

## On Commitments

Jennifer W. Reynolds\*

### I. INTRODUCTION

Legal negotiators are in the business of making commitments. Orchestrating charged discussions, coming up with creative ways to satisfy interests, sifting through relationships and responsibilities, drafting contracts and other complex agreements, dealing with the aftermath of broken promises—in all cases, establishing and re-establishing what and how the parties commit to one another—are central to the negotiating enterprise. In standard interest-based negotiations or mediations, commitments are the final stage of a process in which negotiators manage both substantive issues and relational concerns while intentionally dismantling unproductive positions so that the parties may explore the integrative potential of identifying underlying interests, and then generating value-creating options to satisfy those interests.<sup>1</sup> Put another way, interest-based processes transform some number of party interests into action items, deliverables, contract provisions, memorandums of understanding, preambles, press releases, promises, declarations of intention; that is, interests become commitments.

And often the opposite is true: commitments can become interests, insofar as they are constitutive elements (explicit or not) in future negotiations and decisions. This transformation is less apparent and often invisible. That a decision made today might shape or foreclose

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\* Assistant Professor, University of Oregon School of Law. J.D., Harvard Law School; M.A., University of Texas at Austin; A.B., University of Chicago. Many thanks to the *Washington University Journal of Law and Policy* and to the participants of the 2011 Washington University Negotiation and Dispute Resolution Program Scholarship Roundtable, New Directions in Negotiation and Dispute Resolution. I am also grateful to the wonderful editors of the *Washington University Journal of Law & Policy* for their help throughout the editing and publishing process.

1. See generally ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

the choices of tomorrow may seem intuitive, but often does not occur to the parties negotiating in the present moment.<sup>2</sup> The binding nature of commitments can clarify present priorities and facilitate joint efforts, but can also hinder quick responses to future opportunities or threats. As such, a tension exists between the need to make commitments and the (often unexpected and intractable) difficulties that arise from having made them.<sup>3</sup> Legal negotiators, as commitment makers and re-makers, regularly work within this tension without necessarily being aware of it.

The complex interrelationship between commitments and interests is the focus of this Essay, which maps some of the salient features of commitment-interest mechanics as a starting point for further research into the dynamics and possibilities of this interaction. Such an exercise promises both theoretical and practical benefits. As a theoretical matter, reconceptualizing negotiation as an ecology of interest-based commitments helps reorient the negotiator (or the mediator, facilitator, etc.) toward a better understanding of the ongoing significance of past decisions as well as the future implications of present agreements.<sup>4</sup> As a practical matter,

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2. Mergers and acquisitions (“M&A”) negotiations, for example, are notorious for their high failure rate despite having incredibly sophisticated and skilled negotiators on both sides. *See, e.g.*, DANNY ERTEL & MARK GORDON, *THE POINT OF THE DEAL: HOW TO NEGOTIATION WHEN “YES” IS NOT ENOUGH* 184 (2007) (noting that, regarding business combinations, “more than half of these deals destroy value”). Although there is no consensus around why combinations fail, one common explanation is that negotiators often do not take corporate cultures and other implementation concerns into account when working through the deal. Put another way, negotiators do not perceive the potential impacts of previous institutional commitments around various aspects of workplace culture, including staffing, reporting structures, organizational priorities, and so on. *Id.*

3. *See* DONALD N. SULL, *WHY GOOD COMPANIES GO BAD AND HOW GREAT MANAGERS REMAKE THEM* (2003) [hereinafter *WHY GOOD COMPANIES GO BAD*]; *see also* Donald N. Sull, *Managing by Commitments*, HARV. BUS. REV., June 2003, at 82, 84 (“Caught up in the hurly-burly of the present, managers often take actions that, while beneficial in the near term, impose lasting constraints on their operations and organizations. When markets or competitive conditions change, they can find themselves unable to respond effectively—even though they may see a threat clearly and know they must take action. They find themselves caught in a web of commitments that they (or their predecessors) have spun.”) [hereinafter *Managing By Commitments*].

4. *See* ERTEL & GORDON, *supra* note 2, at 17 (noting that parties often negotiate as though future implementation does not matter); *see also* Amy Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (pointing out, in a different context, how the failure to understand future implications of scaling private interest-based negotiated processes to large populations may perpetuate existing social inequalities).

incorporating a more nuanced treatment of interest-based commitments into a negotiator's structured preparation and process may improve agreement durability and participant satisfaction.

Part II of this Essay frames the analysis around a dispute systems design case study. Dispute systems design ("DSD") is the "applied discipline of institutional design" relating to the management of conflict and disputes.<sup>5</sup> DSD draws upon a variety of specializations and skill sets, from organizational development to interpersonal dispute resolution practices, to develop systematic approaches to recurrent or anticipated disputes in institutions and groups.<sup>6</sup> For the present analysis, such an example limits the scope and players, so that we can more easily trace past commitments that reach into future negotiations. Moreover, as legal negotiators continue working through the possible applications of large-scale ADR processes—such as DSD, collaborative governance, and other methodologies designed for and delivered to large groups of people (companies, nations, etc.)—using examples that illustrate the system effects of interest-based methodologies may provide helpful frameworks for analysis.<sup>7</sup>

Part III situates the case study within recent scholarship that critically analyzes the notion of "interests" in interest-based negotiation. To the extent that commitments reflect the interests of the parties, the reliability and integrity of those interests will affect the nature and quality of commitments made. If interests are a disintegrating category, as some scholars assert, then what does that mean for interest-based commitments? Part IV considers the past-future aspect of commitments-as-interests, drawing on research from Donald Sull, a business school professor specializing in management and strategy. Sull's work dissects the complex interplay of commitments in organizational and individual priorities and activities, examining how these commitments often work to the

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5. Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 75 (2011).

6. *Id.* See generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

7. As opposed to, for example, starting from a simplified bilateral model (e.g., asking for a raise, renting a car) and then extrapolating to more complex scenarios.

detriment of each other.<sup>8</sup> He argues that what makes this conflict of past and present commitments so potentially destructive is that it frequently goes unnoticed, whether by negotiators or by the parties themselves. Part V considers the implications of Sull's research for negotiation practice and theory, and suggests possible approaches for negotiators seeking to bring the parties' commitments-informed interests into sharper focus during the preparation stage of the negotiation. Part VI concludes with possible directions for future research.

## II. CASE STUDY

Consider an example of DSD in an academic setting. This example features a university ("the University") undergoing the transformative changes brought about by the tremendous advances in microcomputing that occurred between the 1970s and 2000s. To understand the DSD dimensions of this situation, some backstory is needed. The short version of this backstory is that during that time the University, like so many other academic and business communities, moved from punch cards to the internet, and managing this transformation in the late 1990s required intense negotiations and careful dispute systems planning.<sup>9</sup>

The longer version: More than thirty years ago, the University decided to automate its central business processes. This was early in the personal and business computing revolution, so little demand or

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8. Substantial literature explores the overlap between management theory and negotiation, and this Essay seeks to contribute to that body of research. *See, e.g.*, MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* (6th ed., 2006); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986). The emerging ADR subspecialty of "dispute systems design" arguably captures and repackages an important management-level set of responsibilities. For example, many dispute systems feature an "ombuds" or other influential organizational figure (a manager type) who takes ultimate responsibility for and control over resolving disputes and giving feedback to the organization. *See, e.g.*, Carole S. Houk & Lauren M. Edelstein, *Beyond Apology to Early Non-Judicial Resolution: The MedicOm Program as a Patient-Safety Focused Alternative to Malpractice Litigation*, 29 *HAMLINE J. PUB. L. & POL'Y* 411 (2008) (advocating within dispute systems design context for the use of medical ombuds/mediator programs to resolve patient and provider disputes and medical malpractice claims in a non-adversarial way).

9. This example comes from my own experience as the facilitator of a campus-wide technology rollout (here, incorporating Java into the University toolkit) from 2001–2004 at the University of Texas at Austin.

money was available for this initiative. As a result, the University hired people with non-technical backgrounds (many from teaching and academia—this was a college town, and as such graduate students were a plentiful source of skilled and relatively cheap labor) and trained them to design administrative applications using easy-to-learn mainframe technologies and architectures. This strategy supported the University's interests in managing costs while offering relatively cutting-edge, versatile systems. Using software written by smart non-programmers, the University created a powerful central computing structure for payroll, accounting, human resources, student information, and other administrative areas at relatively low cost. Moreover, because these technologies were home grown, they were customized to meet the exact needs of administrative users and could be tweaked and embellished to meet evolving user demands.

As the technological landscape began to change in the 1990s, the University sought to take advantage of the tremendous upsides offered by the World Wide Web.<sup>10</sup> Student grades, financial aid, admissions, employment—all these paper-based and labor-intensive functions could be made more efficient and user-friendly through web interfaces and portals. Relying on its in-house model, the University began training its existing and newly hired programming staff to write web pages, using a scripting language developed by one of the University's most talented programmers. The decision to use an in-house scripting language was not controversial; the programming community reasoned that an in-house person could develop something that was sufficiently similar to the mainframe language so that the learning curve for the existing analysts would not be as steep as it would be if one of the standard, widely used, and more technical "outside" languages were adopted. Once trained, campus software developers spent much of their time creating web-based versions of familiar mainframe applications and creating new

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10. Many online repositories document the incredible developments of the 1990s, as the World Wide Web made possible the large-scale public and commercial use of the internet. For an overview of these topics see *A Brief History of the Internet*, available at <http://www.walt.howe.com/navnet/history.html> (last visited Apr. 13, 2012); *A Little History of the World Wide Web*, available at <http://www.w3.org/History.html> (last visited Apr. 13, 2012).

webpages for students, alumni, job applicants, and other non-administrative users.

By the late 1990s, however, the downsides to the University's train-non-experts and write-everything-to-order strategy began to emerge. High-functioning inexpensive software and technically skilled workers started entering the market, but the University could not take advantage of these developments because the organization had already sunk tremendous resources into a legacy system maintained by a developer community trained in a single toolset. Management recognized that this situation was increasingly expensive and unwieldy, but they could not reconcile this new recognition with what had worked in the past.<sup>11</sup> The software developers themselves were even less effective at responding to market and consumer changes. Realizing that their mainframe programming abilities were quickly becoming obsolete, they countered change by leaning on relationships, appealing to traditional values, and pointing to previous successes. The University's interests in low-cost, high-quality systems remained the same, but its existing commitments—to non-technical labor, to in-house programming languages, to home-built customized systems—no longer served those interests. The commitments from the past, which had facilitated stunning progress, now hindered positive change and constricted future growth.

What does all this have to do with legal negotiation? Before continuing, let's consider how interests and commitments animate the narrative so far.

### III. INTERESTS → COMMITMENTS

The story of the University begins in a similar way to many interest-based negotiations and mediations. Participants come to the table to discuss their needs, concerns, goals, fears; they brainstorm possible options, make trades if they can, look to objective criteria to

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11. Tech-savvy students had high expectations, and the University tried to respond using the same technologies as before. Emulating graphics-rich commercial products with a mainframe-based system is difficult, expensive, and often unsuccessful. Failure was often attributed to insufficient time, not to untrained staff or outdated toolsets.

help justify one strategy over another, and develop a plan for moving forward. Here, the negotiation primarily involved the arrangement of administrative and academic affairs such that the University would be able to realize its computing goals without incurring exorbitant costs.<sup>12</sup> When the University set its first data processing goals in the 1970s, these institutional interests in technological savviness, business efficiency, and fiscal responsibility led to a series of commitments around training inexpensive non-technical people to develop custom-built software.

Indeed, the end game of an interest-based process is the commitment, the ultimate tangible or intangible manifestation of some number of these interests raised in the negotiation. Certainly the University's commitments to its software development strategy illustrate this transformation. Before considering the counter-transformation—that is, commitments becoming interests—is instructive to revisit the underlying concepts and implications of interests in interest-based processes.

The importance of interests is axiomatic in interest-based bargaining.<sup>13</sup> Roger Fisher writes that “the basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side’s needs, desires, concerns, and fears.”<sup>14</sup> Robert Mnookin adds that “too often, people focus their preparation too narrowly” and overlook relevant motivations and concerns.<sup>15</sup> Negotiators identify interests so they can figure out how to leverage and resolve shared and conflicting interests. Some interests and concerns can be anticipated through a formal preparation process (such as the “seven elements”<sup>16</sup>) and an across-the-table integrative

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12. Group decision-making often involves what Ertel and Gordon call “internal negotiations,” which are conceptually distinct from dispute resolution and dealmaking scenarios. *See* ERTEL & GORDON, *supra* note 2, at 13–14 (describing the three primary arenas of negotiation as conflict resolution, dealmaking, and “mak[ing] arrangements for working together”).

13. *See* FISHER ET AL., *supra* note 1, at 11 (recommending famously to “[f]ocus on interests, not positions”).

14. *Id.* at 42.

15. ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 28 (2000).

16. The seven elements are alternatives, interests, options, legitimate criteria, communication, relationship, and commitment. *See* Bruce Patton, *Negotiation*, in THE

process audits these guessed-at interests and ideally pulls out additional interests and priorities. On this view, hidden interests—anything intentionally kept secret or inadvertently overlooked—might serve strategic distributional purposes, but can also potentially disrupt the process, undermine trust, leave money on the table, and threaten the integrity of the resultant deal.<sup>17</sup>

Integrative theory posits that interest-based commitments are more durable (“win-win”) because they answer the parties’ actual needs and concerns, which foster buy-in and cooperation through implementation and beyond. That argument assumes, of course, that interests are reliable indicators of what parties truly want. Additionally, the entire interest-based canon privileges private interests—interests that may lead to commitments that in turn may have implications that extend beyond the parties themselves—to an extent that demands closer examination, especially as interest-based ADR processes are deployed to larger and larger populations. These two broad areas of critique provide a starting point for closer examination of commitments in an interest-based framework.

#### *A. We Don’t Know What We Want*

Many negotiation scholars today are well versed in cognitive biases, heuristics, schemas, and other psychological predilections that inform individual and group behavior. For these scholars, the “rational choice” model of negotiation, which presupposes that parties work to maximize their own welfare through the pursuit of static and identifiable interests, has become the strawman for a more nuanced conversation about how people actually behave (even if this strawman still generally dictates the contours of negotiation process

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HANDBOOK OF DISPUTE RESOLUTION 279–85 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

17. See, e.g., Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, 59-OCT DISP. RESOL. J. 56, 59 (2004) (noting that sharing interests fully “offers benefits and poses risks because of the clash of two fundamental goals: the negotiator wants to maximize the creation of joint value and maximize personal gains from the negotiations”); see also John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 188 (2000) (recounting survey results that indicate most businesspeople and lawyers believe that “it is normally appropriate to focus on underlying interests” of all parties concerned in negotiation and mediation).

and pedagogy).<sup>18</sup> Principals and agents in negotiation contexts are not robots but emotive, affective, irrational human beings, often with shifting and inconsistent interests that depend greatly on time, circumstance, mood, and context. As Chris Guthrie and David Sally write, the assumption that people know what they want may be foundational to integrative bargaining but nonetheless should be reexamined:

Proponents of problem-solving negotiation thus argue that disputants should strive not merely to assert positions but rather to identify and satisfy their underlying interests. Indeed, according to the proponents of this approach to negotiation, the object of a negotiation is to satisfy underlying interests. On this view, disputants should try to get what they *really* want at the bargaining table.

But what if they do not know what they *really* want?<sup>19</sup>

Following social psychology research, Guthrie and Sally note that people are simply not good at predicting the impact of future events, valuing losses and gains, and knowing what will make them happy.<sup>20</sup> Additionally, people often want things that, when they get them, they do not actually want or like; such “miswanting” is problematic not only in legal negotiation but in any client-driven process (such as

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18. See, e.g., Ran Kuttner, *The Wave/Particle Tension in Negotiation*, 16 HARV. NEGOT. L. REV. 331, 332 (2011) (arguing that the negotiation process is better understood as an “emergent system” that extends beyond static, discrete interests and individual personalities); Kenneth H. Fox, *Negotiation as a Postmodern Process*, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 20–23 (Christopher Honeyman et al. eds., 2009) (contrasting the “individualist and rational” model of negotiation with an “emergent and dynamic” enterprise in which parties “co-create” meaning’). But see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 523 (2008) (arguing that most modern negotiation scholars still “believe in the possibility, along with the value, of making individuals into [rationally acting] self-managers: purpose, self-reflexive, and able to think clearly and act creatively in conditions of uncertainty”).

19. Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817, 817 (2004) (citation omitted).

20. *Id.* at 818–21. Much fascinating legal scholarship applies social psychology to legal processes and problems. See, e.g., Rebecca Hollander-Blumoff, *Law and the Stable Self*, 54 ST. LOUIS U. L.J. 1173 (2010) (examining reliability of expressed individual preferences in light of social psychology); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157 (2008) (considering policy implications for tort law when considering affective forecasting problems and focusing illusions on the part of victims, juries, and judges).

software development, for example).<sup>21</sup> The upshot of these psychological misfires is that many of an individual's interests—which understandably may be based on predictions about what will happen in the future, valuations of what could be lost or gained, hopes that some acquisitions or activities will bring happiness, fears that other developments will lead to failure and ruin—are shockingly unreliable. As Guthrie and Sally point out, the lack of awareness around these prevalent tendencies has an obvious impact on a process devoted to the recognition and satisfaction of interests.<sup>22</sup>

Moreover, for an analyst focusing on the durability of interest-based commitments, these developments are provocative because they suggest that even the most faithful, transparent, and expressive commitment might be unworkable because of mercurial, shifting, erroneous interests. Moreover, as scholars continue to evaluate the role of emotions in negotiation—not just as distortions to be filtered out, but also as inevitable and perhaps even valuable contributors to the overall decision-making process—the impact of such research on the resultant commitment remains to be seen.<sup>23</sup> Perhaps emotions themselves can be an important heuristic in divining “true” interests and therefore could play a key corrective role in miswanting and other problems. How, however, do these insights implicate commitments, which often transcend the parties (or at least their moods at the time of the negotiation) and persist into the future? As the role of emotions in decision-making contexts such as negotiation

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21. See Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, in *FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION* 178 (Joseph P. Forgas ed., 2000). Clients who miswant or otherwise change their minds are familiar fixtures in software design. See, e.g., KENT BECK, *EXTREME PROGRAMMING EXPLAINED: EMBRACE CHANGE* (2d ed. 2004) (suggesting an iterative approach to design that accommodates the predictably shifting, changing, often inconsistent interests of clients and users).

22. See Guthrie & Sally, *supra* note 19, at 828 (noting that “the most significant problem plaguing disputants may very well be that they cannot always know what they want”).

23. See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 *HARV. NEGOT. L. REV.* 231, 238 (2005) (“[I]t is only by recognizing . . . emotional content and better synthesizing emotional and analytical responses to negotiating stimuli that we can advance our skills to the next level”); see also David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 *BYU L. REV.* 1275, 1281 (2008) (arguing against the prevailing assumption that “emotion in the decisionmaking process” is “bad”).

continues to generate critical study, determining how affective and emotive factors contribute to the development and implementation of commitments is an important area of future research.

*B. Interests and Values Are Not the Same*

Beyond whether we can identify interests accurately, some scholars question the ideological valences of a negotiation model that accords so much privilege to private individual interests. These scholars look at the impacts on the negotiating parties and on the wider community. In both cases, issues of morality and values come into play as separate from interests themselves, which suggests a possible dissonance between what we want and what should happen as a matter of social justice, public and political morality, or individual values.

To illustrate this inherent tension between interests and values in interest-based negotiation, Kevin Avruch provides an example of two parents, devout followers of different religions, who must negotiate about the religious background they will choose for their newborn child.<sup>24</sup> In this kind of situation, value-creating trades (playing on differences in forecasting or risk preferences) and process norms (seniority, flipping a coin, I cut you choose) do not provide much guidance. Importantly, the “value creation” in interest-based methodologies refers more to economic precepts of utility, not deontological principles of values or morality. As such, Avruch’s “two-religions” problem resists conventional interest-based analysis, because it does not draw on or benefit from an essentially economic approach.

Taken more broadly, as Amy Cohen and others have argued, interest-based negotiation valorizes individual private choice and preferences, and thus expresses and perpetuates neoliberal, capitalist ideologies here and abroad.<sup>25</sup> Again, the realization of Pareto-optimal

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24. Kevin Avruch, *Toward an Expanded “Canon” of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic*, 89 MARQ. L. REV. 567, 578–82 (2006).

25. See Cohen, *supra* note 4; see also Amy Guttman, *How Not To Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 6–7 (1999) (pointing out that an interest-based dispute resolution procedure does not necessarily lead to moral or fair results);

solutions between two parties does not necessarily (though arguably it could) improve social welfare or accord with principles of public justice or political morality. One recent manifestation of these concerns comes up in the current debate around the appropriateness of mediator neutrality with respect to human rights:<sup>26</sup> In the pursuit of neutral facilitation, should mediators permit agreements that would impinge upon the human rights of one or both of parties? If not, what kinds of guidelines should mediators use to preserve the benefits of neutrality and impartiality while according the appropriate measure of dignity and social morality into the process? The implications of these important and difficult questions are outside the scope of this Essay, other than to point out that the hegemony of interests in interest-based processes is eroding from several critical angles.

For our University case study, thinking about these recent critical reexaminations of interests helps explain, at least in part, the failure of the original decision-makers to anticipate the possibility that integration with external systems and bringing on technological specialists might someday be desirable, especially if the cost picture changed. The commitment to home-grown technologies became a blind spot for University administrators, who continued charting the same course even as external conditions changed. Certainly, blind spots are not uncommon when organizations and individuals make decisions; otherwise, possible choices might be endlessly debated with no change ever occurring. Moreover, in this case the University might argue that it could not have anticipated the move toward interoperability that the technological industry ending up taking.<sup>27</sup> In any event, the proposition that one's articulated interests may not actually capture what one truly wants—whether because of

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Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—In Africa and Elsewhere*, 27 *LAW & SOC. INQUIRY* 573 (2002).

26. Jim Cavallaro and Stephan Sonnenberg raised this issue at the 2011 Roundtable and are currently wrestling with these sorts of institutional and philosophical disconnects in the development of their International Human Rights and Conflict Resolution clinic at Stanford Law School. See Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights*, 39 *WASH. U. J.L. & POL'Y* 257 (2012).

27. In hindsight, that argument may not be convincing; at the time, however, it was difficult to imagine how interconnected and technologically sophisticated the world would become.

forecasting problems, clouded judgment, or lack of information—gives rise to interesting and important questions around the development of agreements that can provide for this uncertainty without undermining the stated interests of negotiating parties (who, quite reasonably, believe that they know what they want) and without destabilizing any agreements that the parties want to implement.

#### IV. COMMITMENTS → INTERESTS

Using social psychology to complicate and enhance our understanding of interest-based processes, as in the critiques noted above, has greatly benefitted negotiation and ADR scholarship. Additionally, for those ADR analysts interested in organizational and/or system-based dispute resolution and decision-making processes (such as those envisioned by dispute systems designers or collaborative governance process architects or ombuds offices), business scholarship may provide additional insights.

The work of management expert Donald Sull, for example, is particularly relevant. Sull studies “good companies that go bad,” organizations that have been successful and subsequently become “trapped by success.”<sup>28</sup> Sull defines this phenomenon as “active inertia, or management’s tendency to respond to . . . disruptive changes by accelerating activities that succeeded in the past.”<sup>29</sup> Through detailed case studies of these previous-successful but presently-struggling companies, Sull explores how the smart, interest-based decisions of the past often impose structural, organizational, and psychological constraints on the future by becoming embedded interests—albeit often hidden ones—that (negatively?) direct and shape present decisions.<sup>30</sup>

Sull’s definition of “commitment” is congruent with the general definition used in negotiation theory and practice: “any action taken in the present that binds an organization [or an individual]<sup>31</sup> to a

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28. WHY GOOD COMPANIES GO BAD, *supra* note 3, at 23–24.

29. *Id.* at 24.

30. This overview is simplified to demonstrate practical applications of the doctrine for negotiators. Professor Sull’s works cited in this paper deserve closer examination by negotiators interested in organizational change and systems design. *See supra* note 3.

31. Sull asserts that the commitments-based model is not limited to the corporate world,

future course of action.”<sup>32</sup> Examples of commitments include investment, disinvestment, public promises and assertions, relationships, personnel decisions, and information systems.<sup>33</sup> The entrepreneur who purchases a parcel of land, the executive who hires an assistant, the parent who promises to coach the soccer team, are all examples of binding decisions that foreclose other choices. Although such commitments are not necessarily permanent, they have an internal momentum that can be difficult to reverse, especially as external dependencies arise. If the entrepreneur cannot obtain favorable zoning, for example, she might need to sell the parcel right away, and she also might need to file an appeal, remove building materials, change advertisements and listings, alleviate investor concerns, reexamine her financing, and identify another suitable location. Undoing the commitment is much more complicated than making it.<sup>34</sup>

Sull sorts these and other commitments into five categories: strategic frames, resources, processes, relationships, and values.<sup>35</sup> Viewing commitments within these categories highlights their dualistic, sometimes contradictory natures: a company’s commitment to fair labor practices, for example, may be threatened by other commitments to cost-cutting and solvency. Additionally, even if commitments are not presently conflicting, they may eventually conflict with one another as time goes by. Put another way, organizations make commitments in support of some present organizational goal/interests, and as those commitments age, they may become obsolete or even subvert the original motivation goal/interests. The manager—and likewise the negotiator helping shepherd parties through dispute resolution or decision-making—must be able to identify and work with these inherent tensions. Sull’s

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but also holds true for individuals. *See Managing by Commitments*, *supra* note 3, at 82. People define goals, acquire things, rely upon processes, cultivate relationships, and honor values. They often find themselves dealing in the present with the negative effects of past choices—choices that once served important purposes and made sense. *Id.*

32. *Id.* at 84.

33. *Id.* at 85.

34. *See* Donald N. Sull, *Do Your Commitments Match Your Convictions?*, HARV. BUS. REV., Jan. 2005, at 84 (noting that “the most binding commitments in business are often so mundane as to be almost invisible”).

35. *Id.* at 86; *see also* WHY GOOD COMPANIES GO BAD, *supra* note 3, at 45–49.

five categories, along with the classic dissonance experienced within each, are as follows:<sup>36</sup>

- *Strategic frames* comprise the collective goals and shared vision that inform a company's approach to its industry. Without strategy, a company runs the risk of diluting its focus and energies by moving in too many directions at once. However, unexamined strategic frames can blind companies to evolving conditions and new markets.<sup>37</sup>
- *Resources* refer to a company's assets, including intellectual capital. Sull notes that companies make resource decisions to support development and delivery of products and services. Once acquired, however, resources can become burdensome and make it difficult to respond to new challenges.<sup>38</sup>
- Companies establish and use formal *processes* to manage workflow. Such processes are usually more efficient than ad hoc approaches, but also can reduce overall adaptability and turn functional units into silos.<sup>39</sup>
- Forging strong *relationships* between individuals inside and outside the company (clients, employees, providers) helps establish market presence and reputation; but these same relationships can become shackles when the need for change arises.<sup>40</sup>
- Finally, *values* are the collective understanding and ethos of the organization, the "shared norms that unite and inspire employees."<sup>41</sup> Values can be a powerful motivating

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36. Professor Sull argues that when a company begins to suffer from active inertia, strategic frames can become blinders, resources can become millstones, processes can become routines, relationships can become shackles, and values can become dogmas. See WHY GOOD COMPANIES GO BAD, *supra* note 3, at 29–42.

37. *Id.* at 10–11.

38. *Id.* at 11–12.

39. *Id.* at 12–13.

40. *Id.* at 13–14.

41. *Id.* at 14.

force in a company, but also can lead to group-think or other unproductive orthodoxy.<sup>42</sup>

Sull's classification of commitments into strategic frames, resources, processes, relationships, and values provides a helpful nuance to understanding commitments in action. For the interest-based negotiator, this classification makes it easier to see how past commitments become present or future interests. The organization that commits itself now to a cultural norm of cooperation, for example, may have an unstated but robust belief in "maintaining a cooperative workplace" that may reemerge as an interest in future negotiations and decision-making.

Returning to the University case study, it is apparent that many different kinds of commitments were in play. First, the University recognized the need to automate and improve administrative processes (strategic frames) and hired people into analyst positions (resources). Because these analysts were non-technical, the University could hire them cheaply, but needed to train them (resources). To reduce training time and ensure that the non-technical analysts could handle the work, the University limited the scope and complexity of the toolset (resources, processes). Because all systems were home-grown and campus analysts went through the same hiring and training process, significant economies of scale and integration advantages emerged, keeping costs down (resources, processes, relationships). A culture of cooperation and teamwork developed, along with a strong independent streak and organizational pride (relationships, values). These commitments gave the University momentum throughout the mainframe computer era and the advent of the Internet, and supported institutional interests in low cost, system-wide integration, and high portability.

For negotiators, Sull's classification of commitments is the first useful part of his theory because it provides a more concrete way of

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42. See Robert Kegan & Lisa L. Lahey, *The Real Reason People Won't Change*, HARV. BUS. REV., Nov. 2001, at 51, 53 (identifying unconscious commitments to particular identity pieces as a primary source of change resistance, even if consciously the person supports the change); see also DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 113–21 (1999) (describing the "identity quake" that occurs when a conversation implicates core identity pieces).

understanding how past commitments can become present interests for individuals and organizations. Having a rubric for analysis makes it easier to parse the otherwise undifferentiated flow of information that negotiators must manage. A second important insight from Sull's theory is that the transformation from commitment to interest often happens invisibly. In other words, past commitments do not just become present interests; they can easily become present *hidden* interests. As aggregates of interests arising from pressures existing in the past, commitments persevere in the guise of strategic frames, processes, resource allocation, relationships, and values. Because they are such an intrinsic part of the cultural and organizational narrative, their influence or importance may go undetected when new negotiations or decision-making processes are underway. Sull points out that this can lead to difficulties in implementing new agreements and pursuing new opportunities, especially for companies that have successfully followed past commitments—even if the company wants to implement and pursue new agreements and opportunities.<sup>43</sup>

With Sull's commitment categories in mind, let us return to the example. In the early 2000s, the University considered how to take advantage of the skyrocketing developments in IT generally, considering its long-standing commitments to in-house technologies. To determine possible areas and needs that would benefit from outside technologies, project planners from the central IT unit developed an assessment plan and began interviewing department heads from around campus. What started as a project planning campaign quickly turned into an opportunity for dispute systems design, as planners immediately and repeatedly encountered surprisingly vehement resistance from the departments. Departments claimed that the new technology had an exorbitant learning curve, that new servers would overcrowd the machine rooms, and that there were too many high-priority projects already. Moreover, developers argued that training some people but not others in new technologies would create an undesirable caste system among University

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43. See Kegan & Lahey, *supra* note 42 (arguing that change resistance may come from unconscious competing commitments that coexist with conscious support and desire for the proposed change).

programmers and compromise the collegial atmosphere that had fostered so many high-quality, responsive data processing systems.

Those objecting to the proposed new technologies were not, in fact, framing their arguments as interests. Rather, they saw their concerns as common-sense, unavoidable observations about the way “the culture” and “the industry” operated.<sup>44</sup> University facilitators, however, believed that these disconnected objections were actually interests that derived from the organization’s original defining commitments to mainframe programming and non-technical staff. In meetings with department heads, the facilitators asked two kinds of questions: those that followed up on explicit concerns, and those that implicated more indirect or seemingly unrelated concerns based on the five commitment categories. In this way, they were able to approximate broad contours of commitments at stake and start talking with senior University management about possible persuasive approaches and realistic transforming strategies. Putting together a “training camp” for senior programmers to study new technologies for one month during the summer, conducting town halls to talk through the plan and reassure the programming staff of its contributions to the campus, and developing hybrid projects between new IT staff and existing programmers—many of whom had become business process experts in their areas possessing important skills and knowledge—were some of the early strategies deployed by the team to accommodate both the embedded interests created by previous commitments as well as the new interests in incorporating forward-looking technologies and practices into the organization.<sup>45</sup>

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44. Perhaps another frame on the analysis is that previous commitments had become conflated with present legitimate criteria.

45. Professor Sull advocates a three-step process for transforming commitments: selecting an anchor, securing the anchor, and the aligning the organization. This enables companies to manage transformation by starting with a modest commitment and then recalibrating other frames, processes, resources, and so on. *See Managing by Commitments*, *supra* note 3, at 90–91. Such an approach is consistent with conflict theorists who recommend piecemeal or partial commitments as a possible strategy for groups locked in intractable conflicts. *See* BERNARD MAYER, *STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES* 181–206 (2009). Mayer argues that agreements can play a productive role in intractable ongoing conflicts through “bridge building, boundary creation, process formation, and conflict framing.” *Id.* at 189.

Negotiators, mediators, ombudspersons, and process designers have much in common with project planners and change agents in that they attempt to shepherd parties away from the status quo. A negotiation that appears to be about the future—what the parties will do after reaching an agreement—may actually be substantially about the past, as negotiators unearth hidden or embedded interests that are actually commitments based on previous interests and priorities and that persist even if they are no longer instrumental or even valid in the present. This can create an additional layer of complexity for negotiators who must not only determine what future commitments are desired and how they can be reached, but also which past commitments need unwinding, or at least some sort of accommodation.

#### V. IMPLICATIONS

But do these observations about commitments and interests in an organizational DSD context apply with equal force to “typical” legal negotiations and mediations? An early objection might be that only internal negotiators such as in-house counsel or ombuds offices can undertake and benefit from an in-depth analysis of the interrelationship of commitments and interests over time. Indeed, Sull’s theory of commitments was an especially effective framework for the University planners precisely because they were inside agents who could work through the politics and history that characterize large interconnected workplaces. For the legal negotiator or mediator, having this degree of access to the parties’ background and institutional culture may not be possible. There may not be enough time to ask the right questions, and even if there was, parties might be nervous about providing (or unable to consciously explain) the entire backstory of how things came to be as they are now. Additionally, even if parties were entirely forthcoming with the details, the legal negotiator or mediator might run the risk of information overload or, as a relatively peripheral agent, simply be unable to process the information within the proper context.

This objection has two parts, one substantive and one procedural. The procedural objection is that even assuming that Sull’s theory does apply to all negotiations and mediations with equal force, the

structural constraints of most negotiation and mediation settings make the theory difficult or impossible to put into practice. The substantive objection argues that these commitments-oriented observations are most relevant in DSD and other organizational contexts, in which negotiations and decisions interconnect over the years through shared personnel, values, resources, processes, and so on. As such, the substantive objection limits Sull's insights to the management arena, noting the wide gulf between a large-scale corporate strategy session and the small claims mediation featuring a contractor disputing with a homeowner over an unpaid garage door installation.

Taking the substantive objection first, although it is true that organizational negotiations may lend themselves naturally to commitments-based analysis, it is also true that any negotiation or mediation benefits from an understanding of embedded interests, including those that come from earlier interest-based commitments. Organizational psychologists Robert Kegan and Lisa Lahey point out that a negotiated agreement is a necessary but not sufficient condition for change; in fact, they argue that individuals may happily agree to a plan that they are later unable to follow because they have—usually unknown to them—a *competing commitment* from the past:

Resistance to change does not [necessarily] reflect opposition, nor is it [necessarily] merely a result of inertia. Instead, even as they hold a sincere commitment to change, many people are unwittingly applying productive energy toward a hidden competing commitment. The resulting dynamic equilibrium stalls the effort in what looks like resistance but is in fact a kind of personal immunity to change.<sup>46</sup>

Kegan and Lahey provide various examples of individuals agreeing to a new change—accepting a promotion, for example—and then sabotaging or otherwise resisting the implementation of that change.<sup>47</sup>

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46. See Kegan & Lahey, *supra* note 42, at 51 (emphasis omitted).

47. Kegan and Lahey give an example of a “rising star” who received a high-profile project from her boss. Although the employee wants to succeed, she finds herself avoiding the project and inexplicably “spinning her wheels.” *Id.* at 86. In analyzing this situation, she realized that she was invested in a certain kind of relationship with her boss—a subordinate/boss or mentee/mentor relationship—and this particular project might transform that relationship into

The takeaway of this research for negotiators and mediators, of course, is that reaching an agreement is not the same as making that deal happen in practice.<sup>48</sup> Understanding that the negotiated or mediated conversation may need to include more exploration around possible roadblocks to implementation that relate specifically to past commitments, *even if the conversation has already reached an agreement that appears to satisfy everyone*, may help improve deal durability. Without this understanding, the potential for deal disruption and non-implementation increases, regardless of the size or scope of the negotiation.

Turning now to the procedural objection, although it is true that most negotiators will be unable to comprehend fully the complexities of the parties and the circumstances, it is also true that an armchair understanding of commitments doctrine will nonetheless make negotiators more prepared, if only because an enhanced awareness of organizational dynamics can make it easier to ascertain high-priority interests and potential potholes.<sup>49</sup> Such an understanding will help negotiators parse through proposals—identifying new commitments, reinforcing commitments, and transforming commitments<sup>50</sup>—that will give negotiators a better sense of what closure might look like.<sup>51</sup>

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a peer relationship, which seemed fraught with unknowns and risks. *Id.* at 87. Kegan and Lahey point out that negotiating with such an employee is likely to be ineffective—since on the surface, both employee and boss share a common interest in the organization’s success—unless the negotiation reveals that the employee is “struggling unconsciously with an opposing agenda.” *Id.* Because the employee’s struggle is unconscious, the manager-negotiator must enter the conversation anticipating the possibility that competing commitments might be an issue.

48. See ERTEL & GORDON, *supra* note 2.

49. Negotiators know that their success relies in large part upon thorough preparation. See, e.g., Charles B. Craver, *Negotiating Styles: The Impact on Bargaining Transactions*, 58-APR DISP. RESOL. J. 48, 53 (2003) (noting that “[s]uccessful negotiators are thoroughly prepared, behave in an honest and ethical manner, are perceptive readers of others, and are analytical, realistic and convincing”).

50. New commitments (or in Sull’s words, “defining commitments”) come from present interests and do not compete with commitments made in the past. Reinforcing commitments restate and recommit the organization to one or more interests that they have already committed to. For example, a law firm with a long-standing commitment to pro bono work might require its attorneys to work at Legal Aid for a certain number of hours, thus reinforcing the organizational commitment to this kind of service. Transforming commitments specifically recognize the existence of an obsolete or harmful entrenched commitment and attempt to anchor the organization around an agreement that will help dislodge the old commitment and allow management to recalibrate. See *supra* note 45.

51. See FISHER ET AL., *supra* note 1, at 175 (advising readers to “[t]hink about closure

After identifying a long held values-based commitment, for example, negotiators can talk with clients about an implementation plan that includes opportunities such as “learning conversations” or other inclusive processes that validate cultural norms while providing a foundation for change. In short, being familiar with the temporal dimension of commitments, past and present, can help negotiators refine their approach and craft the best, most implementable deal possible.

One example of commitments-sensitivity in practice may occur in client counseling and interviews. Commitment-oriented negotiators can ask questions that help determine what confluence of factors brought these particular parties to the table at this particular time. In other words, through such questions negotiators may discern what commitments are relevant to the discussion, what interests originally informed these commitments, and whether previous commitments and interests conflict with the goals of the specific negotiation. Fisher recommends asking “Why?” and “Why not?” when searching for interests that shape parties’ positions.<sup>52</sup> These simple questions may uncover commitments as well. Additionally, prefacing questions with general rationales (“the more I understand, the better advocate I can be”) or more detailed accounts (“I am trying to get a picture of what led you to this point, so that we can be sure we’re thinking through all the relevant interests and concerns”) can situate inquiries into a commitments frame.<sup>53</sup> As the negotiator becomes more experienced at hearing these stories (especially if she works with the same organization in the future), she will have a better idea of how commitments work in the organization and can bring this awareness to the table.

The table below lays out typical questions that interest-based negotiators and mediators ask clients and parties. The questions themselves are not new, but sorting them into Sull’s five commitment categories (strategic frames, resources, processes, relationships,

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from the beginning” to help move the negotiation from inventing options to making commitments).

52. *See id.* at 45–46.

53. *See, e.g.*, E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 53–55 (1996).

values) provides negotiators with an integrated framework for thinking about the answers they receive when asking these familiar questions and may help flag potential embedded interests or competing commitments that could short-circuit value creation or disrupt the implementation of agreements.

COMMITMENT TYPE	TO ASK	TO LISTEN FOR
STRATEGIC FRAMES	In your opinion, what brought us to this point? Why do you think this deal should happen now?	<i>How do your present choices work within the ecology of past, already-made decisions? Do they clash? Are they synergistic? Will they coexist?</i>
RESOURCES	Who is responsible for the deal going forward? Will the responsible person/team need additional support that we might consider now?	<i>How feasible are any proposed agreements considering current resource allocations? Do we need to rethink previous commitments in light of present concerns?</i>
PROCESSES	What happens after we've made the deal? Is there anyone missing from the table, who might have a stake in what we're doing?	<i>Should we expand our interest-based process to include the development of new routines or the dismantling of old ones?</i>
RELATIONSHIPS	If we get what we're asking for, do you anticipate any pushback from management, colleagues, peers, or clients? If so, why?	<i>How might the present situation affect the client's social/business networks not represented here?</i>
VALUES	Tell me more about the guiding principles and values of you and your organization. How do you see this project fitting into your priorities?	<i>What previous decisions and priorities might manifest as cultural norms, legitimate criteria, "common sense," or other cognitive limits?</i>

Again, these questions are not unfamiliar to legal negotiators; they are the very questions many negotiators usually ask when seeking to discover interests. The difference here is that examining those answers through a commitments-oriented lens helps determine whether those answers suggest existing commitments that may support or undermine the new agreement. Moreover, understanding the questions as potentially related to commitments helps the negotiator comprehend the complexities of the organizational or interpersonal context and ask appropriate follow-up questions. If, for example, the client worries about possible pushback from the negotiation, a commitments-aware negotiator might respond by asking further about current communication processes and personnel, to get a more complete sense of how entrenched the existing commitment might be. These kinds of questions encourage both the negotiator and client to take a more contextualized view of the negotiation and perhaps catch a glimpse of commitments lurking underneath.

In the final analysis, the reason all this matters to ADR theorists and practitioners comes down to a single idea: sensible, durable agreements. Private ordering, whether through mediation or negotiation or dispute systems design or any other ADR process, ultimately relies on the durability and stability of negotiated agreements. Much of interest-based negotiation, with its comprehensive treatment of substantive, procedural, and relational concerns, is aimed at the articulation and development of agreements that will last. At the same time, failing to recognize the ripple effects of enduring commitments can destabilize future agreements. The present discussion about interest-based commitments and commitment-based interests ultimately seeks to enrich interest-based theories and toolkits in order to facilitate sensible, durable, and stable outcomes over time.

## VI. NEXT STEPS

This Essay establishes the starting parameters for a broad research agenda exploring the interrelationship between interests and commitments in ADR settings. First, this agenda envisions the continued collection and organization of research from

interdisciplinary sources to provide a useful foundation for legal empirical and theoretical work. Much has been accomplished already in this area, particularly by those scholars who have one foot in the law and the other in psychology, such as Rebecca Hollander-Blumoff and Jennifer Robbennolt.<sup>54</sup> Additional insights from disciplines such as sociology, political science, and business may helpfully differentiate and enrich the ADR literature around commitments.

Second, the agenda contemplates the development of empirical studies that clarify the relationship between participant satisfaction and implementation in legal negotiation settings. Whether satisfied participants in the present do or do not implement their agreements in the future is useful information for those in ADR practice. Additionally, studies that examine the temporal awareness of negotiation participants—for example, when parties imagine that they will want to do something in the future, do they consider what they have done/wanted in the past?—would be illuminating. Perhaps such studies could build on social psychology regarding temporal construal, which refers to the interrelation between how far away a planned event is and what kinds of features of that event are most salient.<sup>55</sup>

Third and relatedly, the agenda envisions more toolset development that incorporates theoretical and empirical observations into practice. Again, scholars are already doing this kind of work, as process designers and conflict theorists continue to develop sophisticated approaches to identifying and managing potential roadblocks and dealkillers in organizational, international, and other group decision-making contexts.<sup>56</sup> Building “commitments with

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54. See, e.g., Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 386 (2010) (considering social psychological developments around procedural justice within the “Wild West” of negotiated agreements); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008) (describing and explaining empirical psychological studies of apologies in settlement scenarios, along with attendant policy implications).

55. See Hollander-Blumoff, *supra* note 20, at 1177–81 (describing the phenomenon and supplying examples).

56. See, e.g., MAYER, *supra* note 45, at 181–206; see also LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT’S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* (2006) (providing a framework for developing consensus-based decisions); Cathy A. Costantino, *Second Generation Organizational Conflict Management Systems Design: A Practitioner’s Perspective on*

room,” for example, might create additional clarity around the inevitable changes that the future will bring so that parties can remain flexible but still prioritize particular courses of action. Further research on the strategic uses (and divestitures) of commitments would help refine and diversify this toolset, as a matter of practice and pedagogy.

Negotiated agreements, especially those between repeat players, do not exist in a vacuum but instead become part of an ecology of commitments that influence present and future agreements. Indeed, it is the dynamic interplay between interests and commitments that makes negotiation possible. Parties bringing separate interests come together to determine whether they can, jointly, come up with commitments that address those interests. Without interests, there is no need for commitments. Without commitments, there is no way to operationalize interests that depend upon the contribution and participation of the other. Negotiators who can manage the temporal dimension of negotiation effectively—by unearthing existing commitments that may bear on present choices and then figuring out how to manage the tension between past commitments and present desires—stand a better chance to develop innovative and durable agreements.

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*Emerging Issues*, 14 HARV. NEGOT. L. REV. 81 (2009) (considering the evolution of DSD practice and laying out challenges and questions around process, practitioners, and profession).