

# OHIO STATE JOURNAL ON DISPUTE RESOLUTION

VOLUME 24

2008

NUMBER 1

## Designing Justice: Legal Institutions and Other Systems for Managing Conflict

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Lawyering has changed. We no longer just advise and represent clients in courts and administrative agencies; we design justice. For centuries, institutions and systems for delivering justice simply evolved. Social, cultural, and historical context shaped them incrementally; they changed almost imperceptibly. There are examples we recognize in the western tradition as turning points.<sup>1</sup> Aeschylus describes the emergence of a judicial system in the *Oresteia*.<sup>2</sup> We teach students the history of the common law with reference to the King's Court.<sup>3</sup> The drafters of the U.S. Constitution engaged in deliberative, knowing, and intentional institutional design of a democracy.<sup>4</sup> New Deal innovators engendered a national debate on the role of administrative agencies in creating, implementing, and enforcing public policy.<sup>5</sup> The historical trend is toward a conscious and analytic, even a

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<sup>1</sup> A review of the breakthroughs in the world's history of governance is beyond the scope of this, or perhaps any, article.

<sup>2</sup> AESCHYLUS, *ORESTEA: AGAMEMNON, THE LIBATION BEARERS, THE EUMENIDES*, (David Grene ed., Richmond Lattimore ed., trans., The University of Chicago Press 1953).

<sup>3</sup> See generally THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (The Lawbook Exchange, Ltd. 2001) (1956).

<sup>4</sup> See generally ALEXANDER HAMILTON, ET AL., *THE FEDERALIST PAPERS*.

<sup>5</sup> Richard Stewart describes the evolution of administrative law in five stages. First, the United States took from England the common law model in which citizens brought tort actions against regulatory officials to seek judicial review of their actions. With industrialization in the late nineteenth century and the first commissions and regulatory

scientific approach<sup>6</sup> to designing systems to manage conflict among citizens, stakeholders, interest groups, and public, private, and non-profit organizations.

A conflict, issue, dispute, or case submitted to any institution for managing conflict, including one labeled alternative or appropriate dispute resolution (ADR), exists in the context of a system of rules, processes, steps, and forums. In the field of ADR, this is called dispute system design (DSD). In its initial usage, DSD was applied to systems for managing ripe conflicts; such as grievances that ordinarily would be submitted to the quasi-judicial forum of labor arbitration.<sup>7</sup> However, the concept has grown in scope. For example, the civil and criminal justice systems represent DSDs created by a government within a constitutional framework. In the context of a single national government, DSD in ADR exists in the shadow of these traditional justice systems.<sup>8</sup> DSD encompasses the creation of systems for processing many similar claims in court,<sup>9</sup> as in mass torts.<sup>10</sup> It also encompasses the creation of systems within administrative agencies for handling both their own internal conflict and for carrying out their public mission to create, implement, and enforce public policy.<sup>11</sup>

DSD is a lens through which to examine not only domestic justice systems, but also emerging global ones. In the absence of an authoritative

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agencies, this yielded to the “traditional model of administrative law,” in which courts required agencies to use adjudication modeled on courtroom process before ratemaking or other action; the courts then engaged in judicial review of the agency’s fact-finding based on the record and its statutory authority. During the New Deal, Congress created agencies with open-ended statutory delegations of discretionary power, raising constitutional concerns about their accountability. In response to the perceived democracy deficit, James Landis advocated regulatory management by experts “guided by experience and professional discipline.” This vision helped shape the Administrative Procedure Act, enacted in 1946. Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 439–41 (2003).

<sup>6</sup> *Id.* at 441–42.

<sup>7</sup> See WILLIAM L. URY, ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* (1988).

<sup>8</sup> Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349–50 (1994).

<sup>9</sup> See, e.g., Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

<sup>10</sup> See, e.g., Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007).

<sup>11</sup> See generally Lisa Blomgren Bingham, et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547 (2005).

global sovereign, all dispute resolution for conflict that crosses national borders depends upon consent; either of nation-states through treaties or disputants through contracts. Treaties incorporate conciliation, mediation, or arbitration for disputes, sometimes through new international courts.<sup>12</sup> Moreover, entities such as the European Union (EU) are fostering the creation of private dispute resolution infrastructure for perceived competitive advantage.<sup>13</sup> The World Bank<sup>14</sup> and USAID<sup>15</sup> are pressing for private dispute resolution systems as an element of basic legal infrastructure for the rule of law.

Just as we have moved to control natural selection by using genetic engineering to create new life forms, so too we have moved to control the evolution of institutions and dispute systems through conscious design.<sup>16</sup> The fields of institutional design and dispute system design both encompass the human activity of creating new rules, organizations, institutions, and forums to serve various goals related to public policy. However, through these systems, we are also designing justice. The question is, which kind of justice?

My purpose with this essay is to raise, not to answer, this question. First, I briefly introduce the field of institutional analysis and design in social science. Second, I describe the field of DSD and apply elements of institutional analysis. Third, I survey how scholars have discussed varieties of justice in relation to legal institutions and other systems for managing conflict. The organizers of this symposium asked us to look toward the next generation of DSD. I conclude that the most significant issues for the future are: we must become more mindful of how designing institutions and systems to manage conflict affects justice; we should move more knowingly

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<sup>12</sup> See, e.g., International Court of Justice, <http://www.icj-cij.org> (last visited Feb. 7, 2009). See also World Trade Organization, Understanding the WTO: Settling Disputes—A Unique Contribution, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Feb. 7, 2009).

<sup>13</sup> See Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in the Mediterranean Region, <http://www.adrmeda.org> (last visited Feb. 7, 2009).

<sup>14</sup> See The World Bank, Law and Justice Institutions, <http://go.worldbank.org/QYSE23Z150> (last visited Feb. 7, 2009).

<sup>15</sup> See generally USAID CENTER FOR DEMOCRACY AND GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE (1998), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacb895.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf).

<sup>16</sup> Most of our design interventions occur on institutions that already exist and represent innovations or efforts to improve what is. However, in the field of DSD, there are cases where lawyers find themselves designing claims procedures from scratch.

and intentionally to assess justice in DSD; and we owe it to the next generation of lawyers to teach them how to serve ethically in their new role as designers of justice.

### I. INSTITUTIONAL DESIGN

Elinor Ostrom builds on earlier work<sup>17</sup> to explore and explain the wide diversity of institutions that humans use to govern their behavior.<sup>18</sup> Examples of this diversity include “regularized social interactions in markets, hierarchies, families, sports, legislatures, elections,”<sup>19</sup> and others. DSDs create institutions for resolving conflict.<sup>20</sup> These resulting conflict resolution institutions too are amenable to institutional analysis.

Institutions arise, operate, evolve, and change. Ostrom attempts to identify an underlying set of universal building blocks and to lay out a method for researching institutions and how they function. She argues that these universal building blocks are arranged in layers that one can analyze using the Institutional Analysis and Development framework.<sup>21</sup> Most often,

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<sup>17</sup> See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

<sup>18</sup> See generally ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (2005). The study of institutional design is the subject of literature in political science, economics, sociology, public affairs, and policy analysis.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> Kenneth M. Ehrenberg, *Procedural Justice and Information in Conflict-Resolving Institutions*, 67 ALB. L. REV. 167, 175 (2003).

People generally turn to institutions to solve these kinds of conflicts. Sometimes the institutions are formal, as in the cases of the legal regime and orchestra mentioned above. Other times the institutions are informal as in the case of noncodified, but explicit, norms by which a farming neighborhood might solve cattle-grazing disputes. Formal or informal, however, the explicitness with which the institution is implemented for the purpose of settling the kind of dispute arising within the particular institution's context is what distinguishes these institutions from other frameworks in that wider context or enterprise.

*Id.* (citation omitted).

<sup>21</sup> OSTROM, *supra* note 18, at 6. Ostrom defines a framework as the level of analysis necessary to identify the elements and relationships among those elements necessary to engage in institutional analysis, and which provides the most general set of variables that therefore should apply to all settings and institutions. *Id.* at 28. Within the framework is nested the concept of theory in social science. She lists a wide variety of theories that have framed research and policy analysis on institutions: microeconomic, game, transaction cost, social choice, public choice, constitutional, and covenant theories, as well as theories of public goods and common pool resources. *Id.* Several of these theories

this framework will help researchers focus on the simplest unit of analysis—the action situation.<sup>22</sup> Researchers analyze the situation, decide what assumptions to make about participants, predict outcomes, and test the predictions empirically.<sup>23</sup>

However, if the data does not support the predictions, it may be necessary to examine the deeper layers within which the action situation is embedded. For example, structures are nested; families, firms, communities, industries, states, nations, transnational alliances, and others are all structures that can be viewed in isolation or as part of a larger whole.<sup>24</sup> Thus, Ostrom borrows from complex adaptive systems literature the concept of the holons: “nested subassemblies of part-whole units.”<sup>25</sup> To apply this concept to DSD, one might consider a court-connected mediation program as a holon nested within the structure of the court, which is nested in the judicial branch, which in turn is nested within the structure of the state or federal government.

To analyze an action situation, Ostrom uses seven categories of information:

- (1) the set of participants [single individuals or corporate actors], (2) the positions to be filled by participants, (3) the potential outcomes, (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages], (5) the control that an individual has in regards to this function, (6) the information available to participants about actions and outcomes and their linkages, and (7) the costs and benefits—which serve as incentives and deterrents—assigned to actions and outcomes.<sup>26</sup>

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have emerged in legal scholarship about disputing and dispute systems. My all time favorite is Marc Galanter’s use of game theory and transaction cost theory. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (examining the strategic advantages of repeat players in the civil justice system). Within the concept of theory is nested a specific model with hypotheses predicting what a particular action arena will produce as outcomes given its structure.

<sup>22</sup> Ostrom focuses on two holons in the action arena, which is defined as at unit of analysis in which participants (first holon) and the action situation (second holon) interact in ways affected by other outside variables and produce outcomes. OSTROM, *supra* note 18, at 13.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 32; see generally Chapter 2, at 32–68. Ostrom explains how to operationalize these concepts using game theory to structure experiments in a laboratory in Chapter 3, at 69–98.

These are the common structural components that represent the building blocks for all institutions at their most general level. One can readily see how we might use these categories of information to understand DSD. For example, a mediation design affords more control over the outcome of the function of dispute resolution than an arbitration design. On the other hand, limited discovery in a DSD might afford participants significantly less information about actions and outcomes and their linkages.

Once a researcher understands the initial action arena, she will often “zoom out”<sup>27</sup> to understand the outside variables that are affecting it; this is a two-stage process. First, the action arena now becomes a dependent variable subject to factors in three categories of variables: “(1) the *rules* used by participants to order their relationships, (2) the attributes of the *biophysical world* that are acted upon in these arenas, and (3) the structure of the more general *community* within which any particular arena is placed.”<sup>28</sup> In the second stage of the analysis, the researcher will examine linkages between one action arena and others; either in sequence or at the same time.<sup>29</sup> For example, in DSD, parties in mediation negotiate in the shadow of the civil justice system. The trial is an action arena that follows in sequence upon a failed civil or commercial mediation.

As lawyers, we tend to focus more on the rules than on the other two categories of variables.<sup>30</sup> Ostrom’s discussion of rules is central to understanding DSD. She defines rules for the purpose of Institutional Analysis and Development as “shared understandings by participants about

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<sup>27</sup> *Id.* at 15.

<sup>28</sup> OSTROM, *supra* note 18, at 15. Ostrom explains how different disciplines within social science might cause a researcher to focus on one or another cluster of these variables:

Anthropologists and sociologists tend to be more interested in how shared or divisive value systems in a community affect the ways humans organize their relationships with one another. Environmentalists tend to focus on various ways that physical and biological systems interact and create opportunities or constraints on the situations human beings face. Political scientists tend to focus on how specific combinations of rules affect incentives. Rules, the biophysical and material world, and the nature of the community all jointly affect the types of actions that individuals can take, the benefits and costs of these actions and potential outcomes, and the likely outcomes achieved.

*Id.* at 16. Lawyers also focus on the rules, but for the strategic purpose of advancing the interests of their clients as agents of participants in the action arena of the arbitration, administrative agency, court, or other forum.

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Ostrom also reports that her book focuses primarily on rules, which are of central interest to political science and policy analysts, of which she counts herself one. *Id.* at 29.

*enforced* prescriptions concerning what actions (or outcomes) are *required*, *prohibited*, or *permitted*.<sup>31</sup> She describes how rules can emerge through processes of democratic governance, or through groups of people who organize privately, such as corporations or membership associations, or within a family or work team.<sup>32</sup> Rules can evolve as working rules that are a function of what individuals decide to do in practice. In other words, her concept of rules would encompass rules in DSD structures that governments create, those that parties mutually negotiate, and those that one corporate player imposes on a weaker party in an economic transaction.

Moreover, institutional analysis is aimed at all institutions—both those within an open, democratic society governed by the rule of law and also those in other systems where rules and attempts to enforce them exist, but people generally try to get away with noncompliance.<sup>33</sup> Rules are also formulated in language, an imperfect and sometimes ambiguous tool, and hence they depend upon a generally shared understanding of meaning by humans who interpret and apply them in action situations. Thus, rules may or may not be predictable and may or may not produce stability in human action. Compliance with rules is a function of monitoring and enforcement.<sup>34</sup>

Ostrom observes that it is also a function of a shared sense that the rules are “appropriate.”<sup>35</sup> One might argue that this word is an indirect way to say that people view the rules as just on some measure or definition of justice.

The second cluster of exogenous variables concerns the biophysical and material world.<sup>36</sup> These encompass not only what is actually physically possible, but also notions of goods and services, costs and benefits. Goods and services, particularly in the economics literature, are categorized by whether they are excludable (how hard it is to keep others from having or using them) or subtractable (whether if you use them there are fewer or less

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<sup>31</sup> *Id.* at 18. This is a “rule” in the sense of a regulation adopted by an authority. Ostrom describes three other possible definitions of rules from the literature of social science; specifically rules as instructions for successful strategies, or rules as precepts such as the Golden Rule, or rules as principles that can be true or false, such as the laws of physics. *Id.* at 17–18.

<sup>32</sup> OSTROM, *supra* note 18, at 19.

<sup>33</sup> *Id.* at 20. She describes this as rules-in-form being consistent, or inconsistent, with rules-in-practice.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 15.

for everyone else).<sup>37</sup> Low excludability creates the free rider problem. High subtractability requires effective rules.

These categories can be viewed as contexts within which people experience conflict or as things over which people have disputes. They are thus useful for analyzing the nature of cases that go through a DSD and the outcomes that are possible. For example, environmental conflict resolution often addresses disputes over common pool natural resources.<sup>38</sup> Commercial contracts usually entail disputes over private goods. DSDs, in an effort to foster transitional justice, have as their goal the creation of public goods such as safety, security, and stability.<sup>39</sup> The nature of the cases or conflict subject to the design helps inform our assessment of its structure's effectiveness and also helps define the universe of outcomes from the design. It may also foreshadow expectations about what kind of justice the DSD should produce.

The third cluster of variables involves community.<sup>40</sup> Of particular relevance are generally accepted values of behavior (sometimes called culture), the level of shared or common understanding about the structure of the action arena, the homogeneity of their preferences, the size of the community, and the level of income or asset inequality.<sup>41</sup> These variables help us understand and identify some of the differences between indigenous peoples' institutions for addressing conflict<sup>42</sup> and those of traditional Western institutions.<sup>43</sup> They can inform analysis of how a DSD entailing

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<sup>37</sup> *Id.* at 23. These two dimensions yield four categories of goods: toll or club, private, and public goods, and common pool resources. Toll or club goods are low in both excludability and subtractability (the Massachusetts Turnpike); private goods are high in subtractability but easy to exclude people from or low in excludability (buying things at Wal-Mart); public goods are not subtractable and hard to exclude people from (peace); and common pool resources are high in subtractability and hard to exclude people from (fish in the sea). *Id.* at 24.

<sup>38</sup> OSTROM, *supra* note 18, at 255–80.

<sup>39</sup> RUTI G. TEITEL, TRANSITIONAL JUSTICE 11 (2000) (rejecting a single absolute definition of justice in favor of one that is contextual, multiple, and relative).

<sup>40</sup> OSTROM, *supra* note 18, at 15.

<sup>41</sup> *Id.* at 26–27.

<sup>42</sup> See, e.g., William Bradford, "With a Very Great Blame on Our Hearts": *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002) (describing Native American institutions for resolving conflict).

<sup>43</sup> See, e.g., ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS (1996) (describing the elements of court-connected DSDs in the U.S. federal district courts and reporting on the variation of designs).



mediation in Korea<sup>44</sup> or Japan<sup>45</sup> might differ from that in a community mediation center in the U.S.<sup>46</sup>

Institutional analysis provides a structure that we need to apply systematically and rigorously to DSD. As Ostrom observes, “[w]ithout the capacity to undertake systematic, comparative institutional assessments, recommendations of reform may be based on naive ideas about which kinds of institutions are ‘good’ or ‘bad’ and not on an analysis of performance.”<sup>47</sup> Institutional analysis can bring a higher level of conversation to the field of dispute resolution, beyond a debate over evaluative, facilitative, or transformative mediation, beyond a debate over whether mandatory arbitration is right or wrong, but toward an understanding of process in context.

What institutional analysis does not bring to the conversation is the normative concept of justice. Institutional analysts are examining the performance and outcomes of an institution from the standpoint of how they affect relevant public policy. This form of analysis is essential for the field of DSD; however, it is not sufficient. In addition to using institutional analysis, DSD analysts should be examining the performance and outcomes of a particular design in relation to its impact on some conception of justice.

## II. DISPUTE SYSTEM DESIGN

As a field, DSD is correctly understood as a form of institutional design. Perhaps it is best understood as applied institutional design, or institutional design in practice. First, this section will sketch the evolution of DSD as a

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<sup>44</sup> See, e.g., Nam Hyeon Kim et al., *Community and Industrial Mediation in South Korea*, 37 J. CONFLICT RESOL. 361 (1993); Dong-Won Sohn and James A. Wall, Jr., *Community Mediation in South Korea: A City-Village Comparison*, 37 J. CONFLICT RESOL. 536 (1993).

<sup>45</sup> See, e.g., Ronda Roberts Callister & James A. Wall, Jr., *Japanese Community and Organizational Mediation*, 41 J. CONFLICT RESOL. 311 (1997).

<sup>46</sup> See, e.g., Patrick G. Coy & Timothy Hedeon, *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 SOC. Q. 405 (2005) (describing Western community mediation); Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289 (2005) (describing the disconnect between Western-style mediation and Nepalese culture); Timothy Hedeon, *Institutionalizing Community Mediation: Can Dispute Resolution “of, by, and for the People” Long Endure?*, 108 PENN ST. L. REV. 265 (2003) (describing the changes to community mediation as it moves away from an independent institution for neighborhoods to an institution embedded in the courts, among other changes).

<sup>47</sup> OSTROM, *supra* note 18, at 29.

field. Second, I present an evolving catalogue of structural variables that researchers have used to compare designs in the field of ADR. Third, I describe the problem of control over DSD and argue it is one to which researchers should pay more attention. In each section, I give examples of how we might use institutional analysis to deepen our understanding of DSD.

### A. *DSD in Organizations*

Although DSD applies to a wide variety of systems, as a field it emerged in the context of organizational conflict and workplace disputes. Historically, organizations reacted to conflict—they did not systematically plan how to manage it. They used existing administrative or judicial forums to address it.<sup>48</sup> Organizations became dissatisfied with traditional time-consuming and costly processes that often did not produce satisfactory outcomes.<sup>49</sup> Workplace conflict often resulted in inefficiency; a quality conflict management system was essential.<sup>50</sup> Lipsky, Seeber, and Fincher suggest that the rise of ADR in the workplace reflects a changing social contract between employers and employees.<sup>51</sup> In the first part of the twentieth century, employers dictated workplace rules. Through collective bargaining protected by law, unions began to change the top-down workplace structure; these negotiations yielded the private justice system of grievance arbitration. Today, with unionism in decline, a new system of conflict resolution is emerging.<sup>52</sup>

These changes have led to the concept of DSD, a term coined by Professors William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization through which it manages conflict through a series of steps or options for process.<sup>53</sup> They

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<sup>48</sup> DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* 6 (2003). The authors also observe that DSD may serve as a union avoidance strategy.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 7–8.

<sup>51</sup> *Id.* at 36.

<sup>52</sup> *Id.* at 29–74 (describing a much more detailed account of the changing social contract in the United States).

<sup>53</sup> WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 41–64 (1988). Interest-based systems focus on the disputants' underlying needs (interests), such as those for security, economic well-being, belonging to a social group, recognition from others, and autonomy or control. Rights-based processes focus on legal entitlements under the language of a contract, statute,

argued that dispute resolution processes can focus on interests, rights, or power,<sup>54</sup> but that organizational conflict management systems will function better for the stakeholders if they focus primarily on interests. A healthy system should only use rights-based approaches (arbitration or litigation) as a fallback when disputants reached impasse; parties should not generally resort to power.

Organizational DSDs can take a myriad of forms, including a multi-step procedure culminating in mediation, arbitration, ombudspersons<sup>55</sup> programs giving disputants many different process choices,<sup>56</sup> or simply a single-step binding arbitration design. The field of dispute resolution broadly adapted the concept of DSD beyond organizations with employment conflict and courts to other legal and administrative contexts. There are growing numbers of conflict management or dispute resolution programs in the substantive areas of education, the environment, criminal justice, community or neighborhood justice, domestic relations and family law and in settings ranging from

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regulation, or court decision. Power-based systems are least effective as a basis for resolving conflict; workplace examples include strikes, lockouts, and corporate campaigns. Their work on dispute system design grew from experience with industrial disputes in the coal industry. After a series of wildcat strikes, it became clear that the traditional multi-step grievance procedure culminating in binding arbitration was not meeting the needs of coal miners, unions, and management. Ury, Brett, and Goldberg suggested an experiment: grievance mediation. This involved providing mediation, a process for resolving conflict based on interests, as soon as disputes arose. The addition of the grievance mediation step changed the traditional rights-based grievance arbitration dispute system design to one including an interest-based “loop-back,” i.e., a step that returned the disputants to negotiation, albeit with assistance.

<sup>54</sup> *Id.* at 3–19. Recent experimental work empirically supports the emphasis on interests in DSD. See Jean Poitras & Aurélie Le Tareau, *Dispute Resolution Patterns and Organizational Dispute States*, 19 INT’L. J. CONFLICT MGMT. 72, 84 (2008).

<sup>55</sup> An ombudsperson program is an organizational dispute system design in which one person, generally with direct access to upper management, serves as a contact point for all streams of conflict in the organization, and assists employees and consumers with identifying an appropriate process for addressing disputes. See International Ombuds Association, <http://www.ombudsassociation.org> (last visited Feb. 7, 2009); Mary P. Rowe, *The Ombudsman’s Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (1991).

<sup>56</sup> Some argue that best practice in institutional DSD is represented by the integrated conflict management system, a system in which there are multiple points of entry and parallel processes suited to the variety of conflicts in the organization, whether with employees, suppliers, service providers, contractors, consumers, customers, clients, community, or the broader public. See generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); Association for Conflict Resolution, <http://www.acrnet.org> (last visited Feb. 7, 2009).

federal, state, and local governments to a variety of private and nonprofit organizations.<sup>57</sup>

### *B. Elements of DSD: Choices Become Rules That Create Structures*

We can use Ostrom's framework to better understand and identify the elements of DSD. If one surveys program evaluations on both court-annexed<sup>58</sup> and stand-alone ADR programs, one can identify a number of distinct structural variables and/or choices that make up a DSD.<sup>59</sup> These include, but are not limited to:

1. The sector or setting for the program (public, private, or nonprofit);
2. The overall dispute system design (integrated conflict management system, silo or stovepipe program, ombuds program, outside contractor);

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<sup>57</sup> For review articles on field studies and evaluation of the uses of mediation and DSD in the contexts of employment, education, criminal justice, the environment, family disputes, civil litigation in courts, and community disputes, see Symposium, *Conflict Resolution in the Field*, 22 CONFLICT RESOL. Q. 1, 1–320 (2004). DSD occurs within and outside the context of a single organization. Courts and administrative agencies engage in DSD when they adopt alternative dispute resolution programs or supervise mass tort claim systems. For extensive background on DSD efforts in the federal government, see Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/> (last visited Feb. 7, 2009). For evaluation reports reflecting the results of DSD in the federal courts, see Federal Judicial Center, <http://www.fjc.gov/> (last visited Feb. 7, 2009). For similar reports reflecting DSD in state courts, see National Center for State Courts, <http://www.ncsc.org> (last visited Feb. 7, 2009). DSD has addressed the design of legal institutions and constitutions. See Janet Martinez & Stephanie Smith, *Dispute System Diagnosis & Design*, 14 HARV. NEGOT. L. REV. (Forthcoming 2009).

<sup>58</sup> An excellent resource on DSD in the federal courts is PLAPINGER & STIENSTRA, *supra* note 43. For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, see The Resolution Systems Institute: Program Evaluations, <http://aboutrsi.org/publications.php?sID=9> [hereinafter “RSI”] (last visited Feb. 7, 2009).

<sup>59</sup> I first prepared this list as a suggested frame for contributors to a special double issue of CONFLICT RESOLUTION QUARTERLY intended to address the challenge to prove that dispute resolution makes a difference. The project was funded by the William and Flora Hewlett Foundation in 2003. In collaboration with CRQ and its then editor-in-chief Tricia Jones, the Indiana Conflict Resolution Institute at Indiana University commissioned review articles summarizing the field and applied research literature on different substantive areas of practice in the field of dispute resolution. The goal was to capture results in the “grey literature” of program evaluations not published in traditional academic outlets. Articles summarized evaluations of DSDs in employment, the environment, education, courts, community justice, restorative justice, and domestic relations or family law. Invited commentators also offered suggestions for future research. See Symposium, *supra* note 57, at 1–320.

3. The subject matter of the conflicts, disputes, or cases over which the system has jurisdiction;<sup>60</sup>
4. The participants eligible or required to use the system;<sup>61</sup>
5. The timing of the intervention (before the complaint is filed, immediately thereafter, after discovery or information gathering is complete, and on the eve of an administrative hearing or trial);
6. Whether the intervention is voluntary, opt out, or mandatory;
7. The nature of the intervention (training, facilitation, consensus-building, negotiated rulemaking, mediation, early neutral assessment or evaluation, summary jury trial,<sup>62</sup> non-binding arbitration, binding arbitration) and its possible outcomes;
8. The sequence of interventions, if more than one;
9. Within intervention, the model of practice (if mediation, evaluative, facilitative or transformative; if arbitration, rights or interests, last-best offer, issue-by-issue or package, high-low, etc.);
10. The nature, training, qualifications, and demographics of the neutrals;<sup>63</sup>
11. Who pays for the neutrals and the nature of their financial or professional incentive structure;<sup>64</sup>
12. Who pays for the costs of administration, filing fees, hearing fees, hearing space;
13. The nature of any due process protections (right to counsel, discovery, location of process, availability of class actions, availability of written opinion or decision);

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<sup>60</sup> E.g., Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003) (discussing neighborhood disputes).

<sup>61</sup> For example, drug treatment courts provide an alternative to traditional criminal prosecution and incarceration for drug users. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 852–61 (2000) (describing how drug courts collaborate with service providers to coordinate the services provided).

<sup>62</sup> See generally Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469 (2003); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89 (1991).

<sup>63</sup> See, e.g., Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511, 512–17 (2005).

<sup>64</sup> On one mechanism for handling arbitration costs, see Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729 (2006) (arguing that arbitration costs are generally not a barrier to asserting a claim in arbitration).

14. Structural support and institutionalization with respect to conflict management programs or efforts to implement; and

15. Level of self-determination or control that disputants have as to process, outcome, and dispute system design. Is it both parties together, one party unilaterally, or a third party for them?

Each of these categories entails a structural element of the DSD. Moreover, each of the choices must be embodied in a contract, policy, guideline, regulation, statute, or other form of rule.

Ostrom argues that there are three related concepts: strategies, norms, and rules: “[I]ndividuals adopt strategies in light of the norms they hold and within the rules of the situation within which they are interacting.”<sup>65</sup> Even when we limit our use of rules to regulation or prescription subject to enforcement, there are nevertheless many types of rules.<sup>66</sup> Arguing that we need to use simplified, broad, and general types or classes of rules to accumulate comparable research and advance the field of institutional design, Ostrom proposes seven kinds of rules: rules regarding positions, boundaries, choices, aggregation, information, payoffs, and scope.<sup>67</sup>

Using Ostrom’s categories, designers identify who is eligible to use the program; this is a position rule. For example, some federal sector employers have adopted mediation programs that only people who file an Equal Employment Opportunity complaint may invoke.<sup>68</sup> Designers identify what

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<sup>65</sup> OSTROM, *supra* note 18, at 175.

<sup>66</sup> *Id.* at 18. See generally *id.* at 186–215 for a description of different kinds of rules.

<sup>67</sup> *Id.* at 190. Ostrom provides very general definitions:

Position rules create positions (e.g. member of a legislature or a committee, voter, etc.). Boundary rules affect how individuals are assigned to or leave positions and how one situation is linked to other situations. Choice rules affect the assignment of particular action sets to positions. Aggregation rules affect the level of control that individual participants exercise at a linkage within or across situations. Information rules affect the level of information available in a situation about actions and the link between actions and outcome linkages. Payoff rules affect the benefits and costs assigned to outcomes given the actions chosen. Scope rules affect which outcomes must, must not, or may be affected within a domain.

*Id.*

<sup>68</sup> The largest employment mediation program in the world is the United States Postal Service’s REDRESS® Program, which is open to EEO complainants. Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. (forthcoming 2009); see also LISA B. BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE*. (IBM Center for the Business of Government 2003), available at [http://www.businessofgovernment.org/pdfs/Bingham\\_Report.pdf](http://www.businessofgovernment.org/pdfs/Bingham_Report.pdf); Lisa Blomgren

cases the design will cover; this is a boundary rule. For example, some federal agencies only permit mediation of discrimination complaints, while others broaden their program to encompass a wider variety of workplace conflict, such as mentoring disputes outside of EEO law.<sup>69</sup> An ADR program may be voluntary, mandatory, or opt out; this is a choice rule because it defines what action or action set a person/position has in the program. For example, some courts have mandated nonbinding arbitration as a prerequisite to a civil trial.<sup>70</sup>

Aggregation rules are critically important in negotiated rulemaking and environmental or public policy consensus-building designs. Are the parties going to decide outcomes by unanimous consensus or are they going to use a majority vote rules?<sup>71</sup> One can imagine that unanimous consensus rules would make it harder for a collaborative network to take action compared to majority vote because one party could exercise a veto.

DSDs that restrict discovery, as in some of the early abuses in mandatory, adhesive employment arbitration programs, are clearly rules about what information participants can use in the DSD to persuade the neutral or the other participants.<sup>72</sup> DSDs can also limit the award or outcome of the process or intervention, which represent payoff rules. For example, some arbitration plans have high-low provisions that determine at the outset the maximum and minimum award an arbitrator may order.<sup>73</sup> The early

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Bingham et al., *Mediation of Discrimination Complaints at the USPS: Purpose Drives Practice*, in *ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT: PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS*, 269 (Stephen F. Befort & Patrick Halter eds., 2007).

<sup>69</sup> Howard Gadlin is the Ombudsperson for the National Institutes of Health and has written extensively about ombuds programs that have this broader scope.

<sup>70</sup> Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 *J. DISP. RESOL.* 81, 94–99 (2002) (critiquing mandatory mediation and advocating arbitration in court-connected programs as a dignified alternative to trial).

<sup>71</sup> In environmental conflict resolution, which is characterized by the participation of many parties representing diverse stakeholders, DSD is the first phase of the process. See generally *THE CONSENSUS BUILDING HANDBOOK* 61–168 (Lawrence Susskind et al. eds., 1999) (discussing issues of who designs and structures a consensus process, the design phase, and the design committee); Lawrence E. Susskind & Jeffrey L. Cruikshank, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* 169–190 (2006).

<sup>72</sup> Mei L. Bickner et al., *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, 52 *DISP. RESOL. J.*, Jan. 1997, at 8, 80.

<sup>73</sup> See, e.g., Frank E. A. Sander & Lukasz Rozdeicz, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 *HARV. NEGOT. L. REV.* 1, 14 (2006) (“a party may want the recovery not to be larger or

version of the Administrative Dispute Resolution Act,<sup>74</sup> which authorized federal agency use of ADR, provided that the federal agency could reject the supposedly “binding” arbitration award; the other party could not.<sup>75</sup> Using Ostrom’s categories, this rule imposed additional process costs on the non-federal party. Not surprisingly, parties were reluctant under this rule to agree voluntarily to arbitrate with the agency, and under the statute, agencies could not mandate arbitration. Subsequently, this rule was changed to improve the functioning of federal DSDs involving arbitration.

When the DSD entails mediation, that choice of process is a form of scope rule; it determines that the neutral does not have the authority to take the action of imposing an outcome on the disputants.<sup>76</sup> Cooling off periods that allow the parties to reject a tentative agreement reached in mediation within a certain period are also scope rules in that they define the range of possible outcomes of the DSD.<sup>77</sup>

The purpose of this exercise is to illustrate how we might more systematically analyze and compare the implicit rule choices in varying DSDs. Once we can compare the rules, we can better understand the differences in outcomes that systems produce. This is policy analysis, and it is implicit in the calls for research on dispute resolution.<sup>78</sup>

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smaller than a certain number and will agree to a resolution only within that range (high-low arbitration”).

<sup>74</sup> Alternative Means of Dispute Resolution in the Administrative Process, 5 U.S.C. §§ 571–584 (2007) [hereinafter “ADRA”].

<sup>75</sup> Cynthia B. Dauber, Comment, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 185–86 (1995); see also Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?* 6 J. PUB. ADMIN. RES. & THEORY 383 (1996); Jeffrey M. Senger, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT (2003).

<sup>76</sup> For detailed descriptions of alternative mediation practices, see Christopher Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d ed. 2003) (facilitative mediation); Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 41–84 (2005) (transformative mediation).

<sup>77</sup> Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 86–89 (2001) (advocating a cooling off period to counter undue mediator pressure to settle).

<sup>78</sup> See generally Lisa B. Bingham, *Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (2002) (arguing for policy analysis on how DSD affects mediation outcomes); Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277 (2003) (outlining an ambitious multi-disciplinary and inter-disciplinary research agenda for the field of dispute resolution); John Lande, Commentary, *Focusing on*



There have been efforts to evaluate and assess dispute resolution that take into account elements of DSD. Research reviews examine court programs<sup>79</sup> and programs in employment,<sup>80</sup> education,<sup>81</sup> the environment,<sup>82</sup> community mediation,<sup>83</sup> family and domestic relations ADR,<sup>84</sup> and victim-offender mediation or restorative justice.<sup>85</sup>

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*Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RESOL. Q. 89, 93–97 (2004) (arguing that researchers should examine outcomes including substantive justice, empowerment and recognition, and interest-based problem solving).

<sup>79</sup> For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, see The Resolution Systems Institute, *supra* note 58; Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843 (2004); for a recent review of court-connected ADR using DSD as its organizing frame, see Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004); Lande, *supra* note 78.

<sup>80</sup> Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RES. Q. 145 (2004) (concluding that DSDs using mediation has proven itself capable of producing positive organizational outcomes, while there is no evidence that nonunion employment arbitration has that impact); *see also* David B. Lipsky & Ariel C. Avgar, Commentary, *Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RESOL. Q. 175 (2004) (advocating multivariate models and more sophisticated statistical techniques to measure the impact of employment dispute resolution).

<sup>81</sup> Tricia S. Jones, *Conflict Resolution Education: The Field, the Findings, and the Future*, 22 CONFLICT RESOL. Q. 233, 243–51 (2004) (reporting that peer mediation in elementary schools has positive outcomes for student mediators in that they gain in social and emotional intelligence, and schools gain in improved classroom and school climate, while there is some but less evidence for middle school and high school programs, and arguing for more assessment on curriculum, including conflict resolution, bullying prevention, dialogue, and communicative arts); Jennifer Batton, Commentary, *Considering Conflict Resolution Education: Next Steps for Institutionalization*, 22 CONFLICT RESOL. Q. 269, 270–76 (2004) (arguing for institutionalization of conflict resolution education across programs and for all educators).

<sup>82</sup> E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 192 (2004) (identifying key structural elements that distinguish environmental conflict resolution from other uses of mediation, including its use for upstream conflict in policy making and planning); Kirk Emerson, Rosemary O’Leary, & Lisa B. Bingham, Commentary, *Comment on Frank Dukes’s “What We Know About Environmental Conflict Resolution,”* 22 CONFLICT RESOL. Q. 221, 223–29 (2004) (describing a national database for environmental conflict resolution cases through which data on design differences and outcomes will accumulate over time).

<sup>83</sup> Timothy Hedeem, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101 (2004) (reporting that community mediation centers handle cases in a cost and time effective

However, we need to do a much closer reading of the actual designs. At present, much DSD literature is normative and advocates ‘good process’ in

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way while resolving a broad array of disputes in an appropriate and respectful way). On the need for research related to program design, Hedeem observes, “[o]rganizational-level research into case screening criteria and methods, referral systems and funding relationships, program accessibility, and outreach efforts will benefit the field greatly, providing the basis for informed planning and decision making, as well as enhanced services.” *Id.* at 126. He also raises the question of whether community mediation democratizes justice and leads to greater self-sufficiency. *Id.* at 127; *see also* Linda Baron, Commentary, *The Case for the Field of Community Mediation*, 22 CONFLICT RESOL. Q. 135, 135–36 (2004) (articulating a strategy for action through consistent data collection across varying centers implemented through a mini-grant program by the National Association for Community Mediation with support from the Hewlett Foundation).

<sup>84</sup> Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3 (2004). Kelly’s introduction highlights our need for more systematic institutional analysis in dispute system design:

Variations in research populations, methodologies, measures, and dispute settings have been the norm, making it problematic to generalize about family mediation or rely on a single study. Many research publications failed to provide basic descriptors, such as the nature of the population served, number of sessions and hours of service, the model (if any) mediators used, and whether premediation screening was used. Legal rules and cultural contexts of the jurisdiction that might affect outcomes were rarely described. Despite these problems, convergence on many questions has emerged over two decades, indicating that some major findings regarding family mediation are robust and replicable across settings.

*Id.* at 3–4. Based on studies of mediation in California, Colorado, Ohio, Virginia, and Ontario, Canada, Kelly concludes that mediation has proven itself capable of settling highly emotional disputes (settlement rates range from fifty percent to ninety percent) with durable resolutions and high participant satisfaction, although higher when there is an agreement than without. *Id.* at 28–29. In addition, she reports that participants felt heard, respected, given a chance to say what was important, and not pressured to settle. *Id.* at 29. They also felt they had learned to work together and that the agreement would be good for their children. *Id.* at 29; *See also* Donald T. Saposnek, Commentary, *The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 38–49 (2004) (advocating research that is longitudinal, and examines antecedent conditions, screening and triage of cases, the actual process of mediation, and outcomes for children).

<sup>85</sup> Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 287–96 (2004) (concluding that victim-offender mediation is usually effective at meeting the needs of those who participate, generally has a positive impact on restitution and recidivism rates, and has potential to reduce the costs of certain juvenile and criminal cases); Howard Zehr, Commentary, *Restorative Justice: Beyond Victim-Offender Mediation*, 22 CONFLICT RESOL. Q. 305, 305–06 (2004) (describing other models of restorative justice, including family group conferences and peacemaking circles).

creating the design rather than addressing the substance and outcomes of the rule choices.<sup>86</sup> For example, commentators on DSD discuss how we should involve stakeholders in design and evaluation<sup>87</sup> rather than the fundamental power imbalance between employer and employee that shapes the underlying at-will employment contract<sup>88</sup> or that defines the ability of an employer to relocate union work to another country.<sup>89</sup> DSD analysis should include rules that define substantive rights in the system. The collective bargaining agreement's requirement for just cause for discipline is a choice rule in Ostrom's framework; it affects the assignment of particular action sets to positions. Under a just cause rule, the position of employer is no longer free to fire an employee at will, with or without cause, for no reason or any reason except those prohibited by law.<sup>90</sup>

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<sup>86</sup> See, e.g., COSTANTINO & SICKLES MERCHANT, *supra* note 56 at 49–66, 73–92, 96–116, 168–86 (discussing the role of the consultant or contractor, the use of focus groups to involve stakeholders, the need to do an organizational assessment, and the need to build in evaluation to foster continuous innovation and improvement). This is not to suggest that “good process” is a bad thing, only that it is necessary but not sufficient.

<sup>87</sup> *Id.* at 69–95 and 168–87; John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 111 (2002) (advocating local decisionmaking in the design of court-connected mediation programs).

<sup>88</sup> See, e.g., Clyde Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66–84 (2000).

This distinctive aspect of American labor law is more than a minor oddity concerning protection from dismissal. Its tentacles reach into seemingly remote areas of labor law, for at its roots is a fundamental legal assumption regarding the relation between an employer and its employees. The assumption is that the employee is only a supplier of labor who has no legal interest or stake in the enterprise other than the right to be paid for labor performed. The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise. This includes the work performed and the continued employment of its employees. The law, by giving total dominance to the employer, endows the employer with the divine right to rule the working lives of its subject employees.

*Id.* at 65.

<sup>89</sup> Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 315–27 (2007) (comparing employee rights under individual contract and collective bargaining agreements).

<sup>90</sup> Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 145 (1992) (“Control over employment termination is a major determinant of workplace

We are caught in what Ostrom calls a “babbling equilibrium.”<sup>91</sup> We talk about research results and outcomes in DSD, but we are not using the same language to describe the rules and norms we study, and thus we cannot share meaning. For example, in a recent evaluation of community mediation programs nationwide, researchers had to include multiple ways of defining what counts as a “case.”<sup>92</sup> Is a case a phone call, individual conflict coaching, a mediation intake, completed interviews with the disputants, or an actual mediation session? Not all programs do coaching or interviews before the actual mediation session. Certain small claims court programs provide mediation to the parties with no prior intake process.<sup>93</sup> Before we can talk about the relative justice a DSD produces, we need to be able to compare designs meaningfully and systematically.

### *C. Institutions for Managing Conflict and the Problem of Control Over Design*

Ostrom has herself conducted and also collected extensive empirical research on institutions for managing conflict over common pool resources in environmental and other settings.<sup>94</sup> Through these, she tested and refined a set of design principles that characterize robust institutions, defined as institutions that persist, are stable, and adapt to changing circumstances.<sup>95</sup> These design principles include clearly defined boundaries of the resource and clearly defined rights of individuals who can take it, proportional equivalence between benefits and costs, collective choice arrangements, monitoring, graduated sanctions, conflict-resolution mechanisms, minimal recognition of rights to organize, and nested enterprises in which appropriation, enforcement, monitoring, conflict resolution, and governance are nested in layers. All institutions are amenable to institutional analysis; DSDs as institutions can be critiqued through this set of principles. Of particular salience are principles of collective choice arrangements, minimal recognition of the rights to organize, monitoring, and governance.

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power. The debate over employment at-will focuses on the appropriate approach to the legal regulation of this power.”).

<sup>91</sup> OSTROM, *supra* note 18, at 176.

<sup>92</sup> Beth Gazley, Won Kyung Chang & Lisa Blomgren Bingham, *Collaboration and Citizen Participation in Community Mediation Centers*, 23 REV. POL’Y RES. 843 (2006).

<sup>93</sup> Wissler, *supra* note 79 at 56–57 (finding that in small claims mediation programs, mediation usually occurs on the same day as the trial and that the mediator generally has no information about the case prior to mediation).

<sup>94</sup> OSTROM, *supra* note 18, at 258–80

<sup>95</sup> She first described these in OSTROM, *supra* note 17.

Collective choice arrangements are those in which people who are subject to the rules are included in the group who can make or change the rules.<sup>96</sup> This is functionally the same as what I previously characterized as control over DSD.<sup>97</sup> Dispute systems vary across two separate dimensions of disputant self-determination or control: control over the full system design, and control over a given case using a specific process provided by that design.<sup>98</sup> Control over DSD includes the power to make choices regarding the rules that create the design: for example, what cases are subject to the process, which process or sequence of processes are available, what due process rules apply, and other structural aspects of a private justice system in the list provided above. Within a DSD, control over a given case can address process and/or outcome. One or more parties may give control over the process to a mediator, while they both retain control over the outcome. In mediation, the outcome may be impasse or a voluntary, negotiated settlement. In arbitration, one or more parties may give control over outcome to a third party to issue a binding decision.

Dispute systems, and arguably the justice they produce, vary depending on who is exercising control over their design. The key questions are: (1) who is designing the system; (2) what are their goals, and (3) how have they exercised their power. DSDs generally fall into one of three categories: (1) two or more disputants subject to the system jointly design it (all disputants or parties design); (2) a court, agency, or other third party designs it for the benefit of disputants (third party design); and (3) a single disputant with stronger economic power designs it and imposes it on the other disputant (one party design).

For example, historically, the public civil justice system is the product of design by a third party: the judicial branch with funding from the legislative

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<sup>96</sup> OSTROM, *supra* note 18, at 259.

<sup>97</sup> Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004) (arguing that control over dispute system design shifts the settlement value of cases in commercial mandatory arbitration); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002) (arguing that control over dispute system design changes outcomes in employment arbitration); Bingham, *supra* note 78 (arguing that control over dispute system design makes a difference in mediation outcomes).

<sup>98</sup> For purposes of this discussion, I will use the term “control” to discuss the dispute system design level of analysis. I have previously used the terms “self-determination” and “control” synonymously, recognizing that in other contexts, authors may distinguish between the two.

branch acting for the benefit of disputants.<sup>99</sup> In a sense, this is a system designed through collective choice rules, in that it is designed under the auspices of a constitutional form of government in which voters elect legislators who provide appropriations for the judicial branch. There are at least minimal rights to organize in that court-connected DSDs allow people to have the representation of their choice. Public interest litigants can participate. There can be mediation of a class action or built into a mass tort.<sup>100</sup> Moreover, there is monitoring in third party designs.<sup>101</sup> The government tracks its systems.<sup>102</sup> Courts monitor mediator misconduct.<sup>103</sup> Courts enforce the outcomes of the DSD.<sup>104</sup> They adopt consent decrees<sup>105</sup> and enforce rules on confidentiality.<sup>106</sup> There is some ongoing debate as to the costs and benefits of court-connected DSDs, but their widespread adoption and institutionalization would suggest that these are in rough balance.

Traditionally, private justice systems arise when both or all parties to a dispute have negotiated dispute system design in their contracts, for example in labor relations or commercial contracts. Moreover, they have done so in the shadow of the public justice system, specifically, the courts and

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<sup>99</sup> For a number of downloadable publications evaluating ADR programs in a variety of federal courts, see the website of the Federal Judicial Center, <http://www.fjc.gov> (last visited Feb. 7, 2009).

<sup>100</sup> Hensler, *supra* note 10; Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871 (2001); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1998); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995); Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621 (2006).

<sup>101</sup> See The Resolution Systems Institute, *supra* note 58.

<sup>102</sup> See generally Florida State Courts Alternative Dispute Resolution Program, [http://www.flcourts.org/gen\\_public/adr/RRindex.shtml](http://www.flcourts.org/gen_public/adr/RRindex.shtml) (last visited Feb. 7, 2009); see also New York State Uniform Court System Alternative Dispute Resolution Program, <http://www.courts.state.ny.us/ip/adr/publications.shtml#AnnualReport> (last visited Feb. 7, 2009).

<sup>103</sup> See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>104</sup> See Lande, *supra* note 87 (reviewing case law in which courts consider rules requiring good faith participation in court-connected mediation).

<sup>105</sup> Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796 (1988).

<sup>106</sup> Coben & Thompson, *supra* note 103, at 57–73.

administrative agencies that are third party DSDs. Thus, labor relations DSDs both entail their own collective choice rules, and they are nested within a constitutional government that provides through other collective choice rules, a legal framework in labor law that enforces their agreements.<sup>107</sup> Participants have the right to self-organize. There is transparency allowing them to monitor the results of their DSD over time. Moreover, the disputants themselves can determine whether the costs and benefits of their system are in balance; they can change their standing arbitrator panel, or their third party service provider, or determine to adopt a rule that shifts arbitrator fees to the losing party. Private justice systems in the diamond<sup>108</sup> and cotton<sup>109</sup> industries are robust in Ostrom's sense; they are enduring, stable, adaptive, participatory, characterized by collective choice rules in a private democratic membership structure, subject to monitoring by that membership association, and self-governing.

However, in the past three decades, a new phenomenon has emerged and flourished. A single disputant with superior economic power has taken unilateral control over designing a dispute system for conflicts to which it is a party. Moreover, often they have elected DSDs that effectively restrict recourse to the public civil justice system through adhesive binding arbitration clauses.<sup>110</sup> These DSDs do not have meaningful collective choice

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<sup>107</sup> THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (John E. Higgins, Jr. ed., 5th ed. 2006).

<sup>108</sup> Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

<sup>109</sup> Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

<sup>110</sup> Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004) (arguing that some employers use mandatory arbitration to manage risk, and that repeat players should pay more for the privilege); see also Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375 (2003) (finding that rising individual rights litigation and increased judicial deferral to nonunion arbitration are institutional factors leading to increased adoption of mandatory arbitration in the workplace); Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POL'Y 581 (2004); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1593 (2005) (arguing that risks of compelled ADR include the "likelihood that adhesion contract drafters will use arbitration clauses and related requirements to short-circuit existing legislation with newly drafted provisions protective of their special interests, that contract drafters will, in some cases, go even further and use their drafting power to squelch all claims, and that ADR providers will be sorely tempted to cast their lot with adhesion contract drafters in order to win and retain valuable business"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L.

rules within the holon that is the arbitration program.<sup>111</sup> They are nested in a legal framework for arbitration; in interstate commerce that is the Federal Arbitration Act, which is adopted through collective choice rules in a constitutional form of government, namely our democracy. However, the degree of personal participation in collective choice at the level of national government is attenuated.<sup>112</sup> There are limited or no rights to self-organization in the context of adhesive arbitration. For example, plans attempt to prohibit or preclude class action litigation or arbitration. Some plans prohibit the use of legal counsel, which might otherwise be considered a form of self-organization or freedom of association.<sup>113</sup> Moreover, there is limited transparency in adhesive arbitration because awards generally are confidential unless the parties mutually agree to their publication.<sup>114</sup> Even where states attempt to regulate arbitration to require reporting of outcomes, compliance and enforcement are problematic.<sup>115</sup>

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REV. 1631 (2005) (surveying the emergency of mandatory arbitration in lieu of civil litigation for employment and consumer claims and concluding that it is unjust).

<sup>111</sup> I recognize some scholars would argue that there is consent to form contracts or adhesive arbitration clauses in personnel manuals because the prospective consumer or employee can simply walk away. However, when growing numbers of service providers and employers adopt these practices, there are no meaningful alternatives. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004).

<sup>112</sup> In our representative democracy, participation in the work of the federal government is limited to voting and public participation through the Administrative Procedures Act and its amendments, although there is the potential for more civic engagement through the new governance. See generally Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 1 HASTINGS ANNUAL L. REV. (forthcoming 2009).

<sup>113</sup> See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (holding that there is no First Amendment right to freedom of association with legal counsel within an administrative proceeding established to support veterans seeking benefits for injuries).

<sup>114</sup> See Lisa Blomgren Bingham, *Evaluation Dispute Resolution Programs: Traps for the Unwary*, in LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING 104 (2007); David B. Lipsky et al., *Managing the Politics of Evaluation: Lessons from the Evaluation of ADR Programs*, in LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING 116 (2007).

<sup>115</sup> Lisa Blomgren Bingham et al., *Arbitration Data Disclosure in California: What We Have and What We Need*. Paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles, April 2005 (copy on file with author).



The argument over mandatory arbitration as a DSD imposed on one party by the other boils down to an argument over some form of distributive justice. The Supreme Court has enforced this form of arbitration on the theory that it is a mere substitution of forum, not a change in the substance of the remedy.<sup>116</sup> As the above discussion shows, there are reasons to believe this may not be true. Arbitration outcomes may differ systematically from litigation outcomes. Rigorous empirical research might answer this question. However, there are obstacles to that research.<sup>117</sup> These obstacles operate as barriers to improving DSD.

This brief discussion is intended only to illustrate the usefulness of an empirically tested, theoretically grounded framework for rigorously

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<sup>116</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>117</sup> This is a DSD issue, because the designers could provide for disclosure for purposes of monitoring, a characteristic of robust institutions in Ostrom's IAD framework. Instead, most mediation and arbitration occurs in the context of an agreement under which all parties agree to maintain the confidentiality of communications within the process and usually agree not to disclose its outcome. Mediated settlements and arbitration awards are unpublished and confidential. In order to obtain access to data, researchers must demonstrate a willingness to respect that confidentiality, and must develop data collection plans in collaboration with the source. Mediators are even more reluctant than arbitrators to introduce an observer into the delicate interpersonal dynamics of a dispute. The mediator may already be concerned about an imbalance of power between the disputants, and unwilling to bring another person who is a stranger into the caucus with either party. Common methods researchers have used to overcome this problem include: mail and telephone surveys to organizations regarding their dispute resolution plans or the neutral mediators or arbitrators involved, mail and telephone surveys with participants in the processes, experimental research in which neutrals provide data regarding a hypothetical case, and less commonly, examination of archival case files where available. These methods often present problems due to low response rate or sample selection bias. For example, selection bias may occur when disputants have a choice of dispute resolution process, as in many voluntary, court-annexed programs. Moreover, in mandatory arbitration, all cases from a given corporation or organization go into arbitration; it is hard to determine whether that organization's cases are similar to the population of cases found in an administrative agency's or court's docket. Often, it is not feasible to afford dispute resolution by random assignment; disputants excluded from one option might not perceive it as fair. Therefore, a researcher may have samples of participants who use mediation or arbitration and others who do not, but these categories are not random. It is rarely possible to use a pilot site/control site method to structure a study, although this approach is certainly desirable in larger organizations. In order to use a before and after design, the researcher must become involved with an organization early in its development of a dispute resolution program, and collect data over a prolonged period of time. Together, these problems operate to limit what researchers have learned about dispute resolution and the outcomes of various dispute system designs.

analyzing how well DSDs function as institutions. In the next generation of DSD, we need to move beyond arguments over whether a particular design or model is good or bad based on a priori assumptions and incomplete data. Once we have a sound empirical basis to judge, we can begin to assess the nature and quality of justice we have designed and whether the DSD is effectively delivering it.

### III. VARIETIES OF JUSTICE IN LEGAL INSTITUTIONS AND OTHER SYSTEMS FOR MANAGING CONFLICT

How should we compare civil and criminal ‘justice’ systems and justice in ADR? There are a number of arguments that proponents advance to support both settlement and ADR. Galanter and Cahill (2002) provide the best catalogue and critique of these arguments in their Table 1:<sup>118</sup>

#### **TABLE 1: Reasons to Think Settlements Are Good**

##### **A. The Party-Preference Arguments**

1. Party pursuit: Settlement (rather than adjudication) is what the parties seek. In other words, they “vote with their feet.”
2. Party satisfaction: Settlement leads to greater party satisfaction.
3. Party needs: Settlement is more responsive to the needs or underlying preferences of parties.

##### **B. The Cost-Reduction Arguments**

4. Party savings: Settlement saves the parties time and resources, and spares them unwanted risk and aggravation.
5. Court efficiency: Settlement saves the courts time and resources, conserving their scarce resources (especially judicial attention); it makes courts less congested and better able to serve other cases.

##### **C. The Superior-Outcome Arguments**

6. Golden mean: Settlement is superior because it results in a compromise outcome between the original positions of the parties.
7. Superior knowledge: Settlement is based on superior knowledge of the facts and the parties’ preferences.
8. Normative richness: Settlement is more principled, infused with a wider range of norms, permitting the actors to use a wider range of normative concerns.

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<sup>118</sup> Galanter & Cahill, *supra* note 8.

9. Inventiveness: Settlement permits a wider range of outcomes, greater flexibility in solutions, and admits more inventiveness in devising remedies.

10. More compliance: Parties are more likely to comply with dispositions reached by settlement.

11. Personal transformation: The process of settlement qualitatively changes the participants.

D. Superior General Effects Arguments

12. Deterrence: Information provided by settlements prevents undesirable behavior by affecting future actors' calculations of the costs and benefits of conduct.

13. Moral education: Settlements may influence estimations of the rightness or feasibility of various sorts of behavior.

14. Mobilization and demobilization: By defining the possibilities of remedial action, settlements may encourage or discourage future legal actors to make (or resist) other claims.

15. Precedent and patterning: Settlements broadcast signals to various audiences about legal standards, practices and expectations.

Interestingly, this catalogue does not expressly refer to justice. Instead, many of the arguments relate to the *administration* of justice; this is particularly true of the cost reduction arguments.<sup>119</sup>

However, part of the dialogue on dispute resolution revolves around whether it delivers justice.<sup>120</sup> DSDs exist in some relation to the rule of law. Professor MacCormack has observed:

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<sup>119</sup> It is nevertheless possible to use some of these arguments as indicators or measures of the presence of certain forms of justice. For example, satisfaction measures are often related to theories of procedural and distributive justice from social psychology. Superior outcome arguments suggest better distributive or substantive justice. Arguments for creativity suggest Pareto Optimality as used by Rawls in his theory of justice as fairness. JOHN RAWLS, *A THEORY OF JUSTICE* 67–69 (1971).

<sup>120</sup> Dispute resolution encompasses a number of 'conflict-resolving institutions,' as that term is used by Kenneth M. Ehrenberg. Ehrenberg, *supra* note 20. He observes:

As Hume famously noted, justice is not an appropriate standard in situations of abundance or enlarged affections. Rather, it is a concept that serves as a criterion by which we resolve conflicts over property distribution, over showing each other the proper amount of respect, and over the appropriate response to situations where others have been wronged. These and other conflicts define the scope of justice. As social constructions or organizations of people that seek to resolve interpersonal conflicts, conflict-resolving institutions obviously deal extensively with the concept of justice.

Law is necessarily geared to some conception of justice, taking account of distributive, retributive, and corrective aspects of justice, to all of which respect for the rule of law is, in the context of the state’s capability for coercion, essential. It is “necessarily geared” to it in the sense that anyone engaged in its administration, whether in a legislative, executive, or judicial capacity, can only be justified in implementing, amending, or interpreting the provisions of the system given a certain condition. This is that they can give grounds for holding that some reasonable conception of justice is satisfied by the provision in question, or that it pursues some element of a reasonably assessed common good in a way that is reasonably coherent with the relevant conception of justice.<sup>121</sup>

There are many different forms, names, definitions, and varieties of justice depending on context: a sampling includes corrective, substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative, and transitional justices. Even within this sampling, there are multiple definitions for a given term. For example, procedural justice has a variety of meanings, depending on whether you examine the term from the perspective of social psychology or jurisprudence.<sup>122</sup> Table 2 reflects the current results of my ongoing effort to collect these varieties of justice.

**Table 2. Varieties of Justice**

| Name                 | Source                                 | Definition   |
|----------------------|--|--|
| Substantive Justice  | Rawls <sup>123</sup>                   | Distributive Justice   |
| Distributive Justice | Posner citing Aristotle <sup>124</sup> | The state distributes money, honors, and things of value   |
| Distributive Justice | Thibaut and Walker <sup>125</sup>      | Equity theory: An allocation is equitable when outcomes are proportional to the contributions of group members |

*Id.* at 169 (citation omitted).

<sup>121</sup> NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 264 (2007).

<sup>122</sup> See *infra* notes 132–37.

<sup>123</sup> RAWLS, *supra* note 119, at 59.

<sup>124</sup> RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 335 (1990).

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|                            |   |   |
|----------------------------|---|---|
| Egalitarian Justice        | Rawls <sup>126</sup><br>Posner citing Ackerman <sup>127</sup> | Distributive justice to allow for compensating undeserved inequalities of birth (affirmative action)  |
| Allocative Justice         | Rawls <sup>128</sup>  | When a given collection of goods is to be divided among definite individuals with known desires and needs, and the individuals did not produce the goods, justice becomes efficiency unless equality is preferred. Leads to classical utilitarian view. |
| Justice as Fairness        | Rawls <sup>129</sup>  | Inequality justified by improving the situation of the least advantaged person in an ordinal ranking  |
| Justice as Fairness        | Thibaut and Walker <sup>130</sup>                             | Equality or needs based allocation  |
| Social Justice             | Posner <sup>131</sup>   | Purely public non-compensatory remedy that views harm as social and not individual entitlement  |
| Macrojustice               | Lipsky et al. <sup>132</sup>                                  | Pattern of outcomes from the DSD  |
| Restitutionary Justice     | Posner <sup>133</sup>   | Strict liability; justice as restitution for harm that one causes, regardless of wrong; a form of distributive justice  |
| Perfect Procedural Justice | Rawls <sup>134</sup>  | Procedure designed to render perfect distributive justice, e.g. person who cuts the cake must take last piece   |
| Pure Procedural Justice    | Rawls <sup>135</sup>  | Distributing goods based on random procedure, as in odds, dice, gambling  |

<sup>125</sup> JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 85–94 (1975).

<sup>126</sup> RAWLS, *supra* note 119, at 100.

<sup>127</sup> POSNER, *supra* note 124, at 338.

<sup>128</sup> RAWLS, *supra* note 119, at 88.

<sup>129</sup> *Id.* at 115.

<sup>130</sup> THIBAUT & WALKER, *supra* note 125, at 122–124.

<sup>131</sup> POSNER, *supra* note 124, at 335–36.

<sup>132</sup> DAVID B. LIPSKY ET AL., *supra* note 48, at 6.

<sup>133</sup> POSNER, *supra* note 124, at 324–27.

<sup>134</sup> RAWLS, *supra* note 119, at 85.

<sup>135</sup> *Id.* at 86.

|                              |  |  |
|------------------------------|--|--|
| Imperfect Procedural Justice | Rawls <sup>136</sup>   | Criminal trials; human error   |
| Procedural Justice           | Thibaut and Walker as cited by Lind and Tyler <sup>137</sup> | Satisfaction and perceived fairness in allocation disputes are affected substantially by factors other than whether the individual has won or lost the dispute   |
| Procedural Justice           | Lind and Tyler <sup>138</sup>                                | When procedures are in accord with fundamental values of the group and the individual, a sense of procedural justice results. Value-expressive function of voice. People value participation in the life of their group and their status as members. |
| Procedural Justice           | MacCoun <sup>139</sup>                                       | Fairness Heuristic Theory: People value fair procedure as a shortcut to deciding whether outcome is fair in a position of uncertainty.   |
| Organizational Justice       | Folger and Cropanzano <sup>140</sup>                         | Procedural justice in the context of the workplace and grievance procedures  |
| Interactional Justice        | Folger and Cropanzano <sup>141</sup>                         | Quality of interpersonal treatment received during the enactment of organizational procedures, concerns about the fairness of the non-procedurally dictated aspects of interaction, including interpersonal justice and informational                |
| Informational Justice        | Bies, Shapiro, Colquitt <sup>142</sup>                       | Explanations about the procedures used to determine outcomes   |

<sup>136</sup> *Id.* at 85.

<sup>137</sup> THIBAUT & WALKER, *supra* note 125 (as described in E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 7–40 (1988)).

<sup>138</sup> LIND & TYLER, *supra* note 137, at 236.

<sup>139</sup> Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. SCI. 171–201 (2005).

<sup>140</sup> See generally ROBERT FOLGER & RUSSELL CROPANZANO, *ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT* (1998).

<sup>141</sup> *Id.*

<sup>142</sup> See generally Jason A. Colquitt, *On the Dimensionality of Organizational Justice: A Construct Validation of a Measure*, 86 J. APPLIED PSYCHOL. 386, 389–91 (2001)

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|                       |  |  |
|-----------------------|--|--|
| Interpersonal Justice | Colquitt <sup>143</sup>                | Degree to which people are treated with politeness, dignity, and respect by authorities  |
| Microjustice          | Lipsky et al. <sup>144</sup>           | Perceptions of justice on a subjective level   |
| Formal Justice        | Posner <sup>145</sup>                  | Reasonable rule, equal treatment, public justice, procedure to establish facts   |
| Formal Justice        | Rawls <sup>146</sup>                   | Justice as regularity, treating similar cases similarly, rule of law in legal institutions, impartial and consistent administration of law and institutions.                                       |
| Personal Justice A    | Posner <sup>147</sup>                  | Corruption, judge resolves dispute based on his/her personal stake in the dispute as a parent, investor, or other interested party   |
| Personal Justice B    | Posner <sup>148</sup>                  | Judge resolves dispute based on the personal characteristics of the disputants   |
| Personal Justice C    | Posner <sup>149</sup>                  | Judge resolves substantive dispute based on particulars of case, using general standard and not rule; ad hoc   |
| Pragmatic Justice     | Posner <sup>150</sup>                  | Judges must be allowed to change their minds, even though the consequence is arbitrary justice   |
| Retroactive Justice   | Posner <sup>151</sup>                  | Justice with rules invented after the fact to address a wrong (Nuremberg)  |
| Corrective Justice    | Posner citing Aristotle <sup>152</sup> | Rectificatory or commutative justice for transactions; when there is injury and wrongdoing, a judge equalizes with a penalty to take away the gain. Assumes an existing structure of legal rights. |

<sup>143</sup> *Id.* at 386–98.

<sup>144</sup> LIPSKY ET AL., *supra* note 48, at 6.

<sup>145</sup> POSNER, *supra* note 124, at 332–34.

<sup>146</sup> RAWLS, *supra* note 119, at 58–59.

<sup>147</sup> POSNER, *supra* note 124, at 318.

<sup>148</sup> *Id.* at 315.

<sup>149</sup> *Id.* at 318–19.

<sup>150</sup> *Id.* at 333.

<sup>151</sup> *Id.* at 332–33.

<sup>152</sup> *Id.* at 312–13.

|                               |  |  |
|-------------------------------|--|--|
| Deterrent Justice             | Posner <sup>153</sup>  | Punishment for injury and wrongdoing in order to deter others  |
| Retributive Justice           | Posner <sup>154</sup>  | Justice as personal revenge or community punishment based on moral outrage   |
| Justice in Dialogue           | Posner citing Ackerman <sup>155</sup>                              | Justice as neutrality. Justice flows from participation in rational discourse about political legitimacy   |
| Communicative Justice         | Posner citing Habermas <sup>156</sup>                              | Idealized speech or undistorted communication  |
| Communitarian Justice         | Feminist Jurisprudence <sup>157</sup>                              | Concern for other people [community], not simply respect for others [individual]   |
| Utilitarian Justice           | Rawls <sup>158</sup>   | Greatest happiness for the greatest number   |
| Restorative Justice           | Wachtel and McCold <sup>159</sup><br>Umbreit et al. <sup>160</sup> | Through atonement, forgiveness, and compassion, restorative justice promotes reconciliation between victim and offender and seeks to reintegrate the offender into the community |
| Transitional Justice          | Teitel <sup>161</sup>  | Using rule of law as a way to reconstitute the collective-across potentially divisive racial, ethnic, and religious lines  |
| Justice in Civil Disobedience | Posner <sup>162</sup>  | Compliance impossible and futility felt as injustice   |
| Injustice                     | Rawls <sup>163</sup>   | Inequalities not to the benefit of all   |

<sup>153</sup> POSNER, *supra* note 124, at 329–30.

<sup>154</sup> *Id.* at 330.

<sup>155</sup> *Id.* at 336.

<sup>156</sup> *Id.*

<sup>157</sup> See generally NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* (2006).

<sup>158</sup> RAWLS, *supra* note 119, at 89.

<sup>159</sup> Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in *RESTORATIVE JUSTICE IN CIVIL SOCIETY* 114, 114–29 (Heather Strang & John Braithwaite eds., 2001).

<sup>160</sup> See generally MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

<sup>161</sup> TEITEL, *supra* note 39, at 213–30.

<sup>162</sup> POSNER, *supra* note 124, at 334.



It is important for aspiring dispute system designers to recognize that these varieties of justice exist. Not all DSDs can produce as outcomes all forms of justice. Some forms of justice are mutually exclusive while others are reconcilable. For example, it is possible to envision a system that provides distributive justice on some definition but does not result in social justice. In the following discussion, I will briefly survey varieties of justice and provide examples of DSDs that illustrate or are relevant to that variety of justice. I hope that this is the beginning of a broader discussion; it is not a comprehensive treatment of the subject.

### *A. Outcomes: Substantive, Distributive, Allocative, Utilitarian, and Social Justice*

In dispute resolution, the terms substantive and distributive justice tend to be used interchangeably to reflect the justice of an outcome produced by a decision process. Posner characterizes Aristotle's concept of distributive justice as being produced when the state distributes money, honors, and other things of value.<sup>164</sup> Rawls distinguishes between substantive justice, reflected in the assignment of fundamental rights and duties and the division of advantages from social cooperation,<sup>165</sup> and formal justice, which is regularity of process.<sup>166</sup> However, substantive justice is also related to social justice. Rawls describes social justice as encompassing the basic structures of society and arrangement of major social institutions into one scheme of cooperation.<sup>167</sup> In order to understand the substantive justice produced by a DSD, one must then examine the underlying substantive law defining rights and obligations. For example, employment-at-will is a rule of law that shapes the substantive justice of a DSD involving adhesive arbitration.

Distributive justice generally pertains to the distribution of outcomes in a society or within that microcosm of society which is a justice system. Rawls refers to it in connection with the distribution of advantages in a society.<sup>168</sup> He describes a form of distributive justice as allocative justice that occurs when a given collection of goods is to be divided among definite individuals with known desires and needs, and the individuals did not produce the

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<sup>163</sup> RAWLS, *supra* note 119, at 62.

<sup>164</sup> POSNER, *supra* note 124, at 313.

<sup>165</sup> RAWLS, *supra* note 119, at 58.

<sup>166</sup> *Id.* at 59.

<sup>167</sup> *Id.* at 54.

<sup>168</sup> *Id.* at 88.

goods.<sup>169</sup> He observes that justice becomes efficiency unless equality is preferred, and that this view of distributive justice is related to classical utilitarianism.<sup>170</sup> In this sense, it relates to macrojustice, which is the pattern of outcomes produced by an institution, system, or DSD.<sup>171</sup> Rawls argues for a form of distributive justice that is “justice as fairness.”<sup>172</sup> Starting from a social system of equal citizenship and varying levels of income and wealth, he argues for a form of distributive justice in which inequality is only justified by improving the situation of the least advantaged person in an ordinal ranking in a situation where no one knows whether he or she will be the least advantaged person.<sup>173</sup>

In social science, distributive justice has roots in social equity theory.<sup>174</sup> It posits that social behavior occurs in response to the distribution of outcomes. Distributive justice emphasizes fairness in the allocation of outcomes. An allocation is equitable when outcomes are proportional to the contributions of group members.<sup>175</sup> Thus, in mediation research, distributive justice suggests that satisfaction is a function of outcome, specifically the fact and content of a settlement or resolution. In theory, participants are more satisfied when they believe that the settlement is fair and favorable. There is a substantial body of empirical research that supports the distributive justice model as an explanation of satisfaction.<sup>176</sup> The research suggests that distributive justice is a better explanation for satisfaction related to conflicts over resource allocation (such as wage disputes) than other cases in which fairness matters.

Related to distributive justice are arguments for particular distributions in light of fairness. For example, egalitarian justice entails compensating people

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> This term has found use in social psychology and philosophy. See SERGE-CHRISTOPHE KOLM, *MACROJUSTICE: THE POLITICAL ECONOMY OF FAIRNESS* (2005).

<sup>172</sup> See also Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 *CARDOZO J. CONFLICT RESOL.* 19–20 (2004) (arguing for a common sense notion of fairness as the guide for mediators to think about justice in mediation).

<sup>173</sup> RAWLS, *supra* note 119, at 87–90.

<sup>174</sup> This discussion of justice in social psychology and organizational behavior is drawn from Lisa Blomgren Bingham, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 *J. DISP. RESOL.* 131, 131 (2006).

<sup>175</sup> THIBAUT & WALKER, *supra* note 125, at 85–94.

<sup>176</sup> See DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* (1981); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975).

for undeserved inequalities, for example by reason of birth.<sup>177</sup> One example includes consent decree DSDs providing for affirmative action to compensate for historic discrimination based on race, ethnicity, or gender. One might also view DSDs providing for classwide reparations in this light.<sup>178</sup> Restitutionary justice imposes strict liability as restitution for harm that one causes, regardless of wrong. It too is a form of distributive justice justified on public policy grounds to reduce risk of harm.<sup>179</sup>

## B. *Procedural Justice*

Procedural justice has multiple definitions. Within the fields of philosophy and jurisprudence, it tends to refer to a method of arriving at distributive justice. Within social psychology and organizational behavior, it refers to individual participant perceptions of fairness of the processes used in resolving conflict. For example, Rawls discusses perfect procedural justice, pure procedural justice, and imperfect procedural justice. Perfect procedural justice is a procedure designed to render perfect distributive justice, for example the rule that the person who cuts the cake must take last piece.<sup>180</sup> Pure procedural justice entails distributing goods based on random procedure such as odds, dice, or gambling.<sup>181</sup> In contrast, imperfect procedural justice refers to the inevitable human error factor in trials, for example the problem of false convictions of innocent people in criminal trials.<sup>182</sup> Recently Professor Solum examined procedural justice from the perspective of what makes a procedure legitimate, and posited two fundamental principles: participation and accuracy.<sup>183</sup> Procedural justice in

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<sup>177</sup> RAWLS, *supra* note 119, at 100; POSNER, *supra* note 124, at 318.

<sup>178</sup> See, e.g., Bradford, *supra* note 42 (describing the argument for reparations for Native Americans).

<sup>179</sup> POSNER, *supra* note 124, at 324–27.

<sup>180</sup> RAWLS, *supra* note 119, at 85.

<sup>181</sup> *Id.* Professor Stulberg argues that it is possible for mediation, properly designed, to represent another process for “pure procedural justice.” Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 214–15 (2005).

<sup>182</sup> RAWLS, *supra* note 119, at 85.

<sup>183</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192–224 (2004) (examining case law and observing that procedural rules may have intentionally substantive functions or action guiding for litigation-related conduct, and that substantive rules may serve procedural functions, such as rules regarding obstruction of justice or particularized decision making as in motions for summary judgment).

this sense of due process has been used to evaluate the World Trade Organization Dispute Settlement Procedure.<sup>184</sup>

In contrast, social psychologists and socio-legal scholars have developed theories of distributive, procedural, and interactional justice in contexts ranging from the courts<sup>185</sup> to the workplace based on participant perceptions of fairness and their satisfaction with various processes. Justice theory in social science examines perceptions of fairness in, and satisfaction with, the process and outcome of institutions to resolve conflict. Procedural justice refers to participants' perceptions about the fairness of the rules and procedures that regulate a process.<sup>186</sup> Thibaut and Walker argued that satisfaction and perceived fairness in allocation disputes are affected substantially by factors other than whether the individual has won or lost the dispute.<sup>187</sup> In contrast to distributive justice, which suggests that satisfaction is a function of outcome (the content of the decision or resolution), procedural justice suggests that satisfaction is a function of the process (the steps taken to reach that decision). Tyler and Lind theorized that when procedures are in accord with the fundamental values of the group and the individual, a sense of procedural justice results due to the value-expressive function of voice;<sup>188</sup> people value participation in the life of their group and their status as members.

Among the traditional principles of procedural justice are impartiality, voice or opportunity to be heard, and grounds for decisions.<sup>189</sup> Procedural issues such as neutrality of the process and decisionmaker,<sup>190</sup> treatment of

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<sup>184</sup> John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1195–1221 (1999).

<sup>185</sup> For excellent syntheses of the procedural justice literature as applied to court-connected dispute resolution, see Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. DISP. RESOL. 549 (2008) and Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L.J. 487 (2007).

<sup>186</sup> WILLIAM G. AUSTIN & JOYCE M. TOBIASEN, *Legal Justice and the Psychology of Conflict Resolution, in THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES* (R. Folger ed., 1984); THIBAUT & WALKER, *supra* note 125, at 1–5.

<sup>187</sup> THIBAUT & WALKER, *supra* note 125, at 117–22.

<sup>188</sup> LIND & TYLER, *supra* note 137, at 230–37.

<sup>189</sup> MICHAEL D. BAYLES, *PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS* 19–85 (1990).

<sup>190</sup> Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115–92 (Mark P. Zanna ed., 1992) [hereinafter Tyler, *Relational Model*].

the participants with dignity and respect,<sup>191</sup> and the trustworthiness of the decisionmaking authority<sup>192</sup> are important to enhancing perceptions of procedural justice. Extensive literature supports procedural justice theories of satisfaction in a variety of contexts involving both courts and dispute resolution.<sup>193</sup> In general, research suggests that if organizational processes and procedures are perceived to be fair, participants will be more satisfied, more willing to accept the resolution of that procedure, and more likely to form positive attitudes about the organization.<sup>194</sup> Procedural justice has been used to examine DSDs involving courts,<sup>195</sup> special education,<sup>196</sup> domestic violence,<sup>197</sup> the 9/11 Victim Compensation Fund,<sup>198</sup> criminal sentencing,<sup>199</sup> and police and citizen interactions,<sup>200</sup> to name but a few examples.

### C. *Organizational Justice: Interactional, Informational, and Interpersonal Justice*

Beginning in the 1980s, organizational justice researchers developed the notion of interactional justice, defined as the quality of interpersonal treatment received during the enactment of organizational procedures.<sup>201</sup> In general, interactional justice reflects concerns about the fairness of the non-

<sup>191</sup> Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness*, in 1 RESEARCH ON NEGOTIATION IN ORGANIZATIONS, 43–55 (R. J. Lewicki et al. eds., 1986) [hereinafter Bies, *Interactional Justice*]; LIND & TYLER, *supra* note 137.

<sup>192</sup> Tyler, *Relational Model*, *supra* note 190.

<sup>193</sup> LIND & TYLER, *supra* note 137; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experience in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990).

<sup>194</sup> LIND & TYLER, *supra* note 137; Tyler, *Relational Model*, *supra* note 190.

<sup>195</sup> Donna Shestowsky, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Poste Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008).

<sup>196</sup> Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004).

<sup>197</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002).

<sup>198</sup> Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZ. L. REV. 95 (2007).

<sup>199</sup> Adam Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 COLUM. HUM. RTS. L. REV. 115 (2006).

<sup>200</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE: A REVIEW OF RESEARCH 283 (Michael Tonry ed., 2003).

<sup>201</sup> Bies, *Interactional Justice*, *supra* note 191, at 44.

procedurally dictated aspects of interaction.<sup>202</sup> Research has identified two components of interactional justice: interpersonal justice and informational justice.<sup>203</sup> These two components overlap considerably. However, empirical research suggests that they should be considered separately as each has differential and independent effects upon perceptions of justice.<sup>204</sup>

Informational justice focuses on the enactment of decisionmaking procedures. Research suggests that explanations about the procedures used to determine outcomes enhance perceptions of informational justice.<sup>205</sup> Explanations provide the information needed to evaluate the structural aspects of the process and how it is enacted.<sup>206</sup> However, for explanations to be perceived as fair they must be recognized as sincere and communicated without ulterior motives,<sup>207</sup> be based on sound reasoning with logically

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<sup>202</sup> See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006) (discussing how interactional justice interacts with psychological biases that create impediments to settlement).

<sup>203</sup> ROBERT G. FOLGER & RUSSELL CROPANZANO, *ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT* (Sage Publication 1998); Tom Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, in *APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS* 77–98 (J. Carroll ed., 1990) [hereinafter Bies, *Formal Procedures*].

<sup>204</sup> Jason A. Colquitt, *On the Dimensionality of Organizational Justice: A Construct Validation of a Measure*, 86 J. APPLIED PSYCHOL. 386, 386–400 (2001); Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 425–45 (2001) [hereinafter Colquitt et al., *Millennium*].

<sup>205</sup> Robert J. Bies, *The Predicament of Injustice: The Management of Moral Outrage*, in 9 RESEARCH IN ORGANIZATIONAL BEHAVIOR 289, 289–319 (L. Cummings & B. M. Staw eds., 1987); Robert J. Bies, & Debra L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676, 676–85 (1988); Jerald Greenberg, *Organizational Justice: Yesterday, Today, and Tomorrow*, 16 J. MGMT. 399, 399–432 (1990); Debra L. Shapiro, *Reconciling Theoretical Differences Among Procedural Justice Researchers by Re-Evaluating What it Means to Have One's Views "Considered": Implications for Third-Party Managers*, in *JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT* 51, 51–78 (Russell Cropanzano ed., 1993); Bies, *Formal Procedures*, *supra* note 203, at 77–98.

<sup>206</sup> Colquitt et al., *Millennium*, *supra* note 204; Jerald Greenberg, *The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice*, in *JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT* 79 (Russell Cropanzano ed., 1993) [hereinafter Greenberg, *Social Side*]; Jerald Greenberg, *Using Socially Fair Treatment to Promote Acceptance of a Work Site Smoking Ban*, 79 J. APPLIED PSYCHOL. 288, 288–97 (1994) [hereinafter Greenberg, *Smoking Ban*].

<sup>207</sup> Robert J. Bies et al., *Causal Accounts and Managing Organizational Conflict: Is It Enough to Say It's Not My Fault?*, 15 COMM. RES. 381, 381–99 (1988).

relevant information,<sup>208</sup> and be determined by legitimate rather than arbitrary factors.<sup>209</sup>

Interpersonal justice reflects the degree to which people are treated with politeness, dignity, and respect by authorities. The experience of interpersonal justice can alter reactions to decisions, because sensitivity can make people feel better about an unfavorable outcome.<sup>210</sup> Interpersonal treatment includes interpersonal communication,<sup>211</sup> truthfulness, respect, propriety of questions, justification,<sup>212</sup> honesty, courtesy, timely feedback, and respect for rights.<sup>213</sup>

Three psychological models explain these research results: control theory,<sup>214</sup> group value theory,<sup>215</sup> and fairness heuristic theory.<sup>216</sup> Control theory is related to social-exchange theory and posits that decision control allows disputants to shape the final outcome while process control allows them to present evidence and arguments that will in turn affect outcome.<sup>217</sup> Group value theory suggests that people value fair process (neutrality and respectful, dignified treatment) because it signals their value and standing within a social group.<sup>218</sup> In early models, the trustworthiness of the third party authority was an element of perceived fairness.<sup>219</sup> Most recently, fairness heuristic theory suggests that people use information about

<sup>208</sup> Debra L. Shapiro & H. B. Buttner, *Adequate Explanations: What are They, and Do They Enhance Procedural Justice Under Severe Outcome Circumstances?* (Paper presented at the annual meeting of the Academy of Management, Anaheim, CA., 1988).

<sup>209</sup> Robert Folger et al., *Relative Deprivation and Procedural Justifications*, 45 J. PERSONALITY & SOC. PSYCHOL., 268, 268–73 (1983).

<sup>210</sup> Colquitt et al., *Millennium*, *supra* note 204; Greenberg, *Social Side*, *supra* note 206; Greenberg, *Smoking Ban*, *supra* note 206.

<sup>211</sup> Bies, *Interactional Justice*, *supra* note 191.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> THIBAUT AND WALKER, *supra* note 125.

<sup>215</sup> Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. OF PERSONALITY & SOC. PSYCHOL. 830 (1989) [hereinafter Tyler, *Group Value Model*].

<sup>216</sup> Kees van den Bos & E. Allan Lind, *Uncertainty Management by Means of Fairness Judgments*, 34 ADVANCES IN EXP. SOC. PSYCHOL. 1 (Mark P. Zanna ed., 2002). For a review of the literature, see Robert J. MacCoun, *supra* note 139, 171–201.

<sup>217</sup> MacCoun, *supra* note 139.

<sup>218</sup> Tyler, *Relational Model*, *supra* note 190.

<sup>219</sup> Tyler, *Group Value Model*, *supra* note 215, at 831.

perceptions of fair outcome or fair process as a shortcut, or heuristic, in deciding whether an authority can be trusted.<sup>220</sup>

Procedural justice and its cousin organizational justice are the primary frames through which DSDs are evaluated and judged in the literature. Most studies take the form of comparative subjective judgments of fairness and satisfaction based on interviews or surveys of participants and their representatives.<sup>221</sup> Most evaluation research does not directly ask participants to evaluate justice. The dependent variables simply permit researchers to assess which of two or more dispute processes are judged to be fairer or to produce higher satisfaction with process or outcome. This is a useful body of work. However, it is limited in that it is inherently a portrait of collective subjective perceptions. It does not address the question of the actual, objective outcome of a DSD. Some authors have termed the forms of justice based on individual perceptions as “microjustice.”<sup>222</sup>

#### *D. Community and Justice: Corrective, Retributive, Deterrent, Restorative, Transitional, Communitarian, and Communicative Justice*

All varieties of justice are ultimately about humans functioning in a community in relation to each other. Posner describes Aristotle’s corrective justice as a form of substantive justice that is rectificatory or commutative justice in connection with a transaction in which there is injury and wrongdoing.<sup>223</sup> Judges engage in corrective justice when they issue penalties to take away gains and restore equality.<sup>224</sup> Corrective justice assumes an

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<sup>220</sup> Kees van den Bos, *Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness*, 80 J. OF PERSONALITY & SOC. PSYCHOL. 931 (2001); *see also* MacCoun, *supra* note 139.

<sup>221</sup> *See e.g.*, E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953 (1990).

<sup>222</sup> LIPSKY ET AL., *supra* note 48.

<sup>223</sup> POSNER, *supra* note 124, at 313–14.

<sup>224</sup> Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1311 (2006) describing the arguments over the relationship between distributive and corrective justice:

Distributive justice describes the morally required distribution of shares of resources and liberty among people. Corrective justice describes the moral obligation of repair: the person morally responsible for wrongfully harming another has a duty to compensate the person harmed. A question arises about the relationship between distributive and corrective justice. The contemporary debate usually puts the matter in terms of normative priority or independence. Distributive justice is



existing structure of legal rights and is useful for both tort<sup>225</sup> and criminal justice.

Criminal justice gives us two theories that are cousins of corrective justice:<sup>226</sup> deterrent and retributive justice. Deterrence rests on the notion that severe penalties are justified if they reduce the overall incidence of crime.<sup>227</sup> Retributive justice is related to justice as vengeance or punishment by society in lieu of individual vengeance, and applies to both criminal and tort law.<sup>228</sup> DSDs in criminal law<sup>229</sup> include the institutionalization of plea bargaining in the shadow of the criminal trial.<sup>230</sup>

A leading response to both deterrence and retribution is restorative justice.<sup>231</sup> Drawing on religious traditions advocating atonement, forgiveness, and compassion,<sup>232</sup> restorative justice seeks to promote reconciliation between victim and offender and to reintegrate the offender into the community.<sup>233</sup> Braithwaite observes that “restorative justice requires

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normatively prior to corrective justice if corrective justice is merely instrumental to the fulfillment of distributive justice's demands. Corrective justice is normatively prior if there is an obligation of repair even when an unjust distribution of holdings is wrongfully disturbed. And corrective and distributive justice are normatively independent if an obligation of repair applies without regard to satisfaction of the demands of distributive justice.

*Id.* (citation omitted).

<sup>225</sup> See, e.g., Malin, *supra* note 90 (characterizing the tort of retaliatory discharge based on public policy as a judicial exercise in distributive justice better left to legislatures and the tort of abusive discharge as an exercise in corrective justice the courts have overlooked); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) (arguing for tort liability for increasing risk whether or not harm occurs based on corrective justice).

<sup>226</sup> POSNER, *supra* note 124, at 329.

<sup>227</sup> *Id.* at 330.

<sup>228</sup> *Id.* at 330–31.

<sup>229</sup> See Michael M. O'Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1 (2007).

<sup>230</sup> Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 n.1 (2007) (observing that 95% of convictions are obtained by way of guilty plea and arguing for enhanced procedural justice in plea bargaining).

<sup>231</sup> JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2001) (arguing against punitive justice and in favor of a system that restores victims, offenders, and communities through atonement, forgiveness, and compassion, and arguing for deterrence after restorative justice fails).

<sup>232</sup> *Id.* at 1.

<sup>233</sup> Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 228 (2003) (discussing theories of justice in criminal law).

us to think holistically about legal justice and social justice rather than to regard legal justice and social justice as quite separate things, best delivered by separate institutions (say, the criminal justice system for legal justice, the welfare system for social justice).”<sup>234</sup> DSDs entailing restorative justice include “victim-offender mediation, family group conferencing, peacemaking circles, community reparative boards, and victim impact panels.”<sup>235</sup>

Transitional justice is a term that has arisen to describe the process of establishing rule of law and democracy in a post-conflict society.<sup>236</sup> It includes a variety of DSDs for different purposes. For example, it moves beyond traditional criminal process to promote national reconciliation using historical inquiries,<sup>237</sup> reparations, selective justice or prosecution,<sup>238</sup> amnesties, administrative measures to redistribute power, and constitutional reform.<sup>239</sup> The goal is to help the community “to reconstitute the collective-across potentially divisive racial, ethnic, and religious lines.”<sup>240</sup> There is growing literature on DSDs for the purpose of transitional justice in the form of truth and reconciliation commissions;<sup>241</sup> the leading example is South

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<sup>234</sup> John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 391 (2003).

<sup>235</sup> Cynthia Alkon, *The Increased Use of “Reconciliation” in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?* 8 PEPP. DISP. RESOL. L.J. 41, 67 (2007) (citations omitted); *See also*, Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RES. Q. 279, 297 (2004) (describing evaluation studies of victim-offender mediation); Howard Zehr, *Commentary, Restorative Justice: Beyond Victim-Offender Mediation*, 22 CONFLICT RES. Q. 305 (2004) (describing other models of restorative justice, including family group conferences and peacemaking circles).

<sup>236</sup> *See, e.g.*, POST-CONFLICT JUSTICE, INTERNATIONAL AND COMPARATIVE LAW SERIES (M. Cherif Bassiouni ed., 2002).

<sup>237</sup> Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97 (2004).

<sup>238</sup> David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621 (2006) (arguing against retroactive prosecution to punish pre-transition abusers on the theory that deterrence would fail for those living under an abusive regime and inconsistent with truth and reconciliation commission institutional designs).

<sup>239</sup> TEITEL, *supra* note 39, at 6.

<sup>240</sup> *Id.* at 225.

<sup>241</sup> For a comprehensive and ongoing list of truth and reconciliation commissions in countries other than the United States, see The United States Institute of Peace, <http://www.usip.org/library/truth.html> (last visited Feb. 7, 2009).

Africa.<sup>242</sup> The first United States TRC was in Greensboro, North Carolina.<sup>243</sup> These DSDs also include courts established after genocide in Rwanda.<sup>244</sup> Some argue that these DSDs do not yet effectively address the specific harm of sexual violence against women during conflict.<sup>245</sup>

Another conception of justice involves dialogue and communication. Bruce Ackerman argues we can arrive at distributive justice through a dialogic process involving neutrality and participation in rational discourse about political legitimacy.<sup>246</sup> Habermas describes communicative justice as idealized speech or undistorted communication.<sup>247</sup> These ideas are reflected in upstream DSDs involving deliberative democracy and public policy dispute resolution in legislative and quasi-legislative activity to identify preferences, set priorities, and make policy-choices.<sup>248</sup> The notions of communicative and dialogic justice and restorative justice share the central concept of discourse as a process for arriving at just outcomes.<sup>249</sup> Authors advocate communicative justice through discourse as a means of self-

<sup>242</sup> For reports and other materials, see the Truth and Reconciliation Commission, <http://www.doj.gov.za/trc/> (last visited Feb. 7, 2009).

<sup>243</sup> For a final report, see the Greensboro Truth and Reconciliation Commission, <http://greensborotrc.org> (last visited Feb. 7, 2009).

<sup>244</sup> Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765 (2007); Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004).

<sup>245</sup> Phyllis E. Bernard, *Begging for Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda*, 7 CARDOZO J. CONFLICT RESOL. 325 (2006); Naomi R. Cahn, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 WM. & MARY J. WOMEN & L. 335 (2006) (discussing the relationship between violence against women and the DSDs of truth and reconciliation commissions and noting DSD innovations in the International Criminal Court, itself a form of DSD); Christine M. Chinkin, Editorial Comment, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM.J. INT'L L. 335 (2001). These studies can be understood in Ostrom's framework as analyzing DSD from the standpoint of the position of the victim and her specific characteristic of gender.

<sup>246</sup> POSNER, *supra* note 124, at 336.

<sup>247</sup> *Id.* at 338.

<sup>248</sup> Lisa Blomgren Bingham, *supra* note 112; see also THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine eds., 2005).

<sup>249</sup> See, e.g., Bruce P. Archibald, Q.C., *Let my People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution to Criminal Law and Restorative Justice*, 16 CARDOZO J. INT'L & COMP. L. 1 (2008).

determination and democracy.<sup>250</sup> Professor Menkel-Meadow advocates it as a means for strengthening DSDs involving various forms of dispute resolution.<sup>251</sup>

### E. *Formal Justice, Personal Justice, and Injustice*

There are also varieties of justice that represent justice systems functioning efficiently or inefficiently, fairly or unfairly. These provide a lens through which to examine dysfunction in DSD. They include formal justice, personal justice, and injustice.

Formal justice has two different definitions. Posner suggests it entails a reasonable rule, equal treatment, public justice, and a procedure to establish the facts.<sup>252</sup> Essentially, Professor Hensler's critique of court-connected mediation amounts to an observation that it lacks sufficient formal justice because it fails to provide an adequate fact and law-based process.<sup>253</sup> Rawls describes formal justice as regularity, treating similar cases similarly, implementing the rule of law in legal institutions, and impartial and consistent administration of law and institutions.<sup>254</sup> By definition, dispute resolution processes such as mediation and most commercial arbitration do not create rules of law or binding precedent. Due to rules on confidentiality,

<sup>250</sup> Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 362 (2007) (discussing discursive democracy as a system).

<sup>251</sup> Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

<sup>252</sup> POSNER, *supra* note 124, at 332.

<sup>253</sup> Hensler, *supra* note 70, at 96–97. Hensler observes:

In their enthusiasm for helping people resolve their disputes in a less conflict-oriented fashion, I worry that courts may erode their legitimacy. In most trial courts today, there are few trials. In many trial courts, parties are required to mediate; in a growing number of appellate courts, litigants are urged to do likewise. Anecdotal evidence suggests that in order to persuade parties to accept a settlement many mediators paint trials in the most negative light possible. . . . I think we need to think harder about what we are giving up in the effort to persuade people to choose conciliation over litigation, we need to think more carefully about what constitutes fair alternative dispute resolution procedures, and we need to rethink the role of fact- and law-based dispute resolution in the courts.

*Id.*; Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127 (2002) (arguing that the appropriate comparison is not between mediation and trials, but between mediation and the litigation process, which usually does not result in a trial).

<sup>254</sup> RAWLS, *supra* note 119, at 58–59.

it is difficult to determine whether similar cases have similar outcomes in mediation and arbitration. There is a limited notion of persuasive precedent in certain forms, such as labor arbitration of grievances and rights, but this precedent is generally not binding on other arbitrators.<sup>255</sup>

Personal justice can take three forms. First, Posner suggests it entails corruption, in which a judge resolves a dispute based on his or her personal stake in the “dispute as a parent, investor, or other interested party.”<sup>256</sup> Studies of mandatory arbitration based on the repeat player status of employers and corporations explore whether the economic incentive to obtain repeat business from the party in a position to refer future cases to the neutral amounts to a corrupting bias.<sup>257</sup> A second form entails a judge who

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<sup>255</sup> See ELKOURI & ELKOURI: HOW ARBITRATION WORKS (Alan Miles Ruben ed., 6th ed. 2003).

<sup>256</sup> POSNER, *supra* note 124, at 317.

<sup>257</sup> See generally Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. CONFLICT MGMT. 369 (1995) (finding that employers did not have better outcomes based on whether arbitrator is compensated or works pro bono); Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L. J. 108 (1996) (raising concerns about repeat player outcomes); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997) (finding that employers that arbitrate more than once in the case sample have statistically significantly higher win rates in employment arbitration); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (replicating empirical analysis of repeat player effect); Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR, 303 (Samuel Estreicher & David Sherwyn, eds., 2004) (finding that implementation of Due Process Protocol improves employee outcomes); see also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO. ST. J. ON DISP. RESOL. 777 (2003) (proposing alternative explanations for the repeat player effect based on organizational learning and an appellate effect); David S. Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999) (critiquing method used to determine repeat player status in Bingham studies); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005) (exploring a variety of hypotheses for the repeat player effect, including:

(1) [A]n employer will choose an arbitrator who found for the company because it perceives the arbitrator as being proemployer, (2) employers will choose an arbitrator who found against the company because they believe the arbitrator will

resolves a dispute based on the personal characteristics of the disputants.<sup>258</sup> Studies of gender<sup>259</sup> or racial<sup>260</sup> differences in dispute resolution outcomes explore this form of personal justice.

Lastly, the judge can resolve the substantive dispute ad hoc based on the particulars of the case using a general standard and not a specific rule.<sup>261</sup> This is actually one of the arguments proponents use to advocate for dispute resolution; it allows the parties to craft a form of justice (arbitration) or a specific outcome (mediation) that suits their specific needs and context. Proponents of mediation and interest-based negotiation argue that it permits creativity not available in courts. A related concept is pragmatic justice in which judges must be allowed to change their minds, even though the consequence is arbitrary justice.<sup>262</sup>

And then there is injustice, which Rawls defines as inequalities “not to the benefit of all.”<sup>263</sup>

#### IV. DESIGNING JUSTICE

Lawyers and dispute system designers are effectively designing justice. However, we need to be systematic in our approach to institutional design in conflict resolution. We need to build a body of knowledge based on common categories and shared meaning through which to assess empirically the way

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not find against their companies twice, (3) arbitrators will find against the same company twice, (4) arbitrators will not find against the same company twice, and (5) any effect of a repeat arbitrator is explained by the existence or absence of a DRP policy.

*Id.* at 1571.)

<sup>258</sup> POSNER, *supra* note 124, at 317.

<sup>259</sup> See, e.g., Debra J. Mesch, *Arbitration and Gender: An Analysis of Cases Taken to Arbitration in the Public Sector*, 24 J. COLLECTIVE NEGOT. PUB. SECTOR 207 (1995) (suggesting that women charged with felonies are treated more leniently than men); Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 LAW & SOC'Y REV. 51 (2005) (finding that a cooperative setting empowered men and women to use different approaches to conflict, with men using informal processes and women choosing formal ones); see also Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000) (finding no gender differences in arbitration outcomes in a hypothetical case).

<sup>260</sup> Josefina M. Rendón, *Under the Justice Radar?: Prejudice in Mediation and Settlement Negotiations*, 30 T. MARSHALL L. REV. 347 (2005) (discussing racial prejudice in mediation outcomes).

<sup>261</sup> POSNER, *supra* note 124, at 319.

<sup>262</sup> *Id.* at 333.

<sup>263</sup> RAWLS, *supra* note 119, at 62.

these systems function. We need to have an open and public discussion about which variety of justice we have chosen to pursue in a particular system. Moreover, we need to develop ways to generate information to determine whether the resulting system actually produces the justice for which it is designed. And, ultimately, we need to teach all of this to every law student.

*A. Using Institutional Design to Build Shared Meaning in DSD*

We need to build a body of case study research that does for DSD what Ostrom has done for common pool resources. We need to analyze DSDs within a shared framework that examines Ostrom's seven categories for institutional design analysis: 1) participants, 2) their positions, 3) potential outcomes, 4) allowable actions in relation to outcomes, 5) an individual's control over this function, 6) the information available to participants in the DSD, and 7) costs and benefits of various actions and outcomes.<sup>264</sup> We need to start cataloguing specific structural features of DSDs, and the rules that create them, using the working list of features provided here and building on it. We need to assess whether DSDs are robust in Ostrom's sense, and in particular, to what extent they are characterized by proportional equivalence between benefits and costs, collective choice arrangements, monitoring, graduated sanctions, conflict-resolution mechanisms, and minimal recognition of rights to organize.

*B. Transparency in How our DSD Promotes a Variety of Justice*

DSD occurs in advisory committees for courts, in facilitated convenings for environmental conflict resolution, in negotiated consent decrees, in legislatures and executive branch agencies, in NGOs helping with post-conflict reconstruction, and in corporate offices for in-house counsel, among many other settings. We need to develop new ethical precepts for lawyers who find themselves designing justice. Professor Menkel-Meadow and the former CPR Institute<sup>265</sup> began to address this issue through a commission on an ethical code for ADR providers.<sup>266</sup> However, individual practitioners find

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<sup>264</sup> OSTROM, *supra* note 18, at 32.

<sup>265</sup> Now the CPR International Institute for Conflict Prevention and Resolution, CPR Homepage, <http://www.cpradr.org> (last visited Feb. 7, 2009).

<sup>266</sup> For a description of this work, see Georgetown Law—Georgetown Hewlett Program in Conflict Resolution and Legal Problem Solving, <http://www.law.georgetown.edu/hewlett/#cpr> (last visited Feb. 7, 2009).

themselves designing justice, and we do not have ethical guidance for them in this emerging role.

Moreover, we need to determine best practices in DSD. These best practices should include a conscious, deliberative, and transparent consideration of the variety or varieties of justice a system is designed to foster or provide. Instead of having a conversation at the level of administration of justice and transaction costs, we need to have dialogue about justice itself.

### *C. Measuring Varieties of Justice*

How is one to measure justice? We need funding for research on the function of DSDs and transparency. Any effort to examine the overall pattern of outcomes for purposes of determining distributive justice requires disclosure of individual cases. One legislative approach has been to mandate a limited form of disclosure. In 2002, California enacted disclosure requirements for consumer arbitration information, defined to include both employment and consumer disputes submitted to arbitration under the supervision of a private company.<sup>267</sup> Unfortunately, there has been

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<sup>267</sup> California Code of Civil Procedure § 1281.96 (2005). Section 1281.96 “Publication of Consumer Arbitration Information by Private Arbitration Company” provides:

(a) Except as provided in paragraph (2) of subdivision (b), any private arbitration company that administers or is otherwise involved in, a consumer arbitration, shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:

(1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.

(2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars (\$100,000), one hundred thousand dollars (\$100,000) to two hundred fifty thousand dollars (\$250,000), inclusive, and over two hundred fifty thousand dollars (\$250,000).

(3) Whether the consumer or nonconsumer party was the prevailing party.



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incomplete compliance with this provision, although it is not clear whether this is a function of individual arbitrators failing to supply the requisite information about their cases or of providers using categories to preserve confidentiality, which in fact obscure outcomes.<sup>268</sup>

We cannot measure justice without transparency, at least in a limited form for researchers bound by a confidentiality agreement. At present, data is held hostage by the privatization of justice. An alternative approach would be to create public regulatory forums with the power to ascertain the nature of the justice that private systems provide. California's disclosure requirements were intended to forestall this step by empowering the parties to use information to make their own judgments about justice. However, in the

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(4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.

(5) Whether the consumer party was represented by an attorney.

(6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.

(8) The amount of the claim, the amount of the award, and any other relief granted, if any.

(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

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(c) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

*Id.* at (a)–(c).

<sup>268</sup> Lisa Blomgren Bingham et al., *Arbitration Data Disclosure in California: What We Have and What We Need*, (April 15, 2005) (paper presented at the American Bar Association Section of Dispute Resolution Conference, Los Angeles, CA, on file with author). On these disclosures, a researcher cannot examine arbitration award outcomes in relation to which party, consumer or non-consumer, won the case. This makes it impossible to form a judgment on macrojustice. It also makes it difficult for the consumer party to make an informed judgment about the acceptability of individual arbitrators. The information disclosed is not analogous to the institutional memory of a repeat user of arbitration services.

absence of effective disclosure, there may be efforts to find an alternative mechanism to address the concerns about private justice systems. In order to make DSDs accountable for the justice they provide, we must make them more transparent.

#### *D. Building Curriculum to Teach Lawyers how to Design Justice*

The trial is vanishing, yet law schools still train new lawyers to assume the backdrop of their work is primarily a single context: court (civil or criminal, state or federal, trial or appellate). While clients need lawyers in court, increasingly they need their lawyers to help manage conflict long before it gets there. Lawyers work with clients in a wide variety of institutional or organizational contexts: companies, nongovernmental organizations, public agencies at the local, regional, state, national, or transnational levels, and collaborative networks including the public, nonprofit, and private sectors. Moreover, ideally clients ask for advice when conflict is still evolving, before it has matured into a dispute with identifiable parties, and long before it becomes a complaint filed in court or with an administrative agency.

We need to teach law students that they may ultimately design justice. It may happen when they find themselves negotiating a supply contract for which they need a process for resolving future disputes, or advising an employer on how to put in place an administrative grievance procedure for sexual harassment claims, or determining how to engage citizens and stakeholders in the work of a public agency. While a handful of law schools currently have courses or parts of courses on DSD,<sup>269</sup> they are by far the minority. Moreover, the courses are generally electives that most law students will never take.

We need a curriculum component that every law student must learn. How can lawyers better analyze and understand the context in which conflict arises and their choices helping clients manage that conflict? What are the strategic advantages and disadvantages posed by different institutions and systems? In order to design justice, they need the skill set to analyze the institutional DSD that already exists. Stephanie Smith and Janet Martinez have proposed a set of diagnostic questions and categories to help

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<sup>269</sup> These include, but are not necessarily limited to, Harvard Law School, Stanford Law School, University of California Hastings College of the Law, University of Missouri Columbia School of Law, Ohio State University Moritz College of Law, Marquette, Pepperdine, Cardozo and Penn State Dickinson School of Law.

practitioners analyze DSD.<sup>270</sup> These include: 1) the goals of the designers and resulting system; 2) the stakeholders and their relative power; 3) the context within which DSD takes place, specifically how it arose, how the system was designed and by whom; 4) the structures of the system and incentives it creates; 5) its transparency and accountability; 6) how the system is financed; 7) how successful the system is and who participates in it; and 8) how the system relates to and interacts with the formal legal system.<sup>271</sup> Each of these diagnostic questions relate to categories of information in institutional analysis as proposed by Ostrom.

The curriculum should also expose students to case studies illustrating the breadth of contexts within which DSD occurs. In addition to courts, these contexts fall within five broad categories: intraorganizational (the employment context), extraorganizational (person-person; company-company; hospital-patient; vendor-customer, contracts), international public institutions (state-state, treaties, and contracts), international private law (multinational corporations, contracts), and governance or public policy (dialogue and deliberation in legislative and quasi-legislative settings to dispute resolution in quasi-judicial ones). Lawyers owe it to their clients to be skilled in understanding the context within which they are providing services.

## V. CONCLUSION

The organizers of this symposium ask us to look toward the next generation of dispute system design. The most significant future issues are these: we must become more mindful of how we affect justice when we design institutions and systems to manage conflict; we should move more knowingly and intentionally to research, deliberate on, and assess justice in DSD; and we owe it to the next generation of lawyers to teach them how to serve ethically when they design justice.

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<sup>270</sup> Martinez & Smith, *supra* note 57.

<sup>271</sup> *Id.*

