Japan, Sending 47 Aircraft Across Taiwan Strait in 'Strike Drill'*, CNN (Dec. 26, 2022, 2:23 AM), https://www.cnn.com/2022/12/25/asia/taiwan-china-aircraft-incursions-intl-hnk/index.html [https://perma.cc/4QU4-NJ7Z].

100 *See* Sara Carter, *Russia, China and South Africa Start Military Drills Amid Ukraine War, But Russia Says No Hypersonic Missile Test*, CBS (Feb. 22, 2023, 11:59 AM), https://www.cbsnews.com/news/russia-china-south-africa-military-exercise-during-ukraine-war-no-hypersonic-missile-test [https://perma.cc/HQ28-5AR8].

101 *See* Luis Martinez, *US Intercepts Russian Bombers Off Alaska For 2 Straight Days*, ABC (Feb. 16, 2023, 2:14 PM), https://abcnews.go.com/US/us-intercepts-russian-bombers-off-alaska-2-straight/story?id=97260923 [https://perma.cc/88JU-Z3E7].

interests and who our allies are and negotiate with them joint defense strategies, which can be activated quickly. We also should follow rules only if they work to our advantage. This is challenging because we care about our rules and values, even during hybrid warfare.

One critical tool in preparing for hybrid warfare is imagining scenarios about consequences of observed or suspected hybrid warfare moves and then preparing responses, including who is responsible for which move and when. This approach will likely not suffice and will not eliminate surprises, but it will contribute to preparedness. To generate such scenarios, we could draw inspiration from what we might do if we wanted to conduct hybrid warfare against an opponent. It will go some way to diminishing the response time we face now when confronted with hybrid warfare attacks to reduce the likelihood of acting too late to be effective. Another source of scenarios is the past, with events recognized in retrospect as having been hybrid warfare instances. One drawback to this approach is that it reinforces our tendency to protect ourselves from past attacks,[102] which may not be repeated instead of imagining what new means an opponent might use.

Whatever approaches we choose for generating them, scenarios can enhance our response capabilities as they have in other situations with similarities to hybrid warfare (unpredictability, uncertainty, etc.), such as natural hazards and environmental accidents. These too have unexpected timing and other surprise elements, and they are complex in nature and consequences immediately as well as in time, involving numerous decision-makers in the public and private sectors. One advantage we have in imagining hybrid warfare attack scenarios—compared to assembling natural disaster scenarios,[103] for example—is that the former are frequent and diverse, and the damage is often visible and memorable. A recent environmental accident has been the toxic chemical spill following the derailment of a Norfolk Southern freight train in

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102 Also known as "preparing for, and fighting the last war" e.g., Barbara Tuchman Tuchman: "Dead battles, like dead generals, hold the military mind in their dead grip and Germans, no less than other peoples, prepare for the last war." Barbara W. Tuchman, *The Guns of August: The Outbreak of World War I* (Random House 1994).

103 Natural disasters, especially the rare kind occurring once in every generation, are difficult to imagine because no one who experienced them is still around to remind us of the damage. *See, e.g.*, Deborah F. Shmueli, Connie P. Ozawa & Sanda Kaufman, *Collaborative Planning Principles for Disaster Preparedness*, 52 INT'L J. DISASTER RISK REDUCTION (2021).

East Palestine, Ohio, in February 2023.[104] During the first week, when reaction speed mattered, we saw in real time the problem of several federal, state, and local government agencies and the Norfolk Southern railroad company with overlapping responsibilities, communicating that the accident was under someone else's purview and that it needed someone else's response. There was no protocol (or scenario) for who should do what in such circumstances, although chemical spills are not rare.[105] Reflecting on the pervasive lack of preparedness, a first responder from a neighboring county explained in an interview that to respond effectively to such unpredictable and life-threatening occurrences, his team generates scenarios of possible consequences and then imagines actions they need to take to mitigate the effects. We might say that preparedness is the one traditional negotiation prescription that remains valid in hybrid warfare, though the paths to it are different.

We note that a meaningful difference exists between natural hazards and disasters and hybrid warfare. Disasters are increasingly predictable (if not preventable) due to advances in several technologies. This allows people in the path of a hurricane to evacuate, and building structures to resist complete destruction during earthquakes. Preparation is critical in both cases, both to reduce damage and to aid in recovery, and it has been happening. Earthquakes with the same intensity cause little or no damage in Japan, while destroying entire settlements in locations which do not prepare as Japan does.[106] Similarly, hurricane material losses have consistently dropped in the US also due to preparation.[107] Hybrid warfare attacks, although expected, are not predictable. Nevertheless, those vulnerable to such attacks can and should strengthen

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104 *See* Rebekah Riess, Hannah Sarisohn & Christina Maxouris, *Train Derailment in Northeastern Ohio Sparks Massive Fire*, CNN (Feb. 4, 2023, 10:17 PM), https://www.cnn.com/2023/02/04/us/east-palestine-ohio-train-derailment-fire/index.html [https://perma.cc/P6VQ-JNPH].

105 *See* Morgan Phillips, '*There Are Roughly 1,000 Cases a Year of a Train Derailing': Pete Buttigieg Appears to Downplay Ohio Disaster – as Republican Shows 'Chemicals' Bubbling to Surface of a Creek*, DAILY MAIL (Feb. 16, 2023, 7:20 PM), https://www.dailymail.co.uk/news/article-11760173/There-roughly-1-000-cases-year-train-derailing-Pete-Buttigieg-says.html [https://perma.cc/R7RQ-Y8SR].

106 *See, e.g.*, Alex Greer, *Earthquake Preparedness and Response: Comparison of the United States and Japan,* 12.3 LEADERSHIP AND MANAGEMENT IN ENGINEERING 111-12 (2012).

107 *See, e.g.*, Roger Pielke Jr., *What the Media Won't Tell You About . . . Hurricanes*, THE HONEST BROKER SUBSTACK (June 1, 2022), https://rogerpielkejr.substack.com/p/what-the-media-wont-tell-you-about [https://perma.cc/H9F7-B5QA].

their defenses. This may be possible especially against ransomware.[108]

VI. Suggestions for Negotiators

We hope this article will lead to the development of some specific and useful advice for individual negotiators facing immediate crisis negotiations in a hybrid warfare context and that we will be part of starting a process to help negotiators do better in this highly complex form of negotiation. We have nine initial suggestions for negotiators.

1. Adopt a Complexity (Acute VUCA) Mindset: Assume the Situation is Complex and Not Reducible to Classical Negotiation Strategies and Tactics

This means that negotiators accept that they will not know everything they deem necessary, that they cannot reliably predict the impact of their actions, and that their instincts of what works may be partly to absolutely wrong. A complexity mindset requires that negotiators get comfortable with the uncertainty, the ambiguity, and the unknown and still move towards some kind of resolution to protect that which matters to them and their clients. It also requires that negotiators move beyond the interest-based approach.

2. Not the Hour for "Nice"—Hybrid Warfare is Adversarial

By definition, hybrid warfare is adversarial, with no integrative potential. Negotiators need to accept that their negotiation skills will not move the situation from adversarial to integrative negotiation. Besides, unlike in classical negotiation settings, we may not wish to help opponents achieve their objectives. In hybrid warfare it is unlikely that the other side will ever give enough trustworthy information (or time) to move towards an integrative solution.

3. Accept that it is a Zero-Sum Game—Focus on Winning

Hybrid warfare is akin to a zero-sum game. As such, negotiators need to focus on winning, not understanding or building rela-

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108 *See, e.g.*, Sanda Kaufman, *How Should the Whole-of-Society Respond to Hybrid Warfare?* 30 OnTrack 43-53 (2023).

tionships (since negotiators cannot expect to meet again and even if they do it will be another adversarial encounter). If a life is at stake, or a computer system that runs emergency services in a community is jeopardized, compromise is not an option. There are no mutually advantageous tradeoffs. It is all about winning to protect life, or vital systems under threat.

4. Focus on Context Specifics—Best Practices Do Not Go Very Far

Negotiators in a hybrid warfare context need to focus on the specifics of the situation at hand. Perhaps one result of this effort to build our knowledge in this area is that we will eventually have some best practices that negotiators can look to in different types of hybrid warfare scenarios. But for now, our best advice is for negotiators to accept that they need to understand their own context and work within it, to win.

5. It is Positional Negotiation

Hybrid warfare negotiations are positional negotiations. If all a negotiator faces, for example, is a ransom demand and a take-it or leave-it offer, and no idea who is behind the demand, it is not possible to move off the positions. As much as it might go against what many of us have taught and hold dear, positional negotiation is often the only option in hybrid warfare.

6. Understand the Other Side is Likely Playing Without Our Rules, or Without Any Rules, With Values Different from Ours (We May Have to be Underhanded)

Negotiators need to accept that they may be dealing with counterparts who do not respect (our) rules, or are bound by a different set of rules. For example, laws and regulations may not hold any sway—particularly if they are from another country. A kidnapper or computer malware attacker may not care that these acts violate any laws. They are a means to an end which is far more important to them than infringing on laws or ethics—they are at war. They may view those who follow laws as "suckers" who can be easily taken advantage of. In addition, not every society considers protecting life as the highest value. For example, for some, honor is more important. Fear can also be a motive, if they or their families are threatened unless they deliver. Because these warriors may be unknown, it is not possible to know what, if any, rules they

respect, or what their values are. The consequence for negotiators is that they should not assume the other side is bound by constraints and will behave as negotiators might expect someone from their own country or organization to behave. Negotiators should accept that hybrid warfare is lawless.

7. Defend Interests (Positions)

Negotiators in hybrid warfare should defend their own interests. To do so means they must first understand what their interests are—as in classical negotiations. Defending interests in a hybrid warfare context may best be achieved by reducing the interests to specific positions.

8. Prevent Damage, Whether to Life or to the Functioning of Our Life-Sustaining Systems

The ultimate objective of negotiators in a hybrid warfare scenario is to prevent damage or more damage. Negotiators in a kidnapping seek to save the life and freedom of the kidnapped person. Negotiators in a ransomware attack want to protect the system under attack to limit the harm done, so that the hospital doesn't have to shut down, that 911 services are still operating. . .etc. This doesn't mean that there shouldn't also be preventive efforts to minimize the possible harm of these kinds of attacks and to build in better systemic protections. However, once preventive protections have failed and negotiators are involved, their primary job is to limit the damage and that alone may be a win.

9. Help Others Who Might Have to Negotiate in the Midst of Hybrid Warfare Crises

Finally, we should collectively work to help those who may find themselves in a hybrid warfare crisis. This symposium is an important step in that direction. Preventive and communication work by academics, practitioners, non-profits, intergovernmental organizations, and governments is necessary to improve our understanding of hybrid warfare and responses. Vulnerable communities and entities likely to be targeted should not first hear about hybrid warfare and possible responses when confronted with a 48-hour window to pay a ransom.

As educators who teach negotiation theory and skills, we need to move beyond the classical negotiation training approach and help those we train to also develop skills to maneuver in this highly complex negotiating environment. We should make sure that our

students are prepared both to engage skillfully in integrative and competitive/adversarial negotiations. As hard as it may be for us, and as much as it may force us into a worldview we dislike, it is important that we not close our ears and eyes to reality: hybrid warfare is a zero-sum, adversarial, high-stakes game.

VII. Conclusions

Hybrid warfare is now everywhere. We are becoming increasingly aware of numerous attempts our enemies make to weaken or even destroy the systems and networks which sustain our lives. What seem to be accidental disruptions in communication networks turn out to be attacks directed at testing and overcoming our defenses.

We have set out to examine the match between classical negotiation theory prescriptions, with its focus on the key interest-based plank, and hybrid warfare conditions. We conducted a comparison of characteristics of classical negotiations and hybrid warfare contexts. We found that although all social contexts in which both occur are complex, hybrid warfare is more *wicked.* Its covert, adversarial nature, together with its objectives and the ways in which it is conducted make it a poor candidate for classical negotiations. Therefore, classical negotiation theory and its prescriptions, especially regarding the role of interests, are not compatible with the kinds of hybrid warfare in which negotiations take place, such as ransomware and kidnapping.

Based on our analysis, we have generated a set of recommendations for negotiators. Our advice is for negotiators to adopt a complexity mindset while abandoning some of the most cherished tenets and strategies of interest-based negotiations.

THINKING AHEAD IN THE GREY ZONE

Chris Honeyman and Ellen Parker

Readers who have recently begun to consider the implications of grey zone conflict or hybrid warfare for their own companies, law firms, or other organizations could be forgiven for seeing the entire subject as startling if not downright alarming. But some of our colleagues in this issue, notably Chris Corpora and Anne Leslie, have taken pains to point out how hybrid warfare could be seen instead as merely the latest and most technologically sophisticated version of attempts to undermine other countries which go back millennia. And the specific techniques that might help your company—or law firm, municipal government, university or whatever other kind of organization you work with—respond with something more organized and proactive than a desperate "all hands on deck" reaction, to an attack that has just occurred, are not all new either. There is a case to be made that much of the necessary agenda is a logical extension of practices of conflict preparation and prevention that are now increasingly well understood, and which have become a sophisticated practice in at least some domains of corporate conflict. We will make that case here.

The organization one of us (Parker) recently retired from is a case in point. CPR, as it is commonly known, was long ago renamed as the International Institute for Conflict Prevention and Resolution. The name, of course, itself includes the essential principle: prevention of conflict comes before resolution because it is even more desirable. A large-scale practical movement built around that principle, however, has been a long time coming, beyond a few areas of conflict management work.

In 2007, one of the present authors, along with several colleagues, published an early attempt to nail down an elusive set of concerns that seem under-addressed in the conflict management field generally. The venue chosen was CPR's own newsletter, *Alternatives*[1]. Their article attempted to analyze a puzzling phenomenon: a pattern of large organizations, with predictable conflict in the offing, nevertheless routinely—or even deliberately—failing to

[1] Christopher Honeyman, Julie Macfarlane, Bernard Mayer, Andrea Schneider & Jeff Seul, *The Next Frontier is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance*, 25(6) ALTERNATIVES TO THE HIGH COST OF LITIGATION 99103 (2007).

think ahead. The article reviewed the consequences of some then-recent failures to anticipate or prepare for events; analyzed causes and explanations of these failures; reviewed the resources that make it possible to do strategic anticipatory planning; and outlined possible ways in which appropriate skills can be brought to bear to advance the field of conflict anticipation and management. The article also argued that it was time that our field developed a new professional specialty, of assistance to companies and other organizations to encourage them to take the proactive steps necessary in their organization's medium- and longer-term interest. That attempt gradually led to more developed formulations, including a book chapter by James Groton, Chris Honeyman, and Andrea Schneider in 2017[2] and another by the same authors, this time tailored to time-pressed attorneys, in 2019.[3]

But even by 2007, in certain domains, there was *already* a distinguished history of "thinking ahead" about impending conflict, with long-established streams of thinking about how to avert conflict or reduce its cost in both diplomacy and traditional labor relations. More immediately in corporate circles, one particular industry had distinguished itself by wearying of constant conflict on every job and taking proactive steps on a mass scale. That prime example was the construction industry, which had, during the previous 30 years, developed a sophisticated suite of tools for preventing, solving, de-escalating, and achieving almost instantaneous resolution of problems and potential disputes (CPR 1991; CII 1995). And use of these tools had begun to spread to other segments of business.[4] It is worth noting that CPR published much of the early literature in this area, and also that two of the authors of the 2017 book chapter had served on a CPR Committee on the matter in the late 2000's (CPR 2010). CPR now has a publicly available Library of Resources (CPR 2023) on its website containing many of these earlier writings, as well as more recent literature and tools for dispute prevention.

So, when we started to look at the implications of the existing prevention movement in the context of our fresh concerns about

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[2] James P. Groton et al., *Thinking Ahead*, in THE NEGOTIATOR'S DESK REFERENCE, VOL 2 265, 265–280 (Chris Honeyman and Andrea Kupfer Schneider eds., 2017).

[3] James P. Groton et al., *Pre-Dispute and Pre-Escalation Techniques to Improve New Business Relationships*, in NEGOTIATION ESSENTIALS FOR LAWYERS 341 (Andrea Kupfer Schneider and Chris Honeyman eds., 2019).

[4] James P. Groton and Helena Haapio, *From Reaction to Positive Action: Dispute Prevention Processes in Business Agreements*, *in* PROCEEDINGS OF THE INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT, LONDON (2007).

grey zone conflict, it turned out there was plenty to work with. Certainly, not all of the tools developed for general "thinking ahead about conflict" purposes are well suited to the specific context of hybrid warfare / grey zone conflict. But some of them seem ripe for this new use even as they stand. Others could well be adapted to the purpose. For example, Schneider and Honeyman recently argued in an article for a New York State Bar publication that because both in-house counsel at a company and its outside law firm are likely to be called in when a crisis of any kind occurs, and because lawyers may have more freedom to ask difficult questions across multiple departments of the company than others, lawyers may de facto become the people most likely to be able to pull together multiple (and perhaps initially very defensive) corporate officials to formulate and execute a coordinated response.

By the same logic, however, a company lawyer may be well placed to adopt a role which is an adaptation of previous conflict prevention practice: the standing neutral, which in this case would not be expected to be neutral as between the company and its attackers, but could well be seen as a neutral as between the company's many internal departments and other stakeholders. To have such a figure authorized in advance and kept apprised of developments which might result in exposure to attack could provide not only the kind of institutional wisdom and preexisting familiarity that could be crucial to effective responses to an actual attack; it could help keep others aware of the possibilities and provide a point of contact for periodic reviews of potential threats, thus helping to avert them. We will say more about this below.

Here we will outline some specific tools and techniques, focusing on a limited selection drawn from the 2017 and 2019 book chapters cited. The criterion for the current selection is of course the particular tool's apparent adaptability to the new purpose.

The adaptations start with the names of three classes of such tools:

"There are three principal classes of tools that are being used to anticipate and prevent conflict: tools for Problem Prevention, Problem Solving, and Dispute De-escalation and 'Real Time' Resolution. They are most effective if they are mutually agreed upon by contracting parties *before* any conflicts or disputes have arisen."[5] (Any otherwise unidentified quotes below are from the same source). Here, Problem Prevention and Problem Solving as

[5] Groton et al., *supra* note 2.

concepts seem to work just as well for grey zone conflict as in other contexts. But the third category becomes misleading, as it implies action to be taken directly with the "other party." Yet as other authors in this issue have amply demonstrated, the defending side in a grey zone attack may not even know with any certainty who is really behind the attack—i.e., who "the other party" actually is. Modifying the concept to something closer to "Incident Response" makes it clear that the de-escalation and resolution work will most likely be conducted among the components—departments, suppliers, customers, other stakeholders—which together make up the responding party.

We should note that a number of tool categories are omitted from the discussion here, as probably not relevant in grey zone conflict settings. A warning that Project Seshat members repeatedly invoke privately, however, is apposite here: ours is an inquiry which will teach us humility, if we don't exercise it already. We could be wrong about any of the categories we have left out. In case the reader realizes something we have overlooked, we can at least list the titles omitted from the discussion here, though we will otherwise refer the reader to Groton et al. (2017)[6] for the details: Realistic Allocation of Risks, Providing Incentives to Parties to Encourage Cooperation, Notice and Cure Agreements, Agreements that Encourage Rational Behavior, Step Negotiations, and Standing Arbitrators and Standing Mediators are all topics not discussed in these pages, but treated in our primary source.

I. Problem Prevention Tools

> "Problem Prevention Tools are implemented during the planning stages of a business relationship, and structure the relationship in ways that avoid many problems that are otherwise almost inevitable. Some specific practices and techniques follow."[7]

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6 *Id.*

7 *Id.*

A. *Good, Open Communications*

> "The best business relationships are maintained through good communications between participants in the relationship or transaction, so that any incipient problems can be identified, brought out into the open, discussed, and solved before they can become serious problems."

Here the relevant implication is that departments and key outside players such as "outside" lawyers and insurers need a forum developed in which they really will communicate their needs and perspectives—and do so regularly. When the organization is large, ongoing assignment of specific individuals (or alternatively, whoever is occupying named roles such as "deputy general counsel") can help the group build trust, as well as avoiding confusion when an emergency arises.

B. *Joint Initial Analysis*

> "At the inception of any business relationship it is helpful for both parties to conduct a joint analysis of the potential for disputes in the relationship, to use this analysis to anticipate potential future problems, and to design systems that will be suited to resolve the kinds of problems that are likely to occur."

This could be adapted to ongoing relationships and serve as the launch for the forum suggested in the previous paragraphs.

C. *Establishing a Partnering Relationship*

> "Partnering is a team-building effort in which the parties establish cooperative working relationships through a mutually developed, extra-contractual strategy of commitment and communication. It is typically an aspirational, good faith process. But it can be contractually reinforced by a mutual commitment of fair dealing and good faith . . . In any common business enterprise, if individual parties are left to their own devices in trying to achieve their own goals, they are likely to be guided primarily by narrow self-interest, which is likely at some point to conflict with the narrow self-interests of other participants. This conflict can be a breeding ground for disputes. . .."

This too hinges on the kind of forum already discussed. But it goes further: The need for particularly frequent and regularized communication between *certain* departments and outside stakeholders should be an early (and occasionally revisited) agenda item for such a forum.

II. Problem-Solving Tools

Problem-Solving Tools involve the use of various contract and negotiation techniques to deal constructively with problems that can actually arise.

A. *Covenant of Good Faith and Fair Dealing*

> "Although many legal systems already require this, it is useful for any business agreement to contain an explicit covenant that each party will act in good faith and engage in fair dealing."

A written and signed commitment to this effect may be claimed by some participants to be superfluous because "*Of course* we will do this, and it's insulting to suggest otherwise." Shelves full of business histories, meanwhile, are replete with evidence that while such protestations are no doubt made in good faith, they may at crucial moments prove insufficient in the face of real-world business pressures, including individuals' or entire departments' need for face-saving. An explicit document not only signed, but circulated and/or posted, may help when the inevitable moment arises when a corporate official or entire department is tempted to "duck" some nasty new discovery. For more on the patterns of mind that can take over, see Dietrich Dörner's *The Logic Of Failure* (1997).[8]

We should also note that CPR has a number of tools prepared and available for dispute prevention and resolution, including a model term sheet, sample contractual provisions, and a memo explaining—and answering some objections to—the use of a standing neutral. As noted below, we think all of these could readily be adapted for the new need.

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[8] D. Dörner, The Logic Of Failure: Recognizing and Avoiding Error in Complex Situations (New York: Basic Books 1997).

B. *In-House Problem-Solving Tools*

> "There are a number of steps which an organization can take to 'keep the peace' within the organization and encourage good prevention practices:
>
> - Appoint an Ombuds to deal confidentially with employee and internal problems. An Ombuds can clear up communication problems or misperceptions of an employee's relationships with the organization or fellow employees.
> - Charge the transaction costs of a dispute to the budget of the department that generated the dispute, so that managers are made aware of the true costs of the dispute.
> - Institute sensible document-preparation and retention policies that can be useful in case disputes occur or escalate. For example: preserve evidence that you acted reasonably. If an employee writes a 'bad memo' which could be interpreted as injurious to the company, it is good preventive practice to write other memos that put the earlier memo in perspective and correct the errors in the bad memo.
> - Consider and organize in advance how the organization would handle various possible crises.
> - Conduct a corporate legal audit regularly to help foresee where problems might occur."[9]

All of these seem useful in preparing for grey zone conflict and may even be adaptable with little or no modification.

C. *Incident Response Tools*

> "Dispute de-escalation and 'real time' resolution tools [or as redefined here, *incident response* tools] that level the playing field provide transparency, defuse conflict, or provide prompt resolution of pending disputes. These measures can also prevent disputes that do arise from becoming intractable."[10]

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[9] Groton et al., *supra* note 2.

[10] *Id.*

D. *Encourage the Open Sharing of Basic Information*

> "Create a level playing field and provide transparency for all participants by establishing a common web site or other system for full sharing of important information about the business enterprise or transaction. ICANN (Internet Corporation for Assigned Names and Numbers; the governing body of the Internet) is an example of this on the international stage, where the allocation of web addresses and other important functions have been handled through a common web site with clear policies and procedures posted. Comments and blog posts have been collected and publicized. ICANN's use of social media has also tried to provide transparency."

If the standing forum discussed above has been enacted, convening it in an emergency is an obvious step. But this quote is a reminder that even if such a forum has not been developed, the underlying need remains, and is now more urgent. It can be addressed at least at a beginning level on-the-fly.

E. *Use of a "Standing Neutral"*

> "One of the most innovative and promising developments in controlling disputes between parties who are involved in any type of continuing or long-term relationship (such as a joint venture, construction project or outsourcing arrangement) is the concept of having a highly qualified and respected pre-selected or 'standing' neutral to serve as a monitor or dispute resolver *throughout the course of the relationship*. A single neutral or a board of three neutrals (designated variously as a 'standing neutral,' 'mutual friend,' 'referee,' 'dispute resolver,' or 'dispute review board') is selected mutually by the parties early in the relationship; is briefed on the nature of the relationship; is furnished with the basic documents describing the relationship; routinely receives periodic progress reports as the relationship progresses; and is invited to meet occasionally with the parties in the absence of any immediate dispute, simply to maintain a feel for the dynamics and progress of the relationship."

This concept, which was given pride of place and extensive discussion in Groton et al. (2017)[11], needs adaptation for grey zone conflict. As noted above, however, Schneider and Honeyman

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11 *Id.*

(2023)[12] have argued for the adoption of a similar role among departments and other stakeholders, probably by one of an organization's in-house or outside attorneys. This is for two reasons: (a) because a lawyer is often in a better position than others within and around an organization to talk forthrightly with people across all departments and partner organizations, as well as at all levels; and (b) because if the problems are allowed to escalate, they will likely end up on a lawyer's desk anyway. There are many details, variations and examples of the previous uses of standing neutrals in Groton et al. (2017).[13] Also see Groton (2009)[14], and Groton and Dettman (2011).[15]

III. A Springboard to a Next Phase?

Until recently, specific programs and courses in conflict prevention have been thin on the ground in general commercial circles (though not, by contrast, in the construction industry, or even longer in international relations: traditional diplomacy may have its weaknesses, but ongoing attention to prevention work is a highlight of traditional professionalism in that domain). In 2020, however, CPR began hosting and contributing to several programs for corporate counsel and their law firms, introducing the imperative of dispute prevention in their businesses with the aim of expanding the use of these mechanisms beyond the construction industry. In early 2021, CPR launched its Dispute Prevention Pledge and a Model Dispute Prevention and Resolution Provision, both of which call for an upfront commitment by the parties to nurture their strategic relationship and their desire to avoid a value-depleting dispute. Among the commitments were an agreement to act in good faith, engage in transparent communication, and employ prevention mechanisms such as the standing neutral.

In late 2022, one of the authors (Parker) and our symposium colleague Andrea Schneider, along with another law school profes-

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12 Andrea Kupfer Schneider and Chris Honeyman, A*dvocates' and Neutrals' Roles in a New Type Of Conflict — the Private and Public Crises of Hybrid Warfare*, New York Dispute Resolution Lawyer, Vol. 16, No. 1, 34–39 (2023).

13 Groton et al., *supra* note 2.

14 James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes*, 27(11) Alternatives to the High Cost of Litigation 177, 181–185 (2009).

15 James P. Groton and Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29(10) Alternatives to the High Cost of Litigation 177–192 (2011).

sor, Joan Stearns Johnsen, organized and ran a two-day training for experienced mediators, law firm counsel, and in-house counsel interested in moving their conflict resolution skills upstream to become Relationship Facilitators (i.e., Standing Neutrals). Among the relevant topics were the ability to anticipate conflict and help the parties develop business solutions, as well as deeper dives into their listening and communication skills to help the parties navigate the inevitable conflicts that arise due to changed circumstances or human misunderstanding and missed cues.

Some modest adaptations could be made for a course in conflict prevention specifically geared to grey zone conflict. Such adaptations could include a segment on mindset and culture change—moving from reactive to proactive, i.e., a focus on the anticipation of risk/thinking ahead skills inherent in business relationship dispute prevention. Culture change could also focus on a recognition among the various departments charged with maintaining the integrity of the company's systems and technologies that the standing neutral (probably in-house counsel charged with this responsibility) is a trusted business partner with whom they should share information and be transparent. The course should emphasize that strategic business relationships—even internal ones—are subject to inevitable misalignments and demonstrate how such misalignments can easily lead to exposure to attack in grey zone conflict.

We look forward to helping create opportunities for follow-up designs, and actual courses, geared specifically to the new prevention direction suggested by this article, as well as by our colleagues' articles in this symposium issue.

REFERENCES

L. M. Brown, *Legal Audit*, 38 S. CAL. L. REV.431 (1965).

Dispute Prevention and Resolution Techniques in the Construction Industry, CONSTRUCTION INDUSTRY INSTITUTE, https://kb.construction-institute.org/knowledge-areas/risk-management/topics/rt-023/pubs/rs23-1 (last visited Jan. 26, 2017) [https://perma.cc/DY86-AVMY].

Center for Public Resources, *Preventing and Resolving Construction Disputes, Special Supplement*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, 1991, at 182–187.

Dispute Prevention Initiative, and Practice Manual for Reducing Disputes Through Wise Prevention Practices, INT'L INST. FOR CONFLICT PREVENTION & RESOL., https://www.cpradr.org/news/cpr-prevention-practice-materials (last visited Apr. 29, 2023) [https://perma.cc/E9LZ-ADTA].

Dispute Prevention Library of Resources, INT'L INST. FOR CONFLICT PREVENTION & RESOL., https://www.cpradr.org/dispute-prevention-library-of-resources## (last visited Jan. 21, 2023) [https://perma.cc/G2MF-YLKU].

D. DÖRNER, THE LOGIC OF FAILURE: RECOGNIZING AND AVOIDING ERROR IN COMPLEX SITUATIONS (New York: Basic Books 1997).

James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes*, 27(11) ALTERNATIVES TO THE HIGH COST OF LITIGATION177, 181–185 (2009).

James P. Groton and Helena Haapio, *From Reaction to Positive Action: Dispute Prevention Processes in Business Agreements*, *in* PROCEEDINGS OF THE INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT, LONDON (2007).

James P. Groton and Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29(10) ALTERNATIVES TO THE HIGH COST OF LITIGATION177–192 (2011).

James P. Groton, Chris Honeyman & Andrea Kupfer Schneider, *Thinking Ahead in* THE NEGOTIATOR'S DESK REFERENCE, VOL 2 265, 265–280 (Chris Honeyman and Andrea Kupfer Schneider eds., 2017).

James P. Groton, Chris Honeyman & Andrea Kupfer Schneider, *Pre-Dispute and Pre-Escalation Techniques to Improve New Business Relationships*, *in* NEGOTIATION ESSENTIALS FOR LAWYERS 341 (Andrea Kupfer Schneider and Chris Honeyman eds., 2019).

Christopher Honeyman, Julie Macfarlane, Bernard Mayer, Andrea Schneider & Jeff Seul, *The Next Frontier is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance*, 25(6) ALTERNATIVES TO THE HIGH COST OF LITIGATION 99103 (2007).

NOTES

A PORTRAIT OF THE ARTIST'S HEIRS IN MEDIATION: ADR TECHNIQUES TO PREVENT AND RESOLVE DISPUTES FOLLOWING AN AUTHOR'S DEATH

*Nicholas Beudert**

I. INTRODUCTION[1]

If an author's work is powerful enough, or popular enough, it's likely that at some point someone will want to write about her. For scholars embarking upon these projects, the author's body of published work can provide insight into her psyche, but correspondence and other unpublished materials can also be valuable. Copyright law covers all of these materials, and when the author dies, she can bequest her copyright as she would the rest of her estate (if she hasn't transferred it during her lifetime).[2] The recipient of these copyrights may now treat the copyrights as her own, as though she produced the copyright-protected work herself. In addition to granting publishing rights in the copyrighted material to publishers (to print and sell copies of the works), these new copyright holders (be it the author during her lifetime or the author's heirs) field requests from different types of people for permission to use the copyrighted work.

Heirs are within their rights to refuse permission to use the materials in question, and if any requester were to use this material *without* permission of the heir, such a use might be an infringement of the copyright (depending on the use). The fair use provision of

* Symposium Editor, *Cardozo Journal of Conflict Resolution* (Vol. 24); J.D. Candidate 2023, Benjamin N. Cardozo School of Law. B.F.A. New York University, 2015. I would like to thank Professor Christopher Buccafusco for his invaluable comments and suggestions during the development of this note, and Sarah Perillo for her love and support during the note writing process and every day.

[1] A note on terminology: for clarity, this Note will refer to the original people who have written the copyrighted material as 'authors', whomever the author disposes the copyright to as 'heirs', and individuals seeking copyrighted material as 'scholars'.

[2] *See infra* Section II.B.

the Copyright Act allows for use of copyrighted material by non-holders, but most uses are granted exclusively to the copyright holder.[3] Certain authors' heirs are notorious for their efforts to frustrate scholarship about their ancestors by refusing permission to quote from copyrighted material.[4] Some heirs even act outside their rights as copyright holders and go so far as to destroy or otherwise withhold the only physical copies of unpublished material to which they own the copyrights: Evelyn Waugh's son Auberon charged incredibly high permission fees for quoting his father's published and unpublished work, and barred Waugh's would-be biographer Martin Stannard from writing an introduction to Waugh's *The Loved One*.[5] Valerie Eliot, widow of and literary executor to T.S. Eliot, blocked access to correspondence and other material, stopping anyone from reading or quoting it.[6]

Heirs do not always take a passive approach in this restraint by simply refusing every permission request; sometimes they will actively seek out scholars or other users of the copyrighted material in question and claim that the users are infringing. Sometimes this is accurate, sometimes it is not.[7] In this scenario, sometimes the threat of a lawsuit for copyright infringement is enough to cause a scholar to cease their use.[8] Heirs are able to make these claims because they can put their money with their mouth is; if their relative is a literary figure important enough to warrant scholarly work, it's not unreasonable to suggest that the author was successful enough to finance copyright infringement litigation.[9] This steady stream of income can create a power imbalance where heirs have the resources to use the courts against scholars and academics who lack the same finances. The largest biography advance payment will never stand up against decades of large royalties for works in the canon by an author like John Steinbeck, for example.[10]

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3 *Id.*

4 *See* D.T. Max, *The Injustice Collector*, NEW YORKER (Jun. 11, 2006), https://www.newyorker.com/magazine/2006/06/19/the-injustice-collector [https://perma.cc/3GZ7-4RYU]; Leo Robson, *Bitter Feuds, Buried Scandal: The Contested World of Literary Estates*, NEW STATESMAN (Jan. 2, 2019), https://www.newstatesman.com/culture/2019/01/bitter-feuds-buried-scandal-the-contested-world-of-literary-estates [https://perma.cc/BR3V-G6Z7].

5 Robson, *supra* note 4.

6 *Id.*

7 *See infra* Section II.C.

8 *Id.*

9 *See infra* Section III.A.

10 *Id.*

The current Copyright Act guarantees copyright protection of new works for seventy years after the author's death, all but guaranteeing that the heirs will benefit from its protection for far longer than the original author will. Not only is this long grant of protection in tension with the original motivations for the Copyright Act, but this post-mortem term can also lead to a situation where heirs can wield the copyright in a manner at odds with the way an author might have wanted.[11] An author may donate her letters to a museum in the hope that it will encourage scholarship about her work after her death, only for her heir to withhold permission to reproduce those letters when a scholar comes to consult them for a biography.

While it's true that the fair use provision allows for certain uses to be made without needing permission from the heirs, the current case law surrounding fair use is vague or inconsistent at best and influenced by concerns outside of copyright at worst. As a result, fair use fails to be a reliable option for scholars who are denied permission to use copyrighted material. Further, fair use doctrine is of no use to a scholar who is unable to access material from which she might quote in the first place. If a scholar can't read the text in the first place, there can be no use of it (fair or otherwise).

These shortcomings—the overly long term of copyright and the unclear fair use doctrine—both lead to scenarios where a scholar's use of materials that might assist her scholarship can be frustrated. This undermines the original motivation of the Copyright Act, to promote learning. The current state of copyright law is unlikely to change, though. In addition to the arduous nature of amending such a substantial piece of legislation, not every author will think that current copyright law leads to this same frustration of their intent and must be changed. Franz Kafka, for example, famously wished for his manuscripts to be burned after death,[12] and would likely not be upset by any heir making efforts to stop scholars from reading or writing about them. Given the difficulty in the process, and differing opinions of how copyright law should change, it's unlikely that any solution proposed would appease everyone or happen quickly.

Litigation can exacerbate the issues the Copyright Act has; an heir can use the threat of litigation that only she can afford to scare a scholar away from using material. Even if a scholar has the funds

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11 *See infra* Section II.B.

12 Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 265 (2017).

to pursue litigation and claim that the use is fair, current issues with the fair use doctrine make that a risky endeavor. One way to curtail these issues might be to implement the ADR techniques of arbitration and mediation. Both techniques present attractive alternatives: arbitration offers a third-party adjudicator for a much more affordable cost, and mediators utilize several different techniques to identify and 'reframe' the beliefs of the parties to help them come to a mutually beneficial result. Neither option will present a one-hundred-percent-effective method of dispute resolution (for example, an heir who is dead set against allowing use of certain material may never be convinced otherwise) but if an author can compel her heirs to enter arbitration or mediation to solve copyright disputes before entering litigation, there is a greater chance that a deal might be struck for use of or access to the disputed materials. Not only would this promote more scholarship, but it would also serve to support two elements of copyright law currently being stifled: author control and scholarship. An author would be able to exert more control over copyright for its duration and would be able to limit any behavior by her heirs that would be in opposition with her own wishes for her legacy.

This Note proposes using ADR to avoid situations where an author's heirs are able to hold these rights hostage. The note will first outline the background of the scenario, both the status of copyright law as well as an example of the type of issues that arise. The note will then outline the ways in which ADR can be beneficial if applied, before outlining the ways in which ADR can be implemented.

II. BACKGROUND INFORMATION

To fully understand the benefits of ADR it is necessary to understand the conflicts between scholars and heirs that will most benefit from its implementation. First, it is important to know what types of materials scholars and other individual want to use when they create new works about famous authors. Then, we will examine what rights the Copyright Act grants in these materials to the authors who create them, as well as the legislative intent that motivated and has shaped the Act. We'll see that the current iteration of the Act grants rights for a period of time long past the author's death, in some instances giving the heirs the benefit of exclusive rights longer than the author ever got to enjoy them. Af-

ter that, we will see some notable examples of the extreme behavior that heirs have exhibited to make sure that their predecessor's work is not misused in scholar's hands, before discussing how that behavior may conflict with the way the author might have wanted her work to be perceived post-mortem. Finally, we'll see the way the fair use doctrine intends to address these issues, before identifying the doctrine's shortcomings.

A. *What Scholars Want*

Scholars interact with an author's work in many ways when completing their scholarship. If the scholar is writing a biography of the author, she may be interested in reading correspondence, rough drafts, memos, or other material that was produced by the author but not necessarily intended to be published for public consumption. Ian Hamilton intended to write a biography of J.D. Salinger and found correspondence of Salinger's that gave some insight into his thoughts and the people with whom he shared them.[13] It also gave a sense of the historical figures that Salinger corresponded with (such as Judge Learned Hand).[14] Similar unpublished materials by other authors have been donated to archives and museums.[15] The authors can register the copyright to them, as Salinger did, and the museums that own the physical letters may impose procedures that must be completed before scholars access and quote from them.[16]

If a scholar is producing an analytical piece that dissects the author's body of work (rather than only describing the author's life), she may want study and quote from published material produced by the author. The use of this published material can increase the impact of the discussion, as it gives potential readers easy access to the work that is being discussed. In fact, a book about an artist that does not include any examples of the artist's work might not be well-received critically or commercially. As Katrina Strickland correctly notes, "an art book without images of the

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13 Salinger v. Random House, Inc., 811 F.2d 90, 92–93 (2d Cir. 1986).

14 *Id.* at 92.

15 *Id.* at 93 ("Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives").

16 *See infra* Section II.B.

artist's work is severely hobbled."[17] If a scholar is attempting to quote an author's already published material, there is a good chance that permission would be granted by the company that publishes the work, rather than the author (or her heirs).[18] Generally speaking, the author grants publishers a wide range of exclusive rights necessary to publish material without fear of competition, and the right to quote works for use in this manner is sometimes included in those grants.[19]

An individual may also be interested in the dramatic rights to an author's work. Amateur artists may be interested in adapting an author's work into song or into a theatrical piece and would have to get permission from the copyright holder in order to do so (dramatic rights are generally reserved from the rights granted to publishers).[20] The issue of a scholar not being able to use to the work produced by the subject can also be present in dramatic works. Several biographical movies (dubbed 'biopics') have been made about musicians without including any of the musician's notable works, and reviewers almost always comment on this fact as a detrimental element of the movie.[21]

In all cases, permission to use must either be granted by the copyright holder or else the use must be considered 'fair'.

B. *Copyright Law*

Copyright law grants the owner of a copyright the exclusive right to reproduce, distribute, and display the specific work, among other rights.[22] Copyright law's foundation comes from the United States Constitution, which grants Congress the power "[to] promote the Progress of Science and useful Arts, by securing for lim-

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17 KATRINE STRICKLAND, AFFAIRS OF THE ART: LOVE, LOSS AND POWER IN THE ART WORLD 194 (2013).

18 *See infra* Part III.

19 *See infra* Section II.B.

20 *Id.*

21 Jochan Embley, *Can You Ever Really Make a Music Biopic Without the Music?*, EVENING STANDARD (Jan. 13, 2021), https://www.standard.co.uk/culture/music/music-biopics-no-music-b854553.html [https://perma.cc/PGH9-YG5W] (discussing the merits of *Stardust* and *Jimi: All Is By My Side*, biopics of David Bowie and Jimi Hendrix that did not feature music performed by the artist subject).

22 17 U.S.C. § 106.

ited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23]

An author's work is protected by copyright law once it is "fixed in any tangible medium of expression,"[24] but when an author sells a finished work for publication, she will transfer to the publisher certain rights (generally the exclusive rights to publish the work in certain formats and in certain territories) while retaining the copyright itself.[25] This way the copyright remains under the author's ownership, but the publisher controls the right and manner in which to publish and distribute the copyrighted work. In this scenario, any party interested in quoting from a published work (e.g., a scholar who wanted to quote from *The Great Gatsby* in her biography of F. Scott Fitzgerald) would have to seek permission to reprint from the publisher. Major publishers have infrastructure in place to field and grant these requests, either through a website portal or an e-mail address.[26]

Copyright law applies to "extremely varied types of work."[27] The Copyright Act was amended in 1976 and now states that protection is granted to works upon their creation rather than upon their publication.[28] The current copyright statute protects "original works of authorship fixed in any tangible medium of expression."[29] This means as soon as an author writes words on a page, that work is protected by copyright. The statute does include some limitations on the exclusive rights granted, such as the fair use provision which states that "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."[30]

The increase in material covered under the 1976 Copyright Act means that "everything from the author's personal correspondence and snapshots to the great American novel that she has left

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23 U.S. CONST. art. I, § 8, cl. 8.

24 17 U.S.C. § 102.

25 *Copyright Management for Authors,* CORNELL UNIVERSITY LIBR., https://copyright.cornell.edu/authors [https://perma.cc/BLA2-KNP3] (last visited Nov. 19, 2021).

26 *See e.g.*,, *Permissions,* PENGUIN RANDOM HOUSE, https://permissions.penguinrandomhouse.com/ (last visited Nov. 19, 2021) [https://perma.cc/58QL-TS3Z]; Permissions, CURTIS BROWN, LTD., https://curtisbrown.com/permissions/ (last visited Nov. 20, 2021) [https://perma.cc/3XFS-9XQ6].

27 Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J. L. & TECH. 77, 91.

28 *Id.* at 89.

29 17 U.S.C. § 102.

30 17 U.S.C. § 107.

behind" are now given copyright protections.[31] These personal copyrighted materials are not always published professionally, so a party interested in including this material in a work of scholarship would not always be able to seek permission from an established publishing house. In that scenario, such person would need to be granted permission from the author or, if the author has passed away, the author's heir.[32] It's possible that unpublished materials might physically be owned by someone other than the copyright holder; a museum or collector may own the letters or manuscripts while the author's heir owns the copyright in the text of the letters. Anyone who wanted to quote from these letters would need physical access to the unpublished material in order to read them, as well as subsequent permission from the copyright holder to reproduce text from the material.

Currently, the term of copyright lasts for the lifetime of the author of the copyrighted material and for 70 years after the death of the author,[33] but the term has not always been so long. The Copyright Act of 1790, the country's first copyright statute,[34] provided for a much shorter term of fourteen years from the title's recording "in the clerk's office as herein directed", subject to a renewal term of an additional fourteen years if the author survives the original term.[35] The Copyright Act of 1909 doubled both the initial term and renewal term to twenty-eight years, and removed the contingency that the author must survive the initial term in order to renew.[36] One reason for this modification was to increase the likelihood that copyright ownership would last at least for the author's lifetime.[37] The 1976 Copyright Act extended the term and guaranteed protection during the author's lifetime.[38] The 1976 Act extended the term to last "the life of the author and fifty years after the author's death."[39] The Sonny Bono Copyright Term Extension Act ("CTEA") further extended this to the current term of seventy years following the author's death.[40]

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31 Subotnik, *supra* note 27 at 91.

32 *See infra* Part III.

33 17 U.S.C.A. § 302.

34 Subotnik, *supra* note 27 at 88.

35 1 Stat. 124, ch. XV, § 1, 3 (1790).

36 An Act to Amend and Consolidate the Acts Respecting Copyright, 35 Stat. 1075, Ch. 320, §§ 23, 24 (1909).

37 Subotnik, *supra*, note 27 at 89.

38 *Id.*

39 90 STAT. 2573, § 302.

40 112 STAT. 2827 § 102.

For the author who lives a long, fruitful life, this lengthy copyright term allows for the heir to enjoy the fruits of the authors work for an amount of time comparable to that of the author's life. However, if an author were to meet her untimely death at the young age of thirty, like Sylvia Plath,[41] heirs would be able to dispose of the copyright more than twice as long as the author was alive. In fact, even if an author lived a long life their heirs might hold the copyright to the authors work for a disproportionate amount of time.

Many authors in the canon wrote their first novel when they were in their thirties and forties[42], and some, like John le Carré, continued producing works into their late eighties.[43] To take John le Carré as an example, he wrote his first novel, *Call for the Dead*, at thirty[44] and died at the age of eighty-nine. That gave him fifty-nine years to enjoy the benefit of his copyright (under American copyright law), whereas his heirs would get to enjoy the success from that copyright longer than John ever would. Further, not all authors produce their first novels as early as thirty, and eight-nine is a relatively advanced age to live to see.[45] All that to say, the current copyright scheme allows for heirs to enjoy the benefits of copyright longer than the individuals to whom those rights were originally granted.

C. *Heirs Withholding Materials*

Some of these heirs become very protective of this copyright, and one of the most notorious of these protective heirs was James

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41 Dan Chiasson, *Sylvia Plath's Last Letters,* NEW YORKER (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/11/05/sylvia-plaths-last-letters [https://perma.cc/D27G-PFDC].

42 Sam Tenhaus, *How Old Can a Young Writer Be?,* N.Y. TIMES (June 10, 2010), https://www.nytimes.com/2010/06/20/books/review/Tanenhaus-t.html [https://perma.cc/QE38-FRBA].

43 Alison Flood, *Final John le Carre Novel, Silverview, to be Published in October*, GUARDIAN (May 19, 2021, 9:00 am) https://www.theguardian.com/books/2021/may/19/final-john-le-carre-novel-silverview-to-be-published-in-october [https://perma.cc/U29G-958W].

44 Eli Keren, *What is the Best Age to Write a Novel?*, CURTIS BROWN CREATIVE (June 20, 2016), https://www.curtisbrowncreative.co.uk/what-is-the-best-age-to-write-a-novel/ [https://perma.cc/ZN8R-HXP8].

45 Jared Ortaliza et al,, *How Does U.S. Life Expectancy Compare to Other Countries?*, HEALTH SYSTEM TRACKER (Sept. 18, 2021), https://www.healthsystemtracker.org/chart-collection/u-s-life-expectancy-compare-countries/#item-life-expectancy-september-2021-update-chart-1 [https://perma.cc/KA8T-2PY2].

Joyce's grandson, Stephen James Joyce.[46] After James Joyce's death, Harriet Shaw Weaver controlled his literary estate, while Joyce's wife, Nora Joyce, received the royalties.[47] When Nora passed away, her children, Giorgio and Lucia, became beneficiaries of her estate.[48] Giorgio, Stephen's father, allegedly was more interested in the proceeds generated by Joyce's work, and left management of the estate to others.[49] By 1982 Stephen had negotiated with other family members to obtain a fifty percent stake in the estate, increased to seventy-five percent after Giorgio and his second wife had passed away.[50] Eventually, the remaining beneficiaries under the estate became burnt out by the effort and emotion that went into managing the estate and sold their shares to Stephen.[51] By 2000, Stephen completely controlled Joyce's estate.[52]

With Stephen handling Joyce's estate, the relationship between him and Joyce scholars "[went] from awkwardly symbiotic to plainly dysfunctional."[53] Stephen took pride in his contentious relationship with Joyce scholars, stating, "We have proven that we are willing to take any necessary action to back and enforce what we legitimately believe in . . . [w]hat other literary estate stands up the way I do? It's a whole way of looking at things and looking at life."[54] He was particularly disdainful of the scholars' claim that they have added to Joyce's legacy.[55] Instead, Stephen believed that the academia surrounding Joyce's work has scared readers away from Joyce's novels undeservedly.[56] Stephen didn't mince words with regards to scholars, and claimed they were "rats and lice—they should be exterminated!"[57]

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46 *See generally* Tim Cavanaugh, *The Portrait of the Old Man as a Copyright Miser*, L.A. TIMES (June 5, 2007, 12:00 AM), https://www.latimes.com/opinion/la-oew-cavanaugh5jun05-story.html [https://perma.cc/N9PE-A7CB]; *see generally* Max, *supra* note 4; *see generally* Robert Spoo*, Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs,* 56 UCLA L. REV. 1775 (2009).

47 Max, *supra* note 4.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 Max, *supra* note 4.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 Max, *supra* note 4.

Motivated by a desire to put a stop to work that violates the Joyce family's privacy or is in other ways disreputable, Stephen's efforts ranged from reasonably understandable, such as a blanket refusal to grant permission to copy from any of Joyce's unpublished letters, to extremely particular, like his refusal to grant permission to a scholar whose work was going to be published by Purdue University because Stephen felt Purdue's mascot, the "Boilermakers", was objectionable.[58] In addition, Stephen has blocked several public readings of James Joyce's work and has obstructed new editions of Joyce's work. In one instance, Stephen had threatened Adam Harvey, a performance artist who had quoted a portion of *Finnegan's Wake*, by telling Harvey he had likely infringed upon the copyright, only for Harvey to find out later than under British law his performance would have been protected.[59]

Refusing permission is not the only way an heir might seek to impede a scholar's work; she might act outside of the exclusive rights granted by the Copyright Act and impede access to the actual physical materials that scholars wish to copy. After all, a scholar can't copy that which a scholar cannot read in the first place. Stephen's efforts to protect his grandfather's legacy most likely involved both methods; not only did he refuse to grant permission to copy, but some scholars worry that Stephen had gone so far as to obtain original physical copies of Joyce's correspondence from the National Library of Ireland and destroy it, thus preventing any scholar or curio from reading or writing about it.[60]

D. *Tension Between Generations*

Some authors may be pleased with the extent to which that authors' heirs exert their control over the author's writing, be it by refusing permission to quote from copyrighted work or by withholding or destroying unpublished material. Franz Kafka and Vladimir Nabokov both wished for their incomplete works to be destroyed after their deaths.[61] Though their instructions to dispose of their materials weren't completely followed,[62] they might have

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58 *Id.*
59 *Id.*
60 *Id.*
61 Subotnik, *supra* note 12 at 265.
62 *Id.*

been pleased had their heirs been as protective (or destructive) of their manuscripts and letters as Stephen James Joyce was of his grandfather's. Indeed, James Joyce was "a strict guardian of his own image"[63] and by limiting the extent to which scholars could use Joyce's work in new ways, Stephen can be said to be carrying out his grandfather's wishes.

However, it may not be every author's wish for their work to be so protected. Ezra Pound, a twentieth-century poet and critic, was so disillusioned by the way copyright law allowed authors and heirs to hold literature captive that he proposed his own variation of copyright law which sought to allow the public the ability to use copyrighted material to a greater extent.[64] Predictably, the Ezra Pound Literary Property Trust, administered by New Directions Publishing Corporation, has been very generous in granting scholars permission to quote from Pound's letters and manuscripts, both published and unpublished.[65]

Not all authors have been so vocal about how they wish their legacy to unfold, and certainly not all of them sought to propose copyrights statutes. Nevertheless, certain literary estates, like Pound's literary trust, have encouraged scholarly use of the author's materials; W.B. Yeats's estate, for example, is another literary estate that has gladly allowed scholars to read and quote from the author's unpublished materials.[66] It's not hard to imagine that these actions on behalf of these literary estates were motivated by pro-academic mindsets held by the authors during their lifetimes. Even if an author wasn't explicit about the way her work should be handled post-mortem, some scholars have wondered if difficult heirs are acting at odds with the beliefs and opinions held by the authors during the authors' lifetimes: Lorenz Hart's biographer, Frederick Nolan, expressed that he found it difficult to imagine that Hart himself would have restricted Nolan's use of Hart's material the way that Hart's sister-in-law had.[67] In fact, even James Joyce, who so valued his privacy, once told his translator, "I've put in so many enigmas and puzzles that it will keep the professors busy for centuries arguing over what I meant, and that's the only

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63 Max, *supra* note 4.

64 *See generally* Spoo, *supra* note 46.

65 *Id*. at 1827.

66 *Id.*

67 Subotnik, *supra* note 27 at 79.

way of insuring one's immortality," suggesting that he envisioned that scholarship of his work would keep his legacy alive.[68]

While it's difficult to know exactly what an author's wishes are during her lifetime, it has been made clear by numerous academics that the vice-like grip that certain authors' heirs have on the authors' unpublished materials holds a threat to public interest.[69] The Copyright Act grants exclusive rights in authors' works both published and unpublished and allows heirs to control how such materials are disposed of, but it's extremely unlikely that *all* authors would want their heirs wielding the sword of litigation threats against *everyone* who wishes to use their work for creative, critical, or scholarly purposes. Further complicating this idea is the suggestion that authors who would welcome widespread use of their works after they pass away might still want their heirs to benefit financially from the work they produce and would prefer not to leave their copyrights to the public domain.

It's unlikely that copyright law will be amended anytime soon in a way that will achieve a goal of both limiting copyright duration while allowing heirs to receive the benefits of copyright. Not only has the copyright statute only been amended a handful of times during its existence, but there is also evidence that the latest copyright term extension was funded by powerful lobbyists for the entertainment industry.[70] Critics of the CTEA have derisively referred to it as the "Mickey Mouse Protection Act", suggesting that the act's true intention was to protect Mickey Mouse from entering the public domain.[71]

Though there are several different schools of thought with regards to copyright's current length, it is undeniable that the original intention behind a copyright statute suggested a much narrower view of what it was supposed to cover than what the current copyright law actually does. The U.S. Constitution states that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

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68 Max, *supra* note 4.

69 Subotnik, *supra* note 12 at 256 (citing Deven R. Desai, The Life and Death of Copyright, 2011 WIS. L. REV. 219, 258–59; Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1822–27 (2009); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 123–24 (2015).

70 Subotnik, *supra* note 27 at 91.

71 Michael Bradford Patterson, *To Speak, Perchance to Have a Dream: The Malicious Author and Orator Estate as a Critique of the Digital Millennium Copyright Act's Subversion of the First Amendment in the Era of Notice and Takedown*, 22 J. INTELL. PROP. L. 177 at 188 (2014).

the exclusive Right to their respective Writings and Discoveries", and it is this clause that provides the power to enact the Copyright Act.[72] It's useful to note Professor William Patry's interpretation, based additionally on the preamble to the initial copyright act, that "Science" as used in the Constitution refers to the eighteenth century usage which incorporated all forms of "learning".[73]

Though the original rationales for copyright were that authors deserve to have the result of their efforts protected and that such protection would encourage authors to create works beneficial to the public, Professor Patry criticizes the current copyright term length that has extended so far past the death of the author as being motivated by "a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain, thereby threatening trust funds".[74] Now, after copyright protection has promoted creation of work, potentially a great, great, great-grandchild of that author will still hold the copyright to the created work.[75] With that copyright, the heir in question has the exclusive rights to dispose of the material as she sees fit.

While it seems entirely justifiable that a creator should be able to do what she wants with her work, it is harder to justify the work being controlled by such a distant relative of the creator. In that scenario, someone who in all likelihood never met the creator is able to take actions that would stifle scholarship by denying scholars the ability to use the copyrighted material. An individual to whom the drafters of the Constitution had never considered granting ownership would take actions that undermine the very purpose the drafters had in mind. This is especially alarming when that heir is acting at odds with the true intention of the creator.

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72 U.S. CONST. art. I, § 8, cl. 8.

73 William Patry, *Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997).

74 *Id.* at 911, 932.

75 *Id.* at 931–32 ("For an author who dies at age seventy-five and has children who have children at twenty-five, protection will be passed on as follows: 1971, author born; 1996, child born to author; 2021, grandchild born; 2046, author dies; 2056, great-grandchild born; 2071, author's child dies; 2081, great, great-grandchild born; 2096, author's grandchild dies; 2106, great, great, great-grandchild born; 2116, protection ends. In 2116, the author's child will have been dead for forty-five years; the author's grandchild will have been dead for twenty years; the great-grandchild will be sixty years old; the great, great-grandchild will be thirty-five years old, and the great, great, great-grandchild will be ten years old.").

E. *Fair Use*

Scholars can still include copyrighted material in their scholarship, so long as the use is deemed 'fair' in accordance with the fair use provision of the Copyright Act. The fair use provision of the copyright statute states that "fair use of a copyrighted work . . . is not an infringement of copyright".[76] This provision states that certain uses, such as those "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research", even if done by persons other than the copyright holder, will not be considered copyright infringements.[77] In addition to those broad categories, the statute also gives factors that can be weighed to determine whether a use in question is considered fair. The factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[78]

The statute also confirms that use of a copyrighted-but-unpublished work can still be considered 'fair', so long as "such a finding is made upon consideration of all the above factors."[79] The issue with the current fair use provision is that these factors, when taken alone, are not entirely clear. Further complicating this, while there are several judicial opinions ruling on fair use issues, these decisions have failed to clarify what falls under the statute as thoroughly as scholars have hoped.[80]

In *New Era Publications Int'l, ApS v. Carol Pub. Grp.*, 904 F.2d 152 (2d Cir. 1990),[81] the court ruled in favor the Carol Publishing Group and found that their author's use of L. Ron Hub-

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76 17 U.S.C. § 107.

77 *Id*.

78 *Id.*

79 *Id.*

80 *See, e.g.*, Rebecca F. Ganz, *A Portrait of the Artist's Estate as a Copyright Problem*, 41 LOY. L. A. L. REV. 739 (2008); *see also* Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369 (2001); *see also* Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 CARDOZO ARTS & ENT. L .J. 19 (2012).

81 New Era Publications Int'l v. Carol Publishing Grp., 904 F.2d 152 (2d Cir. 1990).

bard's work in an unflattering biography of him was fair use.[82] Jonathan Caven-Atack was a former member of the Church of Scientology until he became disillusioned by the Church's actions towards dissident members.[83] In 1983, he resigned from the Church and began researching the Church and its founder L. Ron Hubbard.[84] *A Piece of Blue Sky: Scientology*, *Dianetics and L Ron Hubbard Exposed* painted an unfavorable portrait on both subjects, and quoted from a large number of Hubbard's written material, with quotes being included both in the beginning of chapters and throughout the body of the text.[85] New Era Publications International, ApS, which held the exclusive right to license L. Ron Hubbard's work, brought suit to enjoin publication of the book, claiming the book infringed upon their copyright.[86] The district court analyzed the factors listed in the fair use provision and entered judgement in favor of New Era Publications and enjoined publication of the biography.[87] Carol Publishing appealed the decision, and the Second Circuit Court of Appeals eventually reversed the lower court's decision and held that the use of quotations was fair.[88]

An earlier case, *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.),[89] also involved the use of an author's work in a biography based on the author's life, but the court held that the use of the author's text was an infringement of the copyright and use of it was enjoined.[90] One notable difference between the two cases is that, where *New Era Publications* involved a biographer's use of his subject's published works, *Salinger* concerned the use of the subject's *unpublished* letters of correspondence. The case concerned a biography of J.D. Salinger written by Ian Hamilton that was to be published by Random House.[91] Hamilton had informed Salinger in 1983 that he was pursuing a biography and requested Salinger's cooperation.[92] Salinger refused, stating that it was his wish for his biography to be written after his death.[93] Hamilton continued his

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82 *Id.* at 153.
83 *Id.* at 154.
84 *Id.*
85 *Id.*
86 New Era Publications Int'l v. Carol Publishing Grp., 904 F.2d 152, 154 (2d. Cir. 1990).
87 *Id.* at 154–55.
88 *Id.* at 161.
89 Salinger v. Random House, Inc., 818 F.2d 252 (2d Cir. 1987).
90 *Id.* at 100.
91 *Id.* at 92.
92 *Id.*
93 *Id.*

work on the biography and read several unpublished letters that Salinger had written to friends and other literary and historical figures, most of which were found in the libraries of Harvard, Princeton, and the University of Texas.[94] Hamilton completed all library procedures necessary to access the letters, and by 1986 had finished a draft of his biography titled *J.D. Salinger: A Writing Life*.[95]

Upon being presented with a galley proof of the biography, Salinger registered seventy-nine of his unpublished letters for copyright protection and instructed his lawyer to formally object to Random House's publication of the biography pending removal of the references to Salinger's unpublished material.[96] Random House produced several amended drafts which replaced many of the direct quotations with paraphrases of Salinger's letters, but Salinger was not swayed and sued both Ian Hamilton and Random House seeking an injunction against publication of the biography.[97] Though the District Court found that the use of the letters was fair, the Appellate Court placed special emphasis on the fact that the letters were unpublished.[98] An earlier precedent set by *Harper & Row* "[gave] special weight to the fact that the copied work [was] unpublished when considering the second factor, the nature of the copyrighted work" and considered the remaining statutory factors before finding that the work was not fair and ruling in Salinger's favor.[99]

While the decision in *New Era* ruled in favor of scholarship, and recognized that "biographies in general, and critical biographies in particular, fit 'comfortably within' these statutory categories 'of uses illustrative of uses that can be fair,'"[100] the decision upholds the requirement that each fair use case includes a "case-by-case determination whether a particular use is fair".[101] This requirement of a case-by-case determination is a reflection of how vague the standards set out in the statute are, and even the U.S. Copyright Office website states that "the outcome of any given case depends on a fact-specific inquiry . . . there is no formula to

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94 *Id.* at 92–93.

95 *Id.* at 93.

96 Salinger, 811 F.2d at 93.

97 *Id.* at 93–94.

98 *Id.* at 95.

99 *Id.* (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985)).

100 New Era Publ'ns Int'l, ApS v. Carol Publ'g. Grp., 904 F.2d 152, 156 (2d Cir. 1990) (quoting Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987).

101 *Id*. at 155.

ensure that a predetermined percentage or amount of a work . . . may be used without permission."[102] If a judicial opinion that determines a fair use of copyrighted material is so fact specific that it can't suggest what future use might be considered fair, it is difficult for scholars to gage whether the work they intend to include will require permission from the copyright holder. A use that one court may deem fair does not guarantee that another court will find a similar use fair (or even that the same court will find a similar use fair), and any challenged use by a scholar might involve a lengthy trial that seemingly could go either way. This unreliability diminishes the usefulness of the fair use doctrine.

Additionally troubling is the legacy of the *Salinger* case, which would cause fair-use analysis to include a blend of copyright law and privacy concerns. One key difference between the material at the center of *Salinger* and that at the center of *New Era* is that the *Salinger* letters were previously unpublished. The *Salinger* court followed precedent set by *Harper & Row* and paid special attention to the fact that the materials were unpublished when considering the second factor, stating that there would be a "diminished likelihood that copying will be fair use when the copyrighted material is unpublished".[103] The analysis of the second factor, 'Nature of the Copyrighted Work' did not proceed much further; the fact that the letters had been previously unpublished meant that "the second factor weigh[ed] heavily in favor of Salinger"[104] and ultimately was deemed unfair.[105]

Though the Copyright Act would later add an additional line that seemingly allowed for the possibility of fair use of unpublished work[106], critics of the act still decry the "baleful effect on copyright doctrine and publishing practice" that Salinger's copyright infringement case had, and the way it "unduly narrowed the fair use defense".[107] Professor Katie O'Neill, in her article *Copyright Law and the Management of J.D. Salinger's Literary Estate* criticized the *Salinger* decision as having been unduly influenced more by J.D.

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102 *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Dec. 2021), https://copyright.gov/fair-use/ [https://perma.cc/GR5J-JE9P].

103 Salinger, 818 F.2d at 97.

104 *Id.*

105 *Id.* at 100.

106 Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (adding to 17 U.S.C. § 107(4) (2006) the sentence: "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

107 Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 CARDOZO ARTS & ENT. L. J. 19, 32 (2012).

Salinger's highly publicized desires for privacy, rather than any specific claims that the fair use infringed on the rights granted by the Copyright Act.[108] Even after Congress's inclusion of the amended sentence of §107, "scholars continue to debate the intersection of a writer's copyrights, privacy interests, and fair use".[109] Suddenly, a statute that encouraged greater scholarship while still respecting an author's right to monetize their work (and encouraging such writers to do so) was being influenced by and enforcing the author's privacy concerns—something completely outside the realm of the Copyright Act. The *Salinger* decision also highlighted the imbalance of power that exists in these disputes. On one side of the case, you have a literary icon known for, and protecting, his private life. On the other, you have a biographer whose stature couldn't possibly compare. It is frankly not surprising that the court was so swayed by Salinger's desire to protect one of the most notable aspects of his personality.

The current state of the Copyright Act has flaws that are shown when a scholar's efforts to write about an artist are frustrated by the subject's heirs, by refusal of permission to quote or otherwise. The Act currently allows an individual who is not the originally intended beneficiary of copyright law to seemingly undermine the very justification for the law's existence, while fair use provision, which ostensibly bridges the gap between encouraging scholarship and protecting author's copyright interests, is too vague or corrupted to be of real use. Even if fair use did work perfectly, it would still not be able to help a scholar unable to access the physical letters or other unpublished materials (either because such items have been destroyed or are being kept by heirs)—legal protection of fair use of text in no means guarantees or provides access to the text in the first place. By looking to ADR, however, there exists a possibility of interactions outside the bounds of copyright.

III. Discussion

The term ADR includes several different means of resolving disputes without pursuing litigation, including mediation, arbitra-

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108 *See generally id.* ("In my view, Salinger's chief reason for suing was to protect his personal interests, rather than his commercial interests. Neither defendant's work threatened Salinger's actual or potential royalties, but the first would have exposed some of his personal correspondence").

109 *Id.* at 32.

tion, and negotiation.[110] While negotiating can be the first process attempted, mediation and arbitration are the most common methods used.[111] Negotiation is actually a large part of book publishing already.[112] The disputes between heirs and scholars concern reproductions of the author's text, and in many situations use of the text is granted to interested parties by the heirs in exchange for a fee and pursuant to some sort of licensing agreement.[113] Many literary agencies and publishing houses have infrastructures set up to consider and approve these licenses.[114] Some of the disputes discussed in this article arise when a copyright holder refuses to grant these permissions.[115] Given that the disputes arise when negotiation has already been attempted, or the copyright holder has refused to come to the table and consider a permission request, it is unlikely that 'negotiation' will be a viable ADR technique. Adding a third party to the discussions, as mediation and arbitration do, might help discussions.[116] This section will consider the benefits of mediation and arbitration to solve these disputes. First, we will discuss the strategies mediators use for challenging each party's mindsets to make everyone more receptive to compromise and resolution, before explaining the financial benefits to both mediation and arbitration, and then finally explaining the benefit that a third-party adjudicator like an arbitrator can add to the dispute.

A. *Mediation*

Mediation exists in a similar space to negotiation. It involves two people coming together to discuss a solution that does not revolve around one position being *correct* (i.e., that one position fol-

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110 *Alternative Dispute Resolution,* LEGAL INFO. INSTITUTE, https://www.law.cornell.edu/wex/alternative_dispute_resolution [https://perma.cc/PJ5Y-VCM5] (last visited Nov. 20, 2021).

111 *Id.*

112 Rachel Kramer Bussel, *How Literary Agents Negotiate the Best Terms for Their Authors*, FORBES (Mar. 2, 2020, 11:20 AM), https://www.forbes.com/sites/rachelkramerbussel/2020/03/02/how-literary-agents-negotiate-the-best-contract-terms-for-their-authors/?sh=1cbb278f3520 [https://perma.cc/VH3Q-F245].

113 *Permission: What Is It and Why do I Need It?*, STANFORD LIBRARIES, https://fairuse.stanford.edu/overview/introduction/permission/ [https://perma.cc/6RFQ-JZVY] (last visited Nov. 20, 2021).

114 *Permissions, supra* note 26.

115 Max, *supra* note 4 ("[Stephen] rejects nearly every request to quote from unpublished letters. Last year, he told a prominent Joyce scholar that he was no longer granting permissions to quote from any of Joyce's writings.").

116 *Alternative Dispute Resolution, supra* note 110.

lows the law more closely). As a result, mediation could be a useful tool both in instances where negotiations have fallen apart and where there is a disagreement over fair use. If a scholar has approached an heir (or an heir's literary agent)[117] and has begun negotiations for a license for the use of certain material, or even just physical access to the material, but those talks have stalled or become derailed, entering into mediation in the middle might help to bring the conversation to a productive and lucrative conclusion. Likewise, if a scholar has used a certain amount of text under the belief that the use would qualify as fair use, but the heir strongly challenges this idea and threatens litigation, a mediator might be able to help the two parties come to an agreement that would allow the scholar to use the material.

Mediators are trained in negotiation and in bringing opposing parties together to attempt to work out a solution.[118] Rather than hearing evidence, mediators work with each party separately after each party has had the opportunity to present their case.[119] The mediator can work with each side and help each party understand the positions of the opposite side. One of the key methods a mediator uses to help parties come to an agreement is the idea of 'reframing' one's beliefs.[120] Sometimes, a party's 'core beliefs' are so set and resistant to reframing that, without help, an agreement can't be reached.[121] When a scholar or an heir are discussing use of an author's material or correspondence, an example of a core belief might be the heir's fear that the scholar is simply trying to capitalize on the heir's ancestor and will completely disrespect the author and embarrass the family. Likewise, a scholar's core belief might be that the heir is being tightfisted and shortsighted and is unwilling (or unable) to see the genius in the work of scholarship being produced. Both of those core beliefs are likely to be at least partially untrue, and certainly make it impossible (or unlikely) for the parties to ever come to terms. Mediators use three strategies for dealing with these stubborn beliefs: 'reality testing', 'communi-

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117 *See infra* Section IV. A.

118 *Alternative Dispute Resolution, supra* note 110.

119 Michael Roberts, *Why Mediation Works*, MEDIATE (Aug. 30, 1999), https://www.mediate.com/articles/roberts.cfm [https://perma.cc/W9VH-PL26].

120 David A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759, 764 (2013). ("It is the mediator's job to step into the rapid-fire, information-processing moment, make his or her best evaluation as to the meaning of the communication or behavior and, if there is a mismatch, correct the interpretation by "reframing" the event for the parties.").

121 *Id.* at 767.

cations about intentions', and 'options to address parties' beliefs.'[122]

'Reality testing' is an attempt to "'complexify' each party's understanding of the past", and essentially use a respected outside party to challenge a participant's preconceived notions.[123] For example, the heir could be shown a review or analysis of the scholar's previous works in order to see that the scholar has produced worthwhile and enlightening scholarship, rather than simply producing tawdry, muckraking tabloid articles. Similarly, the scholar could be shown articles concerning previous embarrassing articles written about the author, in order to see the outcome the heir is afraid will happen again.

'Communications about intentions' involves the mediator asking one party to state their perspective, and then asking the other party to repeat it back to the first party.[124] The mediator then asks the first party if the second party correctly understood their position, with the parties repeating this until each one feels she has been understood.[125] Here, the scholar could fully explain why they need to read any material in the heir's control, and why they feel that the use shouldn't concern the heir. Using this technique, Carol Shloss, an academic interested in materials in Stephen James Joyce's possession, might have explained how she believed the thesis of her book might have been an opinion shared by James Joyce in an attempt to assuage Stephen's fears.[126]

The final option is for mediators to assist the parties in coming up with options "that address the parties' core beliefs—even if those beliefs are antagonistic".[127] Here, the mediator helps each party come up with an option to offer to the other party to assuage

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122 *Id.* at 768.

123 *Id.*

124 *Id.*

125 *Id.* ("In some cases, the parties are in such fragile shape that they cannot engage in this exercise-articulating the other person's perspective is too threatening. In those cases, it may help for the parties to hear the mediator explain, in a nonjudgmental manner, each party's perspectives. The mere act of hearing the mediator explain, with compassion and understanding, each party's experience, fears, intentions, and beliefs can sometimes help the parties open their minds and hearts to another perspective").

126 Max, *supra* note 4 (Carol Shloss began researching the life of James Joyce's daughter, Lucia, and eventually formed the opinion that Lucia was not schizophrenic, as was the impression during her lifetime, but rather "a frustrated genius". James purportedly "had never accepted that his daughter was mentally ill." Like many scholars, Schloss had a contentious relationship with Stephen James Joyce regarding Lucia's medical records, to which Stephen believed he held the copyright).

127 *Id.*

their concerns. For example, the scholar may offer a provision where she shows the heir a draft of the portions of her work that use the requested material, with a promise to listen to any concerns the heir might have about her use before the scholarship is published. The tools that the moderator uses here might help to bridge a gap between two parties that otherwise would have been insurmountable.

In addition to the substantive benefits of mediation that allow for conflict resolution, mediation also boasts practical applications. One of the foremost benefits of mediation is the relative inexpensiveness of either process when compared with litigation. A study in 2013 estimated that a civil case can cost up to $100,000.00 if it goes to trial.[128] One of the suits filed by Stephen James Joyce ended up costing the estate hundreds of thousands of dollars, even though the estate won the case.[129] To put it in comparison, Sheryl Mintz Goski, a mediator who handles copyright disputes, lists an hourly fee of $315.00.[130] Another mediator, Karen L. Keyes, a mediator who works for Arlington Collaborative Law PLLC, suggests that the majority of cases resolve after four to eight sessions of approximately two hours each session.[131] At the rate that Ms. Goski charges, a mediation of the length Ms. Keyes suggests would cost both parties a total of $10,800.00—a far cry from the cost of a full-blown trial.

A lower cost option evens the playing field in a dispute like this and suggests a greater opportunity to resolve the dispute. When litigation is the only option, only those with sufficient funds might be able to take advantage of it; the heir might be the only party able to do so. For example, Gail Knight Steinbeck, one of John Steinbeck's heirs, testified in court that she receives between $120,000.00 and $200,000.00 annually from royalties of John Steinbeck's works.[132] Similarly, sources close to the Joyce estate

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128 Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, INSTITUTE FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Feb. 26, 2013), https://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access [https://perma.cc/384U-U4ZR].

129 Max, *supra* note 4.

130 Sheryl Mintz Goski, MEDIATE, https://www.mediate.com/member/Sheryl-Mintz-Goski/32646 [https://perma.cc/B3QW-77CC] (last visited Feb. 12, 2021).

131 Karen Keyes, *Mediation and Duration: Factors to Consider*, ARLINGTON COLLABORATIVE L. PLLC, https://www.arlingtoncollaborativelaw.com/family-law-services/mediation/mediation-duration/ [https://perma.cc/DZA3-E5V2] (last visited Nov. 21, 2021).

132 Martin Macias, Jr, *Ninth Circuit Tosses $8M Award in Decades-Long Steinbeck War*, COURTHOUSE NEWS SERV. (Sept. 9, 2019), https://www.courthousenews.com/ninth-circuit-tosses-8m-award-in-decades-long-steinbeck-war/ [https://perma.cc/72EE-8YEK].

claimed that the estate generated close to half a million dollars in royalties annually.[133] Alternatively, an advance for a scholar's biography of a famous author is difficult to predict, but when asked by about the average payday that a writer will receive, literary agent Kate McKean gives the range of "$5,000.00 to $50,000.00".[134] These estimations are also based on a variety of different factors. Additionally, advance payments are usually paid in installments.[135] It's unlikely that a biographer in the researching stage of her book will have received all the money that she will be paid by the time the book is published. Given this, it's not surprising that Brenda Maddox, writing a biography of James Joyce's wife, offered to delete the offending section of her book rather than face legal action.[136] With mediation offering resolution at a fraction of the price, it's more likely that the disputing parties would actually have the opportunity to meet and resolve the issue, rather than the heir threatening litigation that only she could afford to pursue.

In addition to the relative affordability, mediation offers a quicker resolution than litigation; it generally takes less time to resolve disputes than litigation does.[137] Not only is the approximately 32-hour time frame that Ms. Keyes suggests[138] a brief period of time, but the availability of such a quick resolution can be helpful when issues over use of authors material come to light soon before the scholarship is set to be published. Publishers have set release deadlines for their books, and those books must be marketed at printed[139]. Disrupting this schedule might be costly, so a publisher might relish the opportunity to suggest remedies in mediation for acceptance or denial *before* the effort has made to implement the remedy. For example, when considering the Salinger biography was being published, Random House attempted to appease Salinger by paraphrasing from his letters rather than quoting

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133 Max, *supra* note 4.

134 Kate McKean, *An Agent Explains the Ins and Outs of Book Deals,* ELECTRIC LIT (Sept. 20, 2019), https://electricliterature.com/an-agent-explains-the-ins-and-outs-of-book-deals/ [https://perma.cc/DLN2-32YP].

135 Kristin Nelson, *Payment Schedules,* PUB RANTS (Mar. 24, 2008), https://nelsonagency.com/2008/03/payment-schedules/ [https://perma.cc/BS3Z-SSVS].

136 Max, *supra* note 4.

137 *See generally, Measuring the Costs of Delays in Dispute Resolution,* AM. ARBITRATION ASS'N., https://go.adr.org/impactsofdelay.html [https://perma.cc/2NUW-PNJE] (last visited Nov. 21, 2021).

138 Keyes, *supra* note 131.

139 *See, e.g., A Guide to the Publishing Process*, BLOOMSBURY, https://www.bloomsbury.com/us/discover/bloomsbury-academic/authors/a-guide-to-the-publishing-process/ (last accessed Feb. 12, 2021) [https://perma.cc/792N-R4QN].

outright.[140] This concession was not satisfactory to Salinger, and he continued with his lawsuit.[141] In a mediation setting, this suggestion could have been posed to Salinger *before* putting in the effort to edit the book, thus avoiding the wasted time and effort Random House put into the option with which Salinger was not satisfied. Additionally, the presence of a mediator working toward a mutually acceptable decision might foster a counter suggestion by the heir that actually would satisfy both parties.

B. *Arbitration*

Mediation, being a cousin to negotiation, essentially works with the idea that a deal can be made. Sometimes, though, the parties are so contentious that a deal is completely off the table. Joyce is a great example of this; his comments about scholars show that he was hostile to their intentions and would be unlikely to ever come to terms with them.[142] Unwillingness to make a deal may not solely be on the heir's side; the scholar might steadfastly believe that her use of the work is fair and not infringement and may believe that they don't need permission from the heir. In certain works, the scholarship may be so unflattering to the subject that there is no deal that would ever be reached given the circumstances. Arbitration might be a better alternative to mediation in these situations.

A key difference between arbitration and mediation is that arbitration involves the third party making the decision for the parties, rather than helping parties come to an agreement.[143] In a scenario where the two parties are so at odds that a deal is unreachable, it could be helpful to have a third party make the decision. Additionally, judgments by arbitrators are binding.[144] This might motivate parties to make sure that the issue is fully discussed; if the parties know the decision is final, they will leave no stone unturned when discussing. Between mediation and arbitration, arbitration is more formal, and more closely emulates the ex-

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140 Salinger v. Random House, Inc., 811 F.2d 90, 93 (2d Cir.).

141 *Id.*

142 Max, *supra* note 4.

143 *Comparison Between Arbitration & Mediation,* FINRA, https://www.finra.org/arbitration-mediation/comparison-between-arbitration-mediation (last visited Feb. 12, 2021) [https://perma.cc/WTN6-TCSD].

144 *Learn About Arbitration*, FINRA, https://www.finra.org/arbitration-mediation/learn-about-arbitration (last visited Feb. 12, 2021) [https://perma.cc/JF6J-PWQ9].

perience of going to court.[145] It might be the more attractive option for a rightsholder who would just as soon file a lawsuit. It involves aspects similar to that of a trial but in a more pared down form (limited discovery and simplified rules of evidence).[146] Arbitrators can have related backgrounds to the issue at hand that help them more accurately issue judgment, so parties disputing a copyright issue could hire an arbitrator with a copyright background.[147]

IV. PROPOSAL

Mediation and arbitration offer alternatives to litigation, and in doing so offer opportunities to work around some of the limitations of current copyright law. If an author were able to compel an attempt at mediation on her heirs, this would extend the influence of the author on the copyrighted material. Now, instead of the heir having full control over the copyright, the author's intentions would be guiding some of the actions the heir takes after the author's death. Mediation and arbitration give fair use disputes another venue outside of the court system, away from the vague standards and doctrine influenced by privacy concerns. Mediation and arbitration have these benefits and more, and there are efforts an author can make to bind their heirs to ADR, as well as steps that the heirs and scholars can take to initiate ADR on their own—but how? This section will detail strategies that organizations in the publishing industry can implement to advise authors on these opportunities for ADR, as well as steps that heirs and scholars can take after an author's death to make use of ADR before a dispute becomes unmanageable.

A. *Proper Counsel on ADR Possibilities*

Before authors or heirs can implement ADR options, they must be properly counseled. Simply put, they need to know of the option's existence. In addition to legal counsel, many authors have literary agents who facilitate the sale of their written material to publishers and who can also take varying levels of involvement in

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145 *Alternative Dispute Resolution*, LEGAL INFO. INST., (last visited Nov. 20, 2021) https://www.law.cornell.edu/wex/alternative_dispute_resolution [https://perma.cc/UJ89-ZCUZ].

146 *Id.*

147 *Id.*

other aspects of their client's professional life.[148] Agents generally "represent the interest of writers to publishers . . . in deal making and negotiations".[149] In addition to facilitating the sale of manuscripts to publishers, agents will take on a variety of other tasks for their clients.[150] Felicity Blunt describes her job as "part lawyer, part accountant, part counsellor and part editorial sounding board."[151] If these agents know of the existence of ADR options, they can suggest them to their clients as they plan their estates. To this end, literary agents are assisted by organizations such as the Association of American Literary Agents.[152] The AALA "regularly holds panels, educational programs, and social events to help its members maintain and broaden their professional skills . . . [and] keep their members and their clients informed of developments in publishing."[153] Were the AALA to organize ADR-centered educational programming, more agents would be aware of this viable option to suggest to their clients as they plan their estates or face these disputes. With greater visibility to the representatives of authors, it's more likely that arbitration and mediation will be entered into this area.

B. *Efforts taken by Authors During Their Lifetime*

When authors are aware of the ADR option, they can take steps to compel ADR to resolve disputes over their copyrights. Copyright law allows for the transfer of copyright "in whole or in part by any means of conveyance or by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession".[154] This allows authors to transfer copyright, in addition to ownership of any letters or unpublished material, via will and then place arbitration or mediation clauses in their wills that force any disputes over the copyright to be handled via ADR before litigation. Professor Eva Subotnik, in her article

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148 *What is a Literary Agent?*, PENGUIN U.K. (last visited Feb. 12, 2021), https://www.penguin.co.uk/articles/company/getting-published/what-is-a-literary-agent.html [https://perma.cc/G94W-QF57].

149 *Id.*

150 *Id.*

151 *Id.*

152 *What is AALA?,* ASS'N OF AM. LITERARY AGENTS, https://aalitagents.org/ [https://perma.cc/ZKM7-6CR7] (last visited Feb. 12, 2021).

153 *Id.*

154 17 U.S.C.A § 201(d)(1).

Artistic Control After Death, suggests the use of a transfer of copyright in fee simple determinable as a method to impose restrictions on future beneficiaries of copyright.[155] Professor Subotnik's suggestion is made in the context of artists attempting to limit the use of their copyrighted material in advertising.[156] If an author were instead inclined to instruct her heirs on the method used to solve disputes, she could transfer a copyright to her heirs with the caveat that any heir must first pursue arbitration or mediation to resolve a claim of copyright infringement. As Professor Subotnik points out, such a disposition must include granting the reversionary interest to a third party to make the ADR clause truly effective.[157] Otherwise, if the heir refuses to use ADR, the copyright would revert back to the estate and might pass through intestate succession back to the troublesome heir.[158] As Professor Subotnik suggests, a reversionary interest into an entity like an author's alma mater (or, even more cunningly, into the public domain), might convince any heirs to follow the author's wishes, lest they lose the opportunity to receive royalties (or even allow for all materials to be made available to the public for free).[159] This solution could also work with regards to unpublished materials—the author could either grant the material to museums or archives outright or grant these institutions a reversionary interest that would vest if the heirs were to ever deny scholars access to the materials without engaging in ADR to resolve the disagreement.

Professor Subotnik also suggests imposing a fiduciary duty upon a trustee in order to ensure that these instructions are followed.[160] The copyright provision that allows for testamentary grants of copyright also allows for copyrights to be granted "by any means of conveyance,"[161] and an author could transfer of copyright to an *inter-vivos* trust or a limited liability corporation. Such a trust instrument can include a clause that designates that arbitration and mediation must be attempted with regards to any future infringer. With a trust, the author can designate the beneficiaries (e.g., her children if she wishes for the book's proceeds to support them), while designating separate trustees to administer the copy-

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155 Subotnik, *supra* note 12 at 272.

156 *See generally* Subotnik, *supra* note 12.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 273.

161 17 U.S.C.A § 201(d)(1).

right.[162] As Professor Subotnik states, "above all, a fiduciary must administer the estate or trust 'in accordance with its terms and purposes'".[163] A designated trustee then would be duty-bound to follow a clause demanding infringement concerns be handled with ADR rather than litigation. Further, if an author were to designate trustees that were not related to her, the potential trustee might not be tempted by familial loyalty and privacy concerns to withhold material in the first place, thus avoiding any need to litigate or mediate.[164]

In addition to compulsory measures, authors could still make known their wishes for the administration of their lives' work, including their desire for ADR to solve all disputes.[165] In the event that a lawsuit between heirs and scholars does move forward, the presiding judge can still suggest or order mediation and arbitration between the parties to see if a resolution can be made.[166] If the author has made it known during her lifetime that she would prefer her copyright issues to be mediated or arbitrated, the judge might be more inclined to order such a course of action.

C. *Efforts Taken by Scholars and Heirs After Author's Death*

Even if the author hasn't taken efforts to include language that compels their heirs, ADR can still be implemented to avoid conflicts. Literary agents frequently represent the author's estate and heirs after the author has passed away,[167] and would most likely be aware of people infringing on the client's copyrighted material. If the agent senses a brewing confrontation that might be resolved via litigation, they might instead suggest mediation or arbitration. Such an option would still be in the copyright holder's

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162 Ian Weinstock, *Personal Trusts Under New York Law,* LEXIS NEXIS (Mar. 11, 2016), https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/personal-trusts-under-new-york-law [https://perma.cc/7SDL-SVSA].

163 Subotnik, *supra* note 12, at 273*,* quoting UNIF. TRUST CODE § 801; *accord* RESTATEMENT (THIRD) OF TRUSTS § 76 ("The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.").

164 *See supra* Section II.C.

165 *See generally* Subotnik, *supra* note 12.

166 *See* Jim Wagstaffe, *Court-Ordered Alternative Dispute Resolution,* LEXISNEXIS (June 22, 2018), https://www.lexisnexis.com/authorcenter/the-journal/b/pa/posts/court-ordered-alternative-dispute-resolution (discussing the court's power to require parties to consider or participate in ADR) [https://perma.cc/55J7-6VSY].

167 *See, e.g., Estate Representation*, WRITER'S HOUSE, http://www.writershouse.com/estate-representation [https://perma.cc/6SD3-NAFA] (last visited Feb. 12, 2021).

best interest given the aforementioned costs and may be more in line with wishes expressed by the author during their lifetime (as mentioned above). Similarly, scholars often have literary agents of their own.[168] If those agents see their clients' attempts at accessing deceased authors' material frustrated, they might suggest that their clients attempt mediation with the obstructing literary executor. A suggestion of mediation might create an option where none would have existed earlier (due to the prohibitive costs, as described above).

Likewise, even if a lawsuit occurs and a settlement is achieved, mediation and arbitration clauses can be included in any settlements to avoid further lawsuits over the settlement agreements. Another famous example of copyright disputes resulting in settlement agreements are the disputes between John Steinbeck's heirs over his copyrights.[169] Despite settlement agreements being reached, the heirs continued to sue over various interpretations over these settlements.[170] An arbitration clause in the 1974 agreement of the Steinbeck heirs might have saved at least thirty-five years of litigation.

D. *Issues*

Issues do remain. It may be hard to get the disputing parties to the table. Particularly in disputes between heirs and scholars, the heirs may be hard to motivate to mediate if they truly have no interest in allowing the deceased author's work to be used for scholarly purposes. Without any legal right to the work, it might be difficult for the scholars to fight against a particularly stubborn heir. Furthermore, arbitration and mediation clauses entered into wills and agreements may prove useless if the wills and agreements themselves are challenged in courts and invalidated. There is also no guarantee that mediation would be successful—it's possible that the parties come to mediation and still don't see eye to eye, and that the heir decides to sue. Even with all of these issues, ADR presents a possible way forward for copyright disputes. Even if not all are successful, any opportunity for two parties to come together

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168 *Agents Specialising in Biography*, WRITER'S SERV.'S, https://www.writersservices.com/directory_agents_specialism/906 [https://perma.cc/3CSB-UTZA] (last visited Feb. 12, 2021).

169 *See* Kaffaga v. Est. of Steinbeck, 938 F.3d 1006 (9th Cir. 2019), *cert. denied,* 141 S. Ct. 236 (2020).

170 *Id*.

and attempt to resolve is a step towards copyright's goal of scholarship.

V. Conclusion

Current copyright law's term extends for a period of seventy years after the authors death, which gives heirs control over the author's material longer than she ever had. Not only does the current term stand at odds with the original justification for copyright law, which was to protect authors' works and encourage scholarship, but it also leads to a possible scenario in which the heir exploits the copyright in a manner contrary to the author's wishes for her own legacy. A lengthy copyright term gives the heirs the ability to hold material hostage and deny permission to scholars who may be interested in using the work for their own scholarship. Though the fair use provision of the Copyright Act allows for certain uses of the copyright to be deemed non-infringements, the current doctrine is not specific enough to be useful, and controlling decisions are influenced by privacy concerns that copyright is not intended to protect.

ADR presents a possible way past these issues. The relative affordability of mediation, and the communication it fosters, present more of an opportunity for disputes between heirs and scholars to be resolved compared with litigation. Likewise, arbitration offers a cheaper alternative to litigation that still involves a third party resolving the dispute. If an author takes certain steps, she can compel ADR upon her heirs, which increases the likelihood that resolution will take place outside litigation, and in doing so can exert control after her death. Not only does this give more power to the individual that copyright law was intended to protect, but it seeks to support copyright's other goal: to foster scholarship.

BIG SCREEN OR BUST?: HOW CONTRACTUAL NEGOTIATIONS IN HOLLYWOOD MUST ADAPT IN THE STREAMING ERA

*Alexis Narotzky**

I. Introduction

Scarlett Johansson made her first appearance as her superhero alter-ego, the Black Widow, on May 7, 2010, in the movie *Iron Man 2*.[1] Over the next intervening eleven years, Johansson appeared in several of Disney's Marvel ("Disney" or "Marvel") movies in supporting roles.[2] On July 9, 2021, Marvel released the *Black Widow* with Scarlett Johansson as the lead character.[3] Johansson's agreement for her character's eponymous film was built upon the expectation of large bonuses based on profit from outsized box-office receipts, understood as a profit-participation or contingent compensation contract.[4] Johansson's lawyers negotiated for a "wide theatrical release" to protect her financial interests by surmising the success of a Marvel blockbuster would result in a higher bonus.[5] Upon learning of the development of Disney's own streaming platform, Disney+, Johansson's lawyers fought for the *Black Widow* to still have a wide theatrical release due to fear that streaming of the film would bastardize Johansson's profits.[6] Although Disney reassured Johansson that the *Black Widow* would

* Notes Editor, *Cardozo Journal of Conflict Resolution* Vol. 24; J.D. Candidate 2023, Benjamin N. Cardozo School of Law.

1 Complaint, Periwinkle Entertainment, Inc., F/S/O Scarlett Johansson v. The Walt Disney Co., No. 21STCV27831 (C.A. Super. Ct. July 29, 2021) [hereinafter Johansson Complaint]; *Iron Man 2*, IMDb, https://www.imdb.com/title/tt1228705/ [https://perma.cc/5YAQ-ZYN8] (last visited Nov. 8, 2021).

2 Johansson Complaint, *supra* note 1.

3 Joe Flint & Erich Schwartzel, *Scarlett Johansson Sues Disney Over 'Black Widow' Streaming* Release, Wall St. J. (last updated July 29, 2021, 5:57 PM), https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278 [https://perma.cc/V8KJ-AZG8].

4 Box office receipts are defined as revenue from ticket sales in movie theaters. *Id.*

5 A wide theatrical release is commonly understood in the movie industry to mean appearing in 600 or more movie theaters for a period of 90–120 days. *See* Johansson Complaint, *supra* note 1, at 3.

6 *Id.* at 4.

first be released in theaters similar to other Marvel movies, the film was released simultaneously in theaters as well as Disney+.[7]

Johansson filed suit, claiming that Disney breached their contract by releasing *Black Widow* in this fashion.[8] Allegedly, this simultaneous release in two formats diminished Johansson's box office profits.[9] Instead of requiring each individual to pay for their own ticket at the theater, groups could watch the film together for the mere thirty-dollar streaming fee charged by Disney+.[10] Thus, Johansson alleged to have missed out on millions of dollars generated by box-office receipts, in turn minimizing the profit the movie earned and, therefore, her contingent compensation.[11] Johansson and Disney settled their dispute, though the details of the settlement are still unknown.[12]

As studios continue to prioritize direct-to-consumer streaming, conflicts over profit-participation have become more numerous.[13] On February 7, 2022, *The Matrix Resurrections* co-producer Village Roadshow Entertainment Group ("Village Roadshow") filed a complaint against WarnerMedia, alleging breach of contract over their decision to release the film in theaters and on HBO Max simultaneously.[14] *The Matrix Resurrections* earned $37 million in box-office receipts.[15] Village Roadshow alleges that WarnerMedia

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7 Flint & Schwartzel, *supra* note 3.

8 Catie Keck, *Scarlett Johansson's Black Widow Lawsuit Has Unearthed a Huge Problem with Streaming*, VERGE (Aug. 5, 2021, 2:10 PM), https://www.theverge.com/22611516/scarlett-johansson-disney-lawsuit-streaming-services-transparency [https://perma.cc/6FSC-FCQ2].

9 *Id.*

10 Abbie Beckley, *Scarlett Johansson Deserves Everything She Got From Disney*, BATTALION (Oct. 8, 2021), https://www.thebatt.com/opinion/scarlett-johansson-deserves-everything-she-got-from-disney/article_a60dc172-2848-11ec-b51d-d714fa5b3418.html [https://perma.cc/R2GG-X53A].

11 Johansson Complaint, *supra* note 1.

12 Kim Masters and Tatiana Siegel, *Scarlett Johansson, Disney Settle Explosive 'Black Widow' Lawsuit*, HOLLYWOOD REPORTER (Sept. 30, 2021, 4:48 PM), https://www.hollywoodreporter.com/business/business-news/scarlett-johansson-disney-settle-black-widow-lawsuit-1235022598/ [https://perma.cc/2YPV-N32H].

13 Kim Masters, *Disney v. Scarlett Johansson: Why "a Ton of Lawsuits" May Be Next*, HOLLYWOOD REP. (Aug. 4, 2021, 6:45 PM), https://www.hollywoodreporter.com/business/business-news/disney-vs-scarlett-johansson-lawsuits-next-1234992368/ [https://perma.cc/T5HP-ULKU].

14 HBO Max is owned by WarnerMedia. Joe Flint, *'Matrix' Co-Producer Sues Warner Bros. Over HBO Max Streaming Release*, WALL ST. J. (Feb. 7, 2022, 2:02 PM), https://www.wsj.com/articles/matrix-co-producer-sues-warner-bros-over-hbo-max-streaming-release-11644254583 [https://perma.cc/N6UE-7CGD].

15 Nicole Sperling, *Producer of 'The Matrix Resurrections' sues Warner Bros. Over How the Film Was Released*, N.Y. TIMES (Feb. 7, 2022), https://www.nytimes.com/2022/02/07/business/matrix-resurrections-lawsuit.html [https://perma.cc/723C-UJAQ].

"materially reduce[d] box office and correlated ancillary revenue . . . that Village Roadshow and others would be entitled to receive in exchange for driving subscription revenue for the new HBO Max service, for which only WarnerMedia would be the sole beneficiary."[16] Essentially, WarnerMedia is accused of furthering its subscription base at the expense of talent's profit participation bonus, similar to Johansson's suit.[17]

Johansson and Village Roadshow's allegations raise important considerations for the future of contractual negotiations between lawyers on behalf of their clients and movie studios. Contracting for compensation based on box-office receipts has been common practice in Hollywood for decades. However, the proliferation of streaming services as a means of watching films has fundamentally changed the release of movies paradigm, resulting in a need to change how talent negotiates with studios.

This Note seeks to address the nascent issue surrounding contracting in Hollywood post the availability of streaming services, called subscription video-on-demand ("SVOD"). To provide necessary context, Part II of this Note will discuss a history of contracts in Hollywood between the actor and the studio. This background will describe the evolution of the relationship between the studio and their stars which in turn resulted in a change in the type of contracts negotiated. Next, this Note will introduce streaming services, its effect on the motion picture industry and their preferred contract model. Part III considers the future of Hollywood as it relates to how films will be released. Part IV highlights important considerations when entering into negotiations for contracts in Hollywood. Part V will provide three suggested provisions that entertainment attorneys should consider negotiating for when contracting in Hollywood: (1) demanding wide-theatrical releases; (2) demanding more money up front; and (3) a pay-per-view streaming fee.

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16 Complaint at 3, Village Roadshow Films (BVI) Ltd. et al. v. Warner Brothers Entertainment, Inc. et al., No. 22STCV04606 (C.A. Super. Ct. Feb. 7, 2022) [hereinafter Matrix Complaint].

17 *Id.* at 3–4.

II. BACKGROUND

A. *The History of Contracting in Hollywood*

i. 1920s–1950s: The Studio Era

The Motion Picture Industry in the 1920s was known as "The Studio Era."[18] At this time, there were five fully integrated movie studios.[19] A fully integrated studio handled all the necessary steps to make a movie in-house: (1) Production, (2) Distribution, and (3) Exhibition.[20] These dominant studios, commonly referred to as the Big Five, were Loew's-MGM, Paramount, RKO, Twentieth Century-Fox and Warner Brothers.[21] These studios maintained virtual monopolies over the motion picture industry.[22] "Each studio had exclusive contracts with actors and directors; owned the theaters where their movies played; worked with each other to control how movies were shown in independent theaters; and, in some cases, owned the companies that processed the film."[23] Each studio was producing approximately fifty films per year.[24]

During the Studio Era, actors predominantly signed contracts in which the "studios would retain the talent's services for a term (often for many years) for a fixed weekly salary."[25] Typically, contracts were for seven-year terms that could be renegotiated and/or terminated every six to twelve months.[26] The actors had little to no control over their roles[27] and the profits remained in the hands of the studios.[28]

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18 *The Studio Era*, LIBR. OF CONG., https://guides.loc.gov/american-women-moving-image/motion-pictures/studio-era [https://perma.cc/DF39-8W5B] (last visited Feb. 7, 2022).

19 F. Andrew Hanssen, *Vertical Integration During the Hollywood Studio Era*, 53 J. L. & ECON. 519, 523 (2010).

20 *Id.*

21 *Id.*

22 Scott Bomboy, *The Day the Supreme Court Killed Hollywood's Studio System*, NAT'L CONST. CTR. (May 4, 2021), https://constitutioncenter.org/blog/the-day-the-supreme-court-killed-hollywoods-studio-system [https://perma.cc/6QNC-769Y].

23 *Id.*

24 *The Studio Era, supra* note 18.

25 Joe Sisto, *Profit Participation in the Motion Picture Industry*, 21 ENT. & SPORTS L. 1, 21 (2003).

26 S. ABRAHAM RAVID, A CONCISE HANDBOOK OF MOVIE INDUSTRY ECONOMICS 45 (Charles C. Moul ed., 2005).

27 *Id.*

28 Sisto, *supra* note 25, at 22.

ii. 1950s–Today: Profit Participation Contracts

The Studio Era ended in 1948 after the Supreme Court's decision in *Paramount v. United States*.[29] The Court ruled that movie studios could not own their own theaters, ending their monopoly on the motion picture industry and the Big Five's fully integrated model.[30] With the downfall of the Studio Era, fewer movies were produced each year. For example, Metro-Goldwyn Mayer released 51 films in 1937, which was reduced to 24 by 1948.[31] The existing model of paying actors a yearly salary was no longer viable as the number of films decreased. Hollywood needed to pivot.

By the 1950s–60s, talent would no longer sign long-term contracts with studios for fixed salaries but instead began negotiations for compensation that entitled the actor to a portion of the film's profits.[32] The first profit participation contract was negotiated by Jimmy Stewart's agent, Lew Wasserman for Universal's *Winchester '73*.[33] At the time, Stewart's typical payment was $250,000 per movie.[34] However, Universal did not have the money to pay him up front.[35] Instead of Stewart receiving his typical fee, Wasserman negotiated a contract in which Stewart would receive part of the net profits.[36] Wasserman's decision proved prescient, as Stewart was awarded millions for his performance.[37] Wasserman's acuity encouraged other Hollywood representatives to begin demanding that their clients be remitted a portion of the net profits *in addition* to their typical flat fee.[38]

1. Buchwald v. Paramount Pictures Corporation

Buchwald v. Paramount Pictures Corp. was a critical case for Hollywood profit participation contracts.[39] Pulitzer Prize-winning author and humorist, Art Buchwald, wrote an eight-page screen

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29 U.S. v. Paramount, 334 U.S. 131 (1948).

30 *Id.*

31 Mark Weinstein, *Profit-Sharing Contracts in Hollywood: Evolution and Analysis*, 27 J. LEGAL STUD. 67, 72 (Jan. 1998).

32 *Id.* at 88–89.

33 Brandon Milostan, *Bye Bye Back End, Hello Streaming*, 42 L.A. LAW. 44 (May 2019).

34 *Id.; see also* Victor P. Goldberg, *The Net Profits Puzzle*, 97 COLUM. L. REV. 524, 527 (1997).

35 Milostan, *supra* note 33.

36 Goldberg, *supra* note 34, at 527.

37 Milostan, *supra* note 33.

38 Weinstein, *supra* note 31, at 85.

39 Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 WL 357611 (1990).

treatment which he titled "It's a Crude, Crude World."[40] Buchwald sent his plot idea to his agent Alain Bernheim, who pitched the idea to Paramount as a potential starring vehicle for Eddie Murphy in 1982.[41] In March 1983, Buchwald entered into an agreement with Paramount in which Paramount had "purchased the rights to Buchwald's story and concept," subsequently titled "King for a Day."[42] Bernheim was notified two years later that Paramount would no longer be making "King for a Day."[43] Thus, Buchwald in turn, optioned his treatment to a competing studio.[44] However, in the summer of 1987, it became apparent that Paramount was working on a project for Eddie Murphy titled "The Quest."[45] This movie is now known as the wildly successful blockbuster Coming to America.[46] In the credits of Coming to America, no acknowledgement was made of Art Buchwald.[47] The agreement between Buchwald and Paramount entitled Buchwald to receive profits "[i]f, but only if, a feature length theatrical motion picture shall be produced *based upon* Author's Work."[48] Ultimately, the Los Angeles County Superior Court found that Coming to America *was* based upon Buchwald's treatment.[49]

Once Buchwald succeeded on his claim of authorship, the next phase of litigation—and most important to our understanding of Hollywood net-profit contracts—addressed the compensation owed to Bernheim and Buchwald.[50] Paramount had argued that even though Coming to America made $288 million at the box office, the studio made no profit because of marketing and development offsets.[51] Therefore, although Buchwald was entitled to net

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40 *Id.*; David Folkenflik, *Columnist Art Buchwald Leaves Us Laughing*, NPR (Jan. 18, 2007, 9:44 AM), https://www.npr.org/templates/story/story.php?storyId=5249437 [https://perma.cc/ND25-JKRT].

41 Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 WL 357611 (1990).

42 *Id.*

43 *Id.* at 5.

44 *Id.* at 6.

45 *Id.*

46 Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 WL 357611, at 6 (1990).

47 PJ Grisar, *Did Art Buchwald Come Up with 'Coming to America?'*, FORWARD (Mar. 4, 2021), https://forward.com/culture/465247/art-buchwald-coming-2-america-eddie-murphy-john-landis-lawsuit-king-for-a/ [https://perma.cc/EAA9-4ES4].

48 Buchwald v. Paramount Pictures Corp., No. C 706083, 1990 WL 357611, at 7 (Cal. Super. Ct. 1990).

49 *Id.* at 15.

50 Buchwald v. Paramount Pictures Corp., No. 706083, 1992 WL 1462910 (Cal. Super. Ct. 1992).

51 Grisar, *supra* note 46.

profits, there were none.[52] This led Judge Thomas Schneider to rule the contract to be unconscionable, throwing out the net profit formula within the contract and opting to calculate fair market value as the compensation for Bernheim and Buchwald.[53]

2. Hollywood's "Creative Accounting"

Buchwald v. Paramount Pictures Corp. shed light on what has colloquially become known as Hollywood's "creative accounting."[54] In Hollywood, the term "profit" has been defined differently in each contract.[55] Specifically, in response to the *Buchwald* case, there have been additional terms that have been incorporated into contracts. For example, contracts now mention production costs, distribution fees, and use phrases such as "ordinary course of business."[56] The struggle for talent is that these ambiguous terms are later defined by corporations in ways that will meet their needs, providing "ample leeway to make interpretation in its favor."[57]

The Financial Accounting Standards Board ("FASB") has published Generally Accepted Accounting Principles ("GAAP"). GAAP governs calculations of revenue and expenses, and has created guidelines specific to different industries.[58] In 1981, FASB released the Financial Accounting Standards Bulletin 53 which explained how "income from the exploitation of a motion picture is to be recognized as earned and when the cost of producing and distributing a motion picture is recognized as incurred."[59] In 2000, Bulletin 53 was revoked and replaced by the American Institute of Certified Public Accountants' Statement of Position 00-2.[60] The motion picture industry is encouraged to follow these revised accounting standards. Nevertheless, studios do not follow these

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52 *Id.*

53 Buchwald v. Paramount Pictures Corp., No. 706083, 1992 WL 1462910 (Cal. Super. Ct. 1992).

54 *See generally* Sergio Sparvierio, *Hollywood Creative Accounting: The Success Rate of Major Motion Pictures*, 2 MEDIA INDUS. J. 19, 20 (2015).

55 Harold L. Vogel, *Movie Industry Accounting*, *in* A CONCISE HANDBOOK OF MOVIE INDUSTRY ECONOMICS 74 (Charles C. Moul ed., 2005).

56 *Id.*

57 *Id.* at 74–75.

58 Joseph F. Hart & Philip J. Hacker, *Less Than Zero*, 19 L.A. LAW. 34, 36 (1996).

59 *Id.*; Status of Statement No. 53, FIN. ACCT. STANDARDS BD. https://www.fasb.org/page/PageContent?pageId=/Reference-library/superseded-standards/status-of-statement-no-53.html&bcpath=TFf.

60 FIN. ACCT. STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 139, RECISSION OF FASB STATEMENT NO. 53 AND AMEND. TO FASB STATEMENTS NO. 63, 89, AND 121 (2008).

guidelines.[61] Instead, profits are defined by a Standard Profit Definition (SPD) which is included in the talent's employment contract.[62]

Studio net profits is essentially "a contractually defined formula which can vary from studio to studio and agreement to agreement."[63] The formula is continuously "subject to recalculation in each accounting period."[64] Profit-participation contracts have been subject to litigation, such as *Buchwald v. Paramount*. However, there has been no federal appellate level decision that has ruled "on the intricacies of studio accounting practices."[65]

An overall understanding of Hollywood's "creative accounting" begins with an understanding of how the industry defines certain terms. First is revenue, which predominantly comes from box office receipts.[66] It is important to note that box office revenue does not immediately go directly to the studio. Instead, a substantial piece of box office revenue is kept by theater owners who exhibit the movies.[67] Thus, revenue received by the studio is the percentage of box office receipts that the studio receives after the theater owners take their allocation.[68] For example, if a film earned $100 million in box office receipts, the studio could have received only half of that.[69]

3. Types of Profit Contracts

Today, contingent compensation agreements fall within a spectrum of three general types: (1) first-dollar gross, (2) adjusted gross, and (3) net profits.[70] Gross receipts are defined as the film's total revenue.[71] A studio will rarely grant a true first-dollar gross contract, in which talent would receive a percentage of revenue

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61 Neal Robin, Note, *Hit Losers: The Good (Faith) Fight for Net-Profits Payments from Blockbuster Hollywood Productions*, 4 J. L. TECH. & INTERNET 445, 456 (2013).

62 Hart & Hacker, *supra* note 57.

63 DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV, AND DIGITAL MEDIA 232 (3d ed. 2018).

64 *Id.*

65 *Id.* at 236.

66 *Id.* at 237.

67 *Id.*

68 *Id.*

69 APPLETON & YANKELEVITS, *supra* note 63, at 237.

70 Angus Finney, *Streamers Help Reignite Big Battles Over Film and TV Profit Participation*, VARIETY (Jan. 15, 2022, 6:02 AM), https://variety.com/2022/film/spotlight/streamers-help-reignite-big-battles-over-film-and-tv-profit-participation-1235154957/ [https://perma.cc/AG3H-N6AR].

71 Sisto, *supra* note 25, at 22.

without any deductions taken first.[72] Thus, first-dollar gross is actually understood in the industry as providing talent a share of the profit after only a few limited expenses have been taken out, such as taxes and trade dues.[73] Considered the most valuable form of profit-participation, the actor needs sufficient bargaining power to receive this type of contract.[74] This was the type of contract that Scarlett Johansson was able to receive for the Black Widow.

Another variation is called the first-dollar gross at break-even, in which the upfront payment to the actor is considered an advance against his back-end payment.[75] For example, if a contract promises $20 million against 10 percent of the gross, the actor is guaranteed a salary of at least $20 million regardless of the box office success of the movie.[76] However, if 10% of the gross exceeds $20 million, the actor would receive the additional payment. The adjusted gross contract allows the talent "a share of the gross receipts after the studio has recouped its negative and print and ad costs."[77] Negative costs are the actual costs of producing the movie.[78] Adjusted gross receipts involve "customary off-the-top deductions as well as certain other contractually stipulated distribution costs."[79] These are typical costs, such as advertising expenses.[80]

Lastly, the term "net profits" has no particularized meaning as a matter of law but rather is subject to Hollywood's changing definitions.[81] "Net profit" has come to be defined by each studio on a contract-to-contract basis. Although "net profits" is defined on a contract-to-contract basis, it is understood to mean that once the break-even point has been reached—when receipts are equal to the amount of money spent by the studio comprehensively—then the talent receives a percentage of the profits.[82] Two of the largest line-item deductions are distribution fees and negative costs. Distribution fees are "means of compensating the studio for its costs for maintaining distribution offices and facilities."[83] Negative costs

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72 APPLETON & YANKELEVITS, *supra* note 63, at 177.
73 Vogel, *supra* note 55, at 73.
74 Sisto, *supra* note 25, at 22, 24.
75 APPLETON & YANKELEVITS, *supra* note 63, at 177.
76 *Id.*
77 *Id*. at 242.
78 Vogel, *supra* note 55, at 73.
79 APPLETON & YANKELEVITS, *supra* note 63, at 252.
80 *Id.*
81 Robin, *supra* note 61, at 451.
82 Sisto, *supra* note 25, at 24.
83 APPLETON & YANKELEVITS, *supra* note 63, at 240.

typically include gross profit participants because those are paid before net profits are reached.[84] Thus, under net profit participation, the profit participant receives profits *only after* the full distribution of fees and costs has been recovered.[85]

B. *Profit-Participation Contract Motivations*

i. The Actor's Perspective

An actor would prefer a contract that enables them to participate in the upside of the film rather than a straight salary. Profit-sharing contracts provide talent an opportunity to make more money than a contract that only provides for a salary.[86] If the movie is wildly successful, more revenue will come in. For gross participants, this provides even greater income; for net participants, they still must overcome Hollywood's "creative accounting" and hope that the movie turns a profit. However, if the movie is unsuccessful, revenue may fall short of expectations, and thus contingent compensation could be disappointing or not at all. Additionally, contingent compensation allows talent to continue to earn money based on residuals.

ii. The Studio's Perspective

A studio might prefer a profit-participation contract as well. Profit participation contracts provide for lower up-front payments, freeing up funds for the studio to invest in the production. Using "creative accounting," studios can allocate numerous expenses to offset the revenue, thus reporting lower income numbers, allowing them to minimize the amount they must pay the talent.[87]

Additionally, profit-participation encourages creative investment. "Each party's reward needs to be tied to what it contributes to the combined value created by the project to induce it to exert the best efforts for the overall project."[88] Essentially, if people have more skin in the game, they are more motivated to bring their best.[89] Incentivizing talent to create will produce not only a better

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[84] *Id.* at 242.

[85] Vogel, *supra* note 55, at 73.

[86] *See* Goldberg, *supra* note 33, at 526.

[87] Sisto, *supra* note 25, at 27.

[88] Peter Labuza, *Putting Penn to Paper: Warner Bros.' Contract Governance and the Transition to New Hollywood*, 80 VELVET LIGHT TRAP 4, 11 (2017).

[89] *Id.*

payoff for the talent themselves but also for the studio backing them, as they might get a blockbuster film.[90]

C. *Enter: Streaming Services*

i. Timeline of Streaming Platforms

Netflix was founded by Reed Hastings and Marc Randolph in 1997.[91] Netflix provided video rentals similar to Blockbuster but delivered the DVD straight to the consumer's home.[92] The process was simple; consumers would select a movie or television show on Netflix's website, and within a few days, the DVD was delivered to their home "in the now iconic red envelopes" along with a prepaid return envelope.[93] In 2000, Hastings proposed a merger with Blockbuster, with the hopes of becoming Blockbuster's streaming service, although the technology was not yet there to allow that dream to come to fruition.[94] He offered "that Blockbuster buy a 49% stake in Netflix and absorb the Blockbuster name."[95] Blockbuster declined, unconvinced that "digital media posed a serious threat to their business [ ]."[96]

Netflix's goal of offering a streaming platform materialized in 2007 and completely "challeng[ed] the Hollywood status quo."[97] Streaming allowed Netflix's subscribers to watch movies directly online, and the need for a physical DVD was eliminated. By 2013, Netflix began developing its own shows, the first being *House of Cards*.[98] Shortly thereafter, Netflix became the first streaming ser-

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90 *Id.*

91 WILLIAM L. HOSCH, BRITANNICA ENCYCLOPEDIA (last updated Jan. 14, 2022), https://www.britannica.com/topic/Netflix-Inc [https://perma.cc/8NAQ-AL5G].

92 *See* Amy Lamare, *How Streaming Started: YouTube, Netflix, and Hulu's Quick Ascent*, BUS. OF BUS. (July 31, 2018, 9:29 AM), https://www.businessofbusiness.com/articles/a-brief-history-of-video-streaming-by-the-numbers/ [https://perma.cc/5NXU-C2A2].

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything is About to Change*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html [https://perma.cc/MW9A-NJBE].

98 Cynthia Littleton & Janko Roettgers, *Ted Sarandos on How Netflix Predicted the Future of TV*, VARIETY (Aug. 21, 2018, 6:30 AM), https://variety.com/2018/digital/news/netflix-streaming-dvds-original-programming-1202910483/ [https://perma.cc/UF6E-VEBY].

vice to win an Emmy Award.[99] The rise of Netflix ultimately drove Blockbuster out of business, with one sole store currently remaining in Bend, Oregon.

Netflix was the original streaming platform, but soon other companies jumped on board. Hulu was launched in 2008 as "a joint venture between AOL, Comcast, Facebook, MSN, Myspace, and Yahoo."[100] Hollywood saw the potential in streaming as not only being more convenient for the customer but providing a way to make money from older television shows.[101] Since then, multiple platforms have been introduced, including but not limited to Amazon Video, Apple Studios, Disney+, HBO Max, and Paramount+.

Streaming services have been the impetus for what is colloquially called "cutting the cord."[102] In essence, individuals are no longer interested in paying for cable television to reduce the number of superfluous channels they pay for while prioritizing the content they desire. Streaming services provide the opportunity to watch your show or movie quickly—"binge-watching"—rather than wait weekly.[103] A Pew Research Center survey found that 71% of individuals who no longer use cable say they do not need it because everything they want to watch is online.[104] From 2015 to 2021, the number of cable users fell among all demographics.[105] Unsurprisingly, individuals ages 18-24 are the lowest percentage (34%) of people who still subscribe to cable television.[106]

Streaming services disrupted the television industry first but then set their sights on the film industry. Netflix released its first original movie in late 2015, titled *Crouching Tiger, Hidden Dragon: The Green Legend*.[107] Netflix continued releasing new original content at an accelerated pace, and by 2019, "Netflix averaged just

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99 CLARE Y. CHO, CONG. RSCH. SERV., R46545, COMPETITION AMONG VIDEO STREAMING SERVICES 4 (2020).

100 Lamare, *supra* note 92.

101 *Id.*

102 Hazal Senkoyuncu, *The Age of Streaming Services: Then, Now, and Beyond*, ARTIFICE (Jan. 24, 2020), https://the-artifice.com/history-of-streaming/ [https://perma.cc/Y6SB-34XT].

103 Elizabeth Barber, *Netflix to Release First Original Movie*, TIME (Sept. 30, 2014, 1:02 AM), https://time.com/3447312/netflix-to-release-first-original-movie/ [https://perma.cc/W4DE-4YDW].

104 Lee Rainie, *Cable and Satellite TV Use Has Dropped Dramatically in the U.S. Since 2015*, PEW RSCH. CTR. (Mar. 17, 2021), https://www.pewresearch.org/fact-tank/2021/03/17/cable-and-satellite-tv-use-has-dropped-dramatically-in-the-u-s-since-2015/ [https://perma.cc/LGU5-2UB5].

105 *Id.*

106 *Id.*

107 Barber, *supra* note 103.

over one new original TV program or movie for every day of 2019."[108] To date, Netflix has received 89 Oscar nominations and has won 15 academy awards.[109] At the 93rd Annual Oscars held in 2021, Netflix and Amazon Prime Video won seven and two awards, respectively, which set a new record for streaming service film wins.[110] Streaming services have proven that they will be a continuous thorn to traditional studios.

ii. The Streaming Service Contract Model

Streaming platforms have opted for a more traditional Studio Era contracting model: a payment upfront. In these contracts, talent is typically offered large compensation upfront.[111] However, especially for contracts for television shows, the talent does not stand to gain profit participation for subsequent re-runs or views.[112] For example, Dan Fogelman, the creator of the hit television show "This Is Us," signed a contract with Netflix in which he received a lump sum payment of around $150 million but will not receive any profits from re-runs of new shows he develops for Netflix in the future.[113] Similarly, Steven Spielberg signed a multiyear deal to make films for Netflix, as did Shonda Rhimes and Ryan Murphy.[114]

Netflix, for example, believes that its contracting model provides "the best of both worlds: providing the contingent compensation that Lew Wasserman fought for nearly 70 years ago but also guaranteeing it by paying it all up front."[115] Streaming services believe that by offering a larger payment upfront, they are factoring in what the actor possibly could receive in profits had there been profit-participation clause in the contract. Additionally, Netflix would argue that it is impossible to provide the back-end model

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108 Gavin Bridge, *Netflix Released More Originals in 2019 Than the Entire TV Industry Did in 2005*, VARIETY (Dec. 17, 2019, 1:50 PM), https://variety.com/2019/tv/news/netflix-more-2019-originals-than-entire-tv-industry-in-2005-1203441709/ [https://perma.cc/L2X9-JTMK].

109 Kasey Moore, *How Many Oscars Has Netflix Won in Its History?*, WHAT'S ON NETFLIX (Apr. 24, 2021, 4:21 PM), https://www.whats-on-netflix.com/news/how-many-oscars-has-netflix-won-in-its-history/ [https://perma.cc/6XAF-TB9V].

110 Dade Hayes, *Streaming Films Notch Nine Overall Oscar Wins, Setting New Record – Update*, DEADLINE (Apr. 25, 2021, 8:29 PM), https://deadline.com/2021/04/2021-oscars-most-streaming-film-wins-ever-1234743184/ [https://perma.cc/4E83-GAKF].

111 Joe Flint, *The War for Talent in the Age of Netflix*, WALL ST. J. (Sept. 21, 2019), https://www.wsj.com/articles/the-war-for-talent-in-the-age-of-netflix-11569038435.

112 *Id.*

113 *See generally id.*

114 *Id.* Joe Flint, *Netflix Strikes Deal with Filmmaker Steven Spielberg*, WALL ST. J. (last updated June 21, 2021, 3:55 PM), https://www.wsj.com/articles/netflix-strikes-deal-with-filmmaker-steven-spielberg-11624293296?mod=Article_inline [https://perma.cc/R8KE-F3J3].

115 Milostan, *supra* note 33.

because "[t]here are no box office receipts, no linear broadcast ad sales, no licensing fees, and no home entertainment sales."[116] Furthermore, streaming services would argue that most films lose money—due to Hollywood's "creative accounting"—thus, the talent benefits from a lump sum upfront.[117]

Streaming platforms typically include provisions that they remain the sole distributor of the film.[118] For television shows, these provisions allow them to maintain control over the choice of distribution of the content without having to renegotiate with the producers who created it.[119] SVOD services have the sole power to decide whether they retain the show on their platform or sell it to a rival network or service willing to pay.[120] Instead of facing potential liability to the talent for not choosing the platform that offers the highest bid for the content, the SVOD services can make their own strategic decisions.[121]

Overall, in the contracting model used by streaming services, the talent "hedge bets on an individual film, taking larger fees for each project in case none of those projects achieve 'net profits.'"[122] On the other hand, streaming platforms "take on all the risk and keep all the reward, losing a fortune in up-front payments on unsuccessful films but reaping all the profits of their hits."[123]

One possible reason that streaming platforms have opted for paying talent more money upfront is due to their immense revenue streams. As of 2020, Netflix garnered $25 billion in revenue, making $4.6 billion in profit.[124] With this immense cash flow, Netflix has the ability to procure more talent and content than traditional studios. Additionally, streaming services seem to be more willing to pay money upfront so that they do not have to worry about

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116 *Id.*

117 *Id.*

118 Matthew Kassorla, *Movie Contracts in the Age of Streaming*, CORNELL SUN (Aug. 20, 2021), https://cornellsun.com/2021/08/20/movie-contracts-in-the-age-of-streaming/ [https://perma.cc/5SLA-GAPE]. *See also Netflix Film and Scripted TV Series Streaming Contracts*, SEBASTIAN GIBSON, https://www.sebastiangibsonlaw.com/netflix-film-and-scripted-tv-series-streaming-contracts/ [https://perma.cc/YAH5-Z89L] (last visited Nov. 14, 2021).

119 Flint, *supra* note 111.

120 *Id.*

121 *Id.*

122 Milostan, *supra* note 33.

123 Milostan, *supra* note 33.

124 Georg Szalai, *Studio Profit Report: Netflix Reigns, Paramount and Sony Gain*, HOLLYWOOD REP. (Mar. 5, 2021, 6:45 AM), https://www.hollywoodreporter.com/business/business-news/studio-profit-report-netflix-reigns-paramount-and-sony-gain-4143889/ [https://perma.cc/VN5G-U5AZ].

back-end deals.[125] Instead, they are able to reap all the benefits if the film is successful without having to be concerned with contingent compensation calculations.

D. *Streaming and the Covid-19 Pandemic*

The Covid-19 Pandemic was an additional boost for streaming services. With movie theaters closed, production companies began releasing their movies straight to streaming platforms. WarnerMedia made the decision to release the rest of "its 2021 slate of films concurrently in theaters and on" their platform, HBO Max, as a reaction to the poor box office receipts of their much-ballyhooed film *Tenet*.[126] Releasing *Tenet* exclusively at the box office allowed WarnerMedia to garner how willing people were to return to the movies. *Tenet*'s meager opening box office receipts of $9.4 million[127] left the industry unsure whether that was an upsetting figure or considered a success given the pandemic.[128] There are multiple factors that could have had an effect on WarnerMedia and *Tenet*'s their success at the box office. The pandemic was still in full force, leaving many patrons wary of venturing to the theaters. Additionally, major cities, like New York, still had their movie theaters closed, leaving streaming as moviegoers' only option.[129] "*Tenet* was the cinema industry's guinea pig—a way for studios to gauge audience willingness to return to theaters."[130] On December 3, 2020, WarnerMedia announced that all seventeen films planned for 2021 would be released in theaters and HBO

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125 Anne Thompson, *Netflix Versus Hollywood: From Oscar Frontrunners to A-List TV Creators, Ted Sarandos Reveals His Master Plan*, INDIE WIRE (Aug. 24, 2017, 1:58 PM), https://www.indiewire.com/2017/08/netflix-ted-sarandos-will-smith-adam-sandler-1201866954/ [https://perma.cc/98KG-2EEU].

126 Alison Herman, *Sifting Through the Fallout of Warner Bros. Paradigm-Shifting Announcement*, THE RINGER (Dec. 4, 2020, 6:15 AM), https://www.theringer.com/movies/2020/12/4/22151472/warner-bros-2021-movies-hbo-max-streaming-takeaways [https://perma.cc/29C8-J9KZ].

127 *Tenet,* BOX OFFICE MOJO BY IMDB PRO, https://www.boxofficemojo.com/release/rl1442940417/ [https://perma.cc/QF92-5MUU] (last visited Feb. 13, 2022).

128 Rebecca Rubin, *Christopher Nolan Defends 'Tenet' Box Office Results*, VARIETY (Nov. 3, 2020, 3:59 PM), https://variety.com/2020/film/news/christopher-nolan-tenet-release-1234822593/ [https://perma.cc/F6NL-RRVK].

129 *Id.*

130 David Sims, *Hollywood's Tenet Experiment Failed*, ATLANTIC (Sept. 14, 2020), https://www.theatlantic.com/culture/archive/2020/09/hollywoods-tenet-experiment-didnt-work/616345/ [https://perma.cc/K6YT-8R72].

Max on the same day.[131] *Tenet*'s director Christopher Nolan vehemently criticized this plan in favor of watching movies on the big screen.[132]

Other studios followed this simultaneous release strategy with their own variations. Disney announced that two of their films, *Cruella* and *Black Widow*, would be available on Disney+ Premier Access in addition to theatrical release.[133] Disney+ Premier Access charges subscribers a $30 one-time fee which allows them "to gain early streaming access to a movie that's still playing in theaters."[134] The one-time fee allows you to stream the movie as many times as you would like so long as you remain a Disney+ member.[135] A new release remains on Disney+ Premier Access for approximately three months before its available to all Disney+ members.[136] That three-month window mimics the traditional "wide theatrical release" timeline that is common practice in Hollywood.[137]

On September 10, 2021, Disney announced that their remaining 2021 films would be exclusively released in theaters.[138] Though films were typically in theaters exclusively for 90—120 days,[139] most 2021 films would maintain exclusive theatrical release for only 45 days.[140] Additionally, WarnerMedia negotiated an agreement with Regal Cinemas, a large movie theater chain in the

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131 WarnerMedia, *Some Big 2021 News for Fans*, MEDIUM (Dec. 3, 2020), https://medium.com/warnermedia/some-big-2021-news-for-fans-62bb4abc883 [https://perma.cc/G4KE-UUR5].

132 Kim Lyons, *Tenet Coming to HBO Max–Which Director Nolan Called the 'Worst Streaming Service'–May 1st*, VERGE (Mar. 21, 2021, 9:22 AM), https://www.theverge.com/2021/3/21/22342955/tenet-coming-hbo-max-nolan-streaming-movie-theaters [https://perma.cc/2BQE-KAC7].

133 Pamela McClintock & Aaron Couch, *'Black Widow' to Hit Disney+ Premier Access and Theaters Simultaneously*, HOLLYWOOD REP. (Mar. 23, 2021, 11:30 AM), https://www.hollywoodreporter.com/movies/movie-news/black-widow-to-hit-disney-premier-access-and-theaters-simultaneously-4129190/ [https://perma.cc/8US3-LDMK].

134 Steven Cohen, *Disney Plus Premier Access Lets Subscribers Buy New Movies While They're Still in Theaters*, BUS. INSIDER (Sept. 22, 2021, 4:56 PM), https://www.businessinsider.com/disney-plus-premiere-access [https://perma.cc/MBY6-45Y3].

135 *Id.*

136 *Id.*

137 *Id.*

138 Jill Goldsmith & Erik Pedersen, *Disney's 'Eternals,' 'West Side Story,' 'Encanto,' 'Last Duel' and More to Hit Theaters Ahead of Streaming Bow*, DEADLINE (Sept. 10, 2021), https://deadline.com/2021/09/disney-release-dates-eternals-encanto-last-duel-west-side-story-kings-manj-last-duel-1234830827/ [https://perma.cc/U59J-59C2].

139 Johansson Complaint, *supra* note 1, at 3.

140 Ramishah Maruf, *Disney Announces the Rest of Its 2021 Movies Will Debut Exclusively in Theaters*, CNN (Sept. 12, 2021, 4:58 PM), https://www.cnn.com/2021/09/12/business/disney-movies-theater-2021/index.html [https://perma.cc/575V-GZPM].

United States, in which Warner's 2022 films would have a 45-day exclusive theatrical release.[141]

i. The Future of Hollywood

Barry Diller, the former chairman and CEO of Paramount Pictures and 20th Century Fox, told NPR that "the industry is dead."[142] Diller is certain that "[t]he movie business as before is finished and will never come back."[143] Are you?

The pandemic has certainly accelerated the shift to streaming services. Many traditional movie theaters were closed, and studios needed to be creative in how to release movies to the public. When WarnerMedia announced that it would release all 2021 films in hybrid format, the plan was for only one year.[144] However, people have come to enjoy being able to watch in the comfort of their own homes. Instead of taking a family to the movies and paying for each individual ticket, families can come together and watch a movie on an oversized, high-definition flat-screen experience without the hassle of finding the right movie time or seat selection.

Performance Research, in partnership with Full Circle Research, conducted a survey of over 1,000 individuals in the United States. These individuals were asked whether they "would wait and watch a must-see movie at home for $20."[145] When told that there would be 90 days between theatrical and home release, 44% said they would either probably or definitely wait to watch it at home.[146] Comparatively, only 27% said they would either probably or definitely see it in theaters first.[147] The data showed that as participants were told that the length between theatrical and home

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141 *Id.*; Jared Bruett, *Warner Bros. Will End Simultaneous HBO Max Releases for Movies in 2022*, GAME RANT (Mar. 25, 2021), https://gamerant.com/hbo-max-warner-bros-theaters-2022-movies/ [https://perma.cc/39VZ-VMXG].

142 David Gura, *Barry Diller Headed 2 Hollywood Studios. He Now Says the Movie Business is Dead*, NPR (July 8, 2021 1:55 PM), https://www.npr.org/2021/07/08/1014095135/barry-diller-headed-2-hollywood-studios-he-now-says-the-movie-business-is-dead [https://perma.cc/2APD-UJXL].

143 *Id.*

144 Nina Gregory & Andrew Limbong, *Warner Bros. to Stream All Its Films in 2021*, NPR (Dec. 3, 2020, 4:08 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/12/03/942360011/warner-brothers-to-stream-all-its-films-in-2021 [https://perma.cc/W6FQ-96P3].

145 Adam B. Vary, *Audiences Still Prefer to See 'Tenet', 'Wonder Woman 1984' in Movie Theaters, but Most Would be Fine Watching at Home (EXCLUSIVE)*, YAHOO! (Aug. 18, 2020), https://www.yahoo.com/now/audiences-still-prefer-see-tenet-155722069.html [https://perma.cc/CLX3-GG7K].

146 *Id.*

147 *Id.*

release was shorter, the number that were willing to wait until home release went up.[148] Notably, participants were then asked about their preferences based on specific movies. When asked about their preferences for viewing *Black Widow*, only 13% said that they "only want[ed] to see this in the movie theater."[149] This number was consistent amongst the rest of the movies surveyed, including *Tenet* and *Wonder Woman 1984*; the range that only wanted to see the movie in the theater was from 12%—19%.[150]

These statistics are not just based on the Covid-19 pandemic instilling fear of being in a movie theater. Pew Research Center conducted a survey back in 2006 in which 75% of survey participants stated that they would prefer watching a movie at home.[151] This survey was conducted prior to Netflix's first Streaming Video On-Demand model, which highlights that this number could only increase.[152] Additionally, the quality of streaming platforms' original movies has skyrocketed in recent years. As previously mentioned, streaming services have been producing content that "is gaining critical recognition at the highest level."[153]

III. Considerations When Negotiating for Streaming Platform Releases

A. *Power Dynamics Between the Streaming Service and the Actor*

When a film premieres in theaters, there is immense data on how well the film performed, typically calculated by its "box-office

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148 *Id.*

149 *Id.*

150 *Id.*

151 *About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV*, Pew Rsch. Ctr. (Sept. 13, 2017), https://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/ [https://perma.cc/UY3J-FW5J]; *Increasingly, Americans Prefer Going to the Movies at Home,* Pew Rsch. Ctr. (May 16, 2006), https://www.pewresearch.org/social-trends/2006/05/16/increasingly-americans-prefer-going-to-the-movies-at-home/ [https://perma.cc/UK3W-CUMD].

152 Netflix began streaming in 2007. Tara Bitran, *Skip Intro: Netflix Turns 25 Today*, Netflix (Aug. 29, 2022), https://www.netflix.com/tudum/articles/netflix-trivia-25th-anniversary [https://perma.cc/N2ZM-2MJ3].

153 Tom Ward, *How Has the Unstoppable Rise of Streaming Platforms Impacted Film? We Asked the Experts*, Esquire (June 9, 2021), https://www.esquire.com/uk/culture/tv/a36842312/streaming-platforms/ [https://perma.cc/M93X-43QP].

numbers."[154] There are countless websites that track how many tickets were purchased opening weekend and keep tallies on how much a movie has "profited" thus far.[155] It is easy to gauge how many have seen a movie based on box office numbers, as each individual is required to have their own ticket. This knowledge provides sufficient bargaining power for the talent, as they can go to the next production company and show them how successful they were in the past, which enables them to contract for a greater percentage of the profits in the future. However, streaming services provide a wrinkle in that analysis. First, it is difficult to ascertain how many individuals have actually watched a movie. Instead of purchasing a ticket for each individual, the family pays one flat monthly fee. However, there are films that are only available for rent, requiring a purchase each time someone wants to stream the film. Secondly, multiple people could be watching together on one screen, but it would appear that only one person has viewed it. One person only needs to pay the monthly subscription or the rental fee; therefore, it is difficult to determine how many people have actually seen the film on streaming services. All that is known is that the monthly or rental fee has been paid, not how many have seen it.

Only the streaming service themselves have access to the number of streams, and they are reluctant to give out that information. For example, the first episode of Ted Lasso season 2 premiered on July 23, 2021.[156] Apple TV+ boasted how fantastic the premiere was without providing any concrete data to support their assertions.[157] Apple TV+ stated that it had "expanded its number of new viewers by a record-breaking 50% week-over-week."[158] However, this statistic is meaningless when there is no base value to compare it to.[159] Similarly, Marvel's premiere of Loki on Disney+ was said to be "the most-watched first episode in Disney+ his-

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154 Box office numbers refers to the number of ticket sales in theaters.

155 *See generally Box Office Mojo*, IMDB PRO, https://www.boxofficemojo.com [https://perma.cc/44FC-NA2N] (last visited Nov. 4, 2021); *The Numbers*, NASH INFO. SERV., https://www.the-numbers.com/box-office [https://perma.cc/Q38L-TA3Y] (last visited Nov. 4, 2021).

156 Brandon Katz, *How Many Viewers are Actually Watching 'Ted Lasso' Season 2?*, OBSERVER (July 27, 2021, 3:23 PM), https://observer.com/2021/07/apple-tv-plus-ted-lasso-season-2-viewership-ratings-audience/ [https://perma.cc/X4AV-GGRQ].

157 *Id.*

158 *Id.*

159 Brandon Katz, *Why Big Streaming Companies are Determined to Keep Their Ratings Hidden at All Costs*, OBSERVER (July 28, 2021, 3:25 PM), https://observer.com/2021/07/netflix-apple-amazon-disney-streaming-viewership-ratings-mystery/ [https://perma.cc/6TXA-RYMD].

tory."[160] Again, this assertion is meaningless when there is no data provided on what the previous most-watched first episode viewership was to properly gauge how successful Loki was comparatively. This inane puffery amongst all streaming services, providing "unverifiable numbers or vague platitudes meant to sound monumental."[161] The lack of transparency makes it difficult to compare a Netflix release to a Hulu release to an HBO release, and especially to a theatrical release.[162]

Streaming platforms have been reluctant to provide this data to the public because they believe it makes them more competitive against other streaming platforms.[163] As an example, if a streaming platform has a smaller number of subscribers, their numbers would look worse compared to streaming giants like Netflix simply because more people are subscribed to the latter.[164] Additionally, people question Netflix's decision to count at least two minutes of streaming as a view of the content, claiming that the threshold is low to inflate their numbers.[165] The secrecy of the true data allows these streaming services to self-report without the fear of criticism that the numbers are not as strong as one would expect.

This secrecy behind the true numbers provides difficulty for talent and their representatives. Box-office scorecards provided information on daily totals of tickets and viewers in theaters. Agents can use these statistics as bargaining chips for their clients to achieve a larger percentage of the profits.[166] However, the lack of access to reliable viewership data on streaming services makes it difficult to know how well the movie truly did and thereby understand what the actors are entitled to for that film and leverage that success on their client's next endeavor. Additionally, streaming services typically reserve the right to be the sole distributor of the film.[167] This provides even more of an upper hand to the streaming platform as they have complete control over the future of the film.

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160 *Id*.

161 *Id.*

162 Stephen M. Colbert, *Why Netflix Counts Two Minute Views in its Movie Watch Numbers*, SCREEN RANT (Aug. 9, 2021), https://screenrant.com/netflix-2-minutes-veiwership-numbers-why/ [https://perma.cc/W3QX-MLWD].

163 Katz, *supra* note 159.

164 *Id.*

165 Colbert, *supra* note 162.

166 Brooks Barnes & Nicole Sperling, *How's Hollywood to Plan When it Doesn't Know Who's Watching What?*, N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2021/09/05/business/box-office-movie-ratings.html [https://perma.cc/TKZ4-SHWE].

167 Kassorla, *supra* note 118.

i. The True Benefactors of Streaming: The Streaming Services Itself

The market was not always convinced that SVOD platforms would be successful. In March of 2020, the shares of ViacomCBS fell to $11 when it announced that its own platform would enter the market.[168] The market was clearly unconvinced that consumers were willing to pay for additional streaming services. However, a year later, ViacomCBS' stock increased sevenfold, trading at over $82 a share.[169] Similarly, HBO Max's global subscriber base increased by 18% to 73.8 million in 2021.[170] A streaming service becomes a more valuable property as the number of subscribers increases.[171] As Village Roadshow's complaint alleges, "by using Village Roadshow films to drive the HBO Max subscriber base to nearly 74 million, [Warner Brothers] has enabled its HBO Max service to have a valuation of $60 billion on a standalone basis."[172] Companies such as Disney and WarnerMedia have every incentive to release films on their platforms, leading to an increase in their subscriber base and, thus, their revenue.

Chief Executive Officers (CEOs) greatly benefit because stock prices skyrocket when new content on their streaming services are announced, and CEOs tend to have large stock options in their corporation. For example, the co-CEOs of Netflix, Reed Hastings and Ted Sarandos, are expected to earn $34.6 million each in 2021.[173] Hasting's compensation comprised $34 million in stock options. Sarandos' compensation comprised over $14 million in stock options. The remainder comprised their base salary.

Village Roadshow's complaint against WarnerMedia illustrates how studios and their CEOs stand to benefit at the expense of talent. In their complaint, Village Roadshow alleges that WarnerMedia's primary purpose was to increase subscription revenue for HBO Max rather than consider what was best for the film and its stars.[174] By releasing the movie on their SVOD platform,

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168 Meg James, *Why Media Stocks are Booming One Year After Coronavirus Shutdown*, L.A. TIMES (Mar. 10, 2021, 5:16 PM), https://www.latimes.com/entertainment-arts/business/story/2021-03-10/media-stocks-growth-boom-streaming [https://perma.cc/G7NC-WVKP].

169 *Id.*

170 Matrix Complaint, *supra* note 16, at 7.

171 *Id.* at 4.

172 *Id.* at 7–8.

173 Natalie Jarvey, *Netflix Co-CEOs Set to Earn More Than $34M in 2021*, HOLLYWOOD REP. (Dec. 28, 2020, 1:29 PM), https://www.hollywoodreporter.com/business/digital/netflix-co-ceos-set-to-earn-more-than-34-million-in-2021-4105742/ [https://perma.cc/BG99-G24Y].

174 Matrix Complaint, *supra* note 16, at 3–4.

they allegedly rerouted the audience to their own platform, reaping all the benefits and causing Village Roadshow to lose out on ancillary revenue that they would have received from a wide-theatrical release.[175] When WarnerMedia decided it was going to release films simultaneously, CEO Jason Kilar acknowledged that HBO Max[176] would greatly benefit from this arrangement.[177] Furthermore, Andy Forrsell, the Head of HBO Max, stated that films released on HBO Max "have been very helpful in the acquisition and more helpful in retention than we ever could have seen or hoped."[178] Overall, releasing movies direct-to-consumer not only helps raise the value of the streamer but also has an accretive impact on CEO's compensation.

B. *Big Stars v. Small Stars?*

If studios continue to simultaneously release films at the box office and on an SVOD platform, it is important to consider how smaller stars will be impacted compared to blockbuster stars. The big A-list actors have greater negotiating leverage; thus, even though a movie may be profiting less through streaming, they can bargain for a bigger piece of the pie. Smaller stars, on the other hand, typically do not have that kind of bargaining power. In the case of profit-participation contracts, this would leave smaller stars with even less money because of Hollywood's creative accounting.

Those with less leverage end up signing net-profit agreements, like Art Buchwald, whereas the film's bigger stars tend to enter gross-profit agreements for traditional theatrical release movies.[179] However, if the movie is released on a streaming service and there is a profit-participation contract in place, the profits will most likely be lower than if there had been a wide theatrical release. The big-

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175 *Id.* at 3.

176 *Id.* at 1 (stating that HBO is owned by WarnerMedia).

177 Adam Epstein, *How Many Studios Will Follow Warner's Direct-to-Streaming Strategy in 2021?*, QUARTZ (Dec. 4, 2020), https://qz.com/1941829/will-other-studios-follow-warnermedias-hbo-max-release-strategy/ [https://perma.cc/E3YZ-WJPC]; Peter Kafka, *WarnerMedia's CEO Explains Why He's Blowing Up the Movie Business*, VOX (Dec. 3, 2020, 4:18 PM), https://www.vox.com/recode/22151073/warner-bros-hbo-max-movies-jason-kilar-warnermedia-interview [https://perma.cc/G4J3-YS7V].

178 Ryan Faughnder, *Theaters or HBO Max? Warner Bros. Movie Plans Take Shape as Discovery Merger Looms*, L.A. TIMES (June 8, 2021, 5:00 AM), https://www.latimes.com/entertainment-arts/business/story/2021-06-08/can-warner-bros-keep-movie-dreams-alive [https://perma.cc/6VG4-6KLN].

179 Weinstein, *supra* note 31, at 68.

ger star that signed the gross profit contract will receive a pay-out first, and "[t]he fact that some major stars get a percentage of the gross is considered one of the reasons 'net-profits' are reduced."[180] Thus, when the bigger stars' profit participation is treated as a cost, the payoff to the net participant will be reduced.[181] If box office numbers are already lower because of streaming, the smaller star is going to get even less than they would before.

On the other hand, the streaming services' contracting model could end up being better for smaller stars because it guarantees money upfront; thus, one does not need to worry about profits. This would prove the up-front payment model common amongst streaming services better for smaller stars. However, if the upfront payment is based on what one would expect to make through profits as well, then smaller stars may still end up with less.

Brandon Milostan notes that Hollywood's history is filled with "overnight sensations whose limelight quickly flickers and fades after their first big success."[182] For these one-hit wonders, their only compensation would be upfront rather than a potential continuous stream of income far into the future.[183]

IV. Proposals for New Hollywood Contracting

A. *Traditional Negotiations for Wide Theatrical Releases*

Instead of moving towards the contracting methods of streaming services, attorneys and their talent can instead advocate that the film maintain its wide theatrical release. For the actor, this would be beneficial because they stand to gain greater profit numbers from a wide theatrical release. For the studio, they can continue the gamble that they pay the actor less up front and the rest through profit determined by box-office numbers.

Actors may also want to continue having a wide-theatrical release of their films due to the access to information regarding the success of the movie. Negotiating for wide-theatrical releases is something that would bridge the information asymmetry gap that streaming services pose because SVOD platforms are reluctant to

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180 *Id.*

181 *Id.* at 95.

182 Milostan, *supra* note 33, at 47.

183 *Id.* at 46–47.

provide verifiable numbers of viewership.[184] Information regarding the success of the movie is also necessary to increase their bargaining power for future negotiations.

However, the future is streaming. Given the Covid-19 pandemic, people are enjoying the ability to watch movies in the comfort of their own homes. Not only do people enjoy watching movies at home, but the studios have every incentive to continue streaming. A studio like Warner Brothers is able to retain all the profits without having to compensate an intermediary such as the movie theater owner. Instead, releasing a film on their streaming platform brings all the revenue directly to them. One could view it as almost having a monopoly on the process. Thus, studios have little incentive to want movies to be released in theaters.

Negotiating for a clause requiring a wide-theatrical release in the wave of streaming is something that only A-list talent would be able to demand. Studios want to retain talent, and if the talent decides this is the route they want to continue, they would have the leverage to ask for this. However, continuing to negotiate for wide-theatrical releases would be maintaining the status quo in Hollywood negotiations.

One consideration is the fact that after Scarlett Johansson's lawsuit, Disney announced that the rest of its movies for 2021 would be released solely in theaters to start. However, the contracts for these movies being released were most likely signed pre-pandemic. Thus, it is reasonable to believe that Disney's decision was in response to Johansson's complaint and was fearful that other actors would file similar suits. Companies like Disney and WarnerMedia did not produce films for their streaming services primarily, compared to Netflix and Amazon Prime. Therefore, companies that did not engage in streaming releases prior to the Covid-19 pandemic will want to include release on streaming services clauses in their contracts going forward.

B. *Negotiate for More Money Up Front*

Another consideration for lawyers negotiating for their talent is to ask for a larger up-front payment. This is a common practice that streaming services are already engaging in, and it seems to be working for them in retaining talent. However, studios like Disney

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184 *See generally* Katz, *supra* note 156.

may be wary of doing this because it requires access to a significant amount of up-front capital. This brings the issue full circle, as this lack of capital to pay large up-front compensation brought about the change from the Studio Era to modern-day profit-participation contracts.

Nevertheless, this could be a good option for talent. Asking for more money upfront is hopefully providing "the projected contingent compensation that the talent would have received under the back-end model, paradoxically guaranteeing contingent compensation."[185] In essence, streaming services believe and proclaim to the talent that they are providing the same amount they would have received had there been contingent compensation, but in accelerated form.[186] However, because knowledge is king, with streaming services reluctant to provide true viewership data and only estimations as to the success of the film, it seems that talent is at a disadvantage. Actors are taking a calculated risk by accepting guaranteed dollars today versus contingent compensation based on the performance of their films. Given Hollywood's "creative accounting," the large initial payment would provide some financial security.[187] Instead, "talent will receive the time value of money by not having to wait for a film to hit 'net profits.'"[188]

Despite receiving a potentially larger initial payment upon signing the contract, the actor could still come out worse off should the movie be wildly successful. Typically, A-list talent can receive up to eight-figures in profits.[189] However, streaming platforms will likely not pay these large sums to all stars across their content. Additionally, these up-front payments will be subject to taxation when received, whereas contingent payments made in the future provide the talent the ability to pay taxes over time.[190]

C. *Negotiations for Pay-Per-View Streaming*

Streaming took over the music industry long before it did the film industry. Applications like Spotify provide a similar concept to Netflix; for a monthly fee, subscribers have access to unlimited

185 Milostan, *supra* note 33, at 46.
186 *Id.*
187 *Id.*
188 *Id.* at 47.
189 *Id.* at 47.
190 *Id.*

titles.[191] Thus, attorneys could consider advocating for a similar model that talent has through streaming music. Under this type of model, lawyers would negotiate for compensation based on the number of views a title has received.[192]

i. How it Works

As of April 2021, Apple Music paid one penny per stream.[193] Notably, Spotify pays roughly one-third to one-half penny per stream.[194] The question that remains is how does this process work. Journalist Anne Steele succinctly explained the process. "Streaming services pay royalties to rights holders—a group that includes labels, publishers and other distributors—which in turn pay artists based on their recording, publishing and distribution agreements. Both Apple and Spotify pay rights holders based on the share of total streams their artists garner on each service."[195]

Essentially, the royalty received by the artist is calculated by the number of streams of the artist's music divided by the total number of streams on the service.[196]

Spotify's website outlines how their royalties work. They have two kinds of royalties: recording and publishing. Recording royalties is the "money owed to rightsholders for recordings streamed . . . which is paid to artists through the licensor that delivered the music, typically their record label or distributor."[197] Publishing royalties are the money that is owed to songwriters or the owners of the composition, which is issued to publishers, collecting societies and mechanical agencies based on the territory of usage.[198] Interestingly, Spotify says that they do not pay on a per-stream rate. Instead, they calculate net revenue, which is revenue minus taxes,

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191 Unique to Spotify, you can have the application for free. However, your use of the app is limited, and you must listen to advertisements in between songs. Madi Alexander and Ben Sisario, *Apple Music, Spotify and a Guide to Music Streaming Services*, N.Y. TIMES (Apr. 5, 2016), https://www.nytimes.com/interactive/2015/06/30/business/media/music-streaming-guide.html [https://perma.cc/EB2N-M3PW].

192 Milostan, *supra* note 33, at 48.

193 Anne Steele, *Apple Music Reveals How Much It Pays When You Stream a Song*, WALL ST. J. (Apr. 16, 2021, 5:38 PM), https://www.wsj.com/articles/apple-music-reveals-how-much-it-pays-when-you-stream-a-song-11618579800 [https://perma.cc/BP2G-Z99Q].

194 *Id.*

195 *Id.*

196 Joseph Dimont, *Royalty Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model*, 69 HASTINGS L. J. 675, 685 (2018).

197 *Royalties*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/en/help/article/royalties [https://perma.cc/7AX6-H4X8] (last visited Feb. 5, 2022).

198 *Id.*

processing fees and other outstanding payments, and then the rightsholders are paid by streamshare.[199]

Video streaming platforms could provide the same. First, it could be negotiated that the talent is paid a price per stream. Second, it could be negotiated that they receive payment similar to Spotify, in which talent receives a royalty based on their percentage of streaming on the platform. Talent, especially smaller stars, would be in favor of this method because it is a different take on the back-end model; it would allow stars to continue receiving payments. Talent across the board might be in favor of this model because they would still be receiving additional payments based on streams. Platforms like Netflix may be against such a model because it would require them to be more transparent about their streams, which as mentioned earlier, is something they are opaque about. On the other hand, this would allow them to not have to pay talent as much up front; it would provide a way to continue the back-end model.

ii. DVDs and Television

Pay-per view was also used through the sale of DVDs.[200] Royalties were "paid by the studio's home-entertainment arm to its distribution arm."[201] A standard DVD royalty was approximately twenty percent of the wholesale price. However, some of the top stars were able to negotiate for a royalty of nearly forty percent of wholesale price.

To this day, this method is used for television. For example, Warner Brothers earns an estimated $1 billion a year from *Friends* re-runs.[202] Each star receives approximately 2%—or $20 million—every year in royalties from re-runs.[203] Streaming services are even adopting this model when entering contracts for their original television shows. Diana Appleton's book *Hollywood Dealmaking* explains how Amazon Studios has adopted this strategy, which they have called Amazon Service MAGR (Modified Adjusted Gross)

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199 *Id.*

200 Edward Jay Epstein, *Gross Hysteria*, SLATE (Jan. 23, 2006, 6:40 AM), https://slate.com/culture/2006/01/how-the-studios-compensate-the-most-powerful-movie-stars.html [https://perma.cc/2GZ5-H6FH].

201 *Id.*

202 Rachel Farrow, *Here's How Much Jennifer Aniston and Other Actors Get Paid for Their Reruns*, YAHOO! (Dec. 22, 2020), https://www.yahoo.com/now/much-jennifer-aniston-other-actors-203800883.html [https://perma.cc/7M4K-CWXJ].

203 *Id.*

Payment.[204] The formula was structured to account for factors including "participant's level of stature" and the length of the feature, assigning "a profit value on a per-point basis for every season that the show is picked up, commencing in the third season of the show."[205] This allows talent to receive meaningful back-end payments. A version of this could be adopted for films, in which streaming services like Apple Studios can take into account the participant's stature and assign a profit value for every stream of the film.

iii. Considerations

As discussed previously, streaming services have a lack of transparency. This will pose difficulty in calculating how many views have been obtained if the streaming platform fails to provide it. For example, Netflix counts a view as someone who has watched the content for at least two minutes.[206] This could be a good threshold for talent, as it could be considered a lower threshold that needs to be met to retain their right to profit from viewership. Some may argue a simple click on the content is insufficient because that is not true viewership. Additionally, individuals tend to listen to their favorite music repeatedly while television shows and movies are not viewed as frequently.

Another potential issue is the small price paid for a royalty. Receiving one cent per stream for a two-hour movie seems disproportionate to a two-minute song. Therefore, the price per stream is something that would need to be negotiated in more detail. Additionally, this would require a complete overhaul of the system, requiring a new way to monitor streaming, lawyers, and accountants ensuring there is a methodology to prove these calculations are proper.[207]

The inclusion of royalties raises the concern that if the movie is not successful, talent will receive very little. However, this is a similar gamble that talent take when negotiating for contingent compensation; if the film is not successful, profit-participation will be less. Additionally, musicians have debated heavily with music platforms about their payment. Most notably was singer-songwriter Taylor Swift. Swift published an opinion piece in the Wall Street Journal in 2014, vocalizing her opinion over the shift to

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204 APPLETON & YANKELEVITS, *supra* note 63, at 26.

205 *Id.*

206 Colbert, *supra* note 162.

207 Milostan, *supra* note 33.

streaming as a platform to listen to music.[208] Swift noted that "[v]aluable things should be paid for. It's my opinion that music should not be free, and my prediction is that individual artists and their labels will someday decide what an album's price point is."[209] The same can be said for actors; they will have to enter into negotiations to find the proper price in order to avoid a situation in which actors avoid streaming services due to lack of payment, like Swift avoided Spotify for years.

A situation like Spotify paying minimal in royalties may be mitigated by the fact that there are less music platforms out there compared to streaming film. According to recent Midia Research Report, Spotify retains the highest market share of 31%, and Apple Music comes in second with 15% market share.[210] Together, they make up almost half of the music streaming service usage and typically have similar music provided. Comparatively, streaming platforms like Netflix and Hulu all have proprietary content, requiring the viewer to purchase subscriptions to several different streamers to access as much content as they desire. This may provide more competition amongst the platforms and encourage companies like Hulu to pay more money in royalties to stay competitive in the field.

V. CONCLUSION

Between viewership changes due to the Covid-19 Pandemic, the "Cutting the Cord" phenomenon, and the increase in quality of original content by streaming services, SVOD has not only changed the playing field but is poised to dominate for decades to come. Just as the Studio Era became extinct, so too should traditional profit-participation contracts between talent and the studios. Representatives of talent must reevaluate what is in their clients' best interests, taking into account: new delivery methods to the viewer,

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208 Taylor Swift, *For Taylor Swift, the Future of Music is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219 [https://perma.cc/3TAX-5REH].

209 *Id.*; *see also* Jack Linshi, *Here's Why Taylor Swift Pulled Her Music From Spotify*, TIME (Nov. 3, 2014, 1:24 PM), https://time.com/3554468/why-taylor-swift-spotify/ [https://perma.cc/VQ7J-EL2G].

210 Mark Mulligan, *Music Subscriber Market Shares Q2 2021*, MIDIA RSCH. (Jan. 18, 2022), https://www.midiaresearch.com/blog/music-subscriber-market-shares-q2-2021 [https://perma.cc/FBT3-XBQU].

the dates of exclusivity to theater owners, and what is deemed a successful theatrical release among other factors.

This Note considers different contract clauses that representatives can consider negotiating for on behalf of their clients to the studio. First, one could try negotiating for the inclusion of provisions requiring their client's film to wide exclusive theatrical release to facilitate the films profitability. Next, this Note considered negotiating for more up-front money to alleviate the whims of the creative accountants. Finally, this Note proposed a new way of viewing contractual negotiations with studios, in which the actor would receive a pay-per stream rate. Initially, streaming services and their CEOs were the sole beneficiaries of streaming. This new model would allow for their clients to also be a beneficiary. This last recommendation most closely mimics the profit-participation contract, while modifying it for streaming platforms. Given the change in Hollywood, attorneys must pivot and negotiate for new provisions which would best protect their client's interests.