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## ARTICLE

# THE ACTIVIST PLUS: DISPUTE SYSTEMS DESIGN AND SOCIAL ACTIVISM

JENNIFER W. REYNOLDS\*

### INTRODUCTION

This article is a small but important part of a larger project on activism and alternative dispute resolution (ADR). It may be helpful to zoom out to the larger project before describing how this small but important part works.

#### *The Larger Project*

The larger project explores how activism fits into and/or disrupts alternative methods and values, an inquiry that itself is situated in an even larger project around law and social movements.

Scholars have argued for decades that social movement activism is as much a source of law as statutes and judicial decisions. In a recent article, for example, Lani Guinier and Gerald Torres write that “ongoing collective action by ordinary people can permanently alter the practice of democracy by changing the people who make the law and the landscape in which that law is made” and that “social movements challenge, and if successful, change governing norms, creating an alternative narrative of constitutional meaning.”<sup>1</sup> Their work on what they call “demosprudence”<sup>2</sup> builds on the

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1. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2750, 2757 (2014).

2. “Demosprudence is a lawmaking or legal practice that builds on the collective wisdom of the people. It focuses on the relationship between the lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law.” Lani Guinier, *Foreword: Demosprudence Through Dis-sent*, 122 HARV. L. REV. 4, 47 (2008).

scholarship of Bruce Ackerman and others who have sought to better understand the interrelationship between collective action and legal change.<sup>3</sup>

For those of us who study alternative dispute resolution, this rich literature presents a potentially fertile area of inquiry. If activism is strategic persuasion, outside formal legal channels, that creates social meaning and binding commitments, then does that make activism a type of ADR? Or is ADR a type of activism, in that it continually seeks to innovate new and better methods of dispute processing and decision making? Is an activist the opposite of a negotiator or simply a certain kind of negotiator—perhaps the hard-core, values-driven, distributive kind? How do we in ADR account for activists, anarchists, violent protestors, and other radical groups that are suspicious of political and legal institutions and often reluctant to negotiate? Are we mortal enemies, natural allies, strange bedfellows, or wary potential partners?<sup>4</sup>

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3. See generally BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011); Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

4. This implicates a long-standing discussion among ADR scholars around how effective “neutral” mediators can be in disputes, especially when human rights and power disparities are relevant here. See, e.g., BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004); see also Kirk Emerson et al., *Disrupting Deliberative Discourse: Strategic Political Incivility at the Local Level*, 32 CONFLICT RESOL. Q. 199, 319 (2015) (“The value of neutrality is particularly problematic. Few people outside the facilitation field believe that third parties are neutral, and in fact this claim may lead to distrust [because the claim is seen as false] and even active dislike [because neutrality itself, which may be seen as uncaring, or absence of thoughtfulness, or unwillingness to acknowledge injustice, is not wanted].”); Joseph B. Stulberg, *Must a Mediator be Neutral? You’d Better Believe It!*, 95 MARQ. L. REV. 829 (2012); Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L.J. 467 (2011) (arguing that mediator neutrality may negatively affect disadvantaged groups); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (arguing that compulsory ADR may further disenfranchise structurally weak parties); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391–99 (1985) (setting out “the left critique of ADR”).



Fig. 1. Greenpeace activists vandalizing a fishing vessel; hacktivist collective Anonymous declaring techno-war on ISIS after the Paris terror attacks; peaceful protest by Oregon graduate students. Are these forms of negotiation, or conflict management, or self-determination, or participatory process, or normative leverage, or some other recognizable ADR mechanism?<sup>5</sup>

What's interesting about this uncertainty around how activism and ADR fit together is that ADR itself has activist roots. Early proponents of modern ADR were striving for nothing less than real access to justice and high-quality dispute resolution by way of social transformation (extralegal services) and individual empowerment (self-determination).<sup>6</sup> They were optimists and innovators who believed real change was achievable, extolling the importance of consensus, continual improvement, and authentic engagement.<sup>7</sup> To this day, the field of ADR resonates with the idealism and passion of these early activists.<sup>8</sup>

5. See *Time's Running Out for Tuna*, GREENPEACE INT'L (Apr. 20, 2008), <http://www.greenpeace.org/international/en/news/features/time-s-running-out-for-tuna-200408/>; Conspiracyclub, *Anonymous Declares War on ISIS*, C CLUB (Nov. 16, 2015), <http://www.conspiracyclub.com/2015/11/16/anonymous-declares-war-on-isis-sent-a-chilling-message-we-will-hunt-you-down/>; jcox2199, *Graduate Teaching Fellows at the University of Oregon Go Out on Strike, Cripple Campus*, DAILY KOS (Dec. 5, 2014, 3:22 PM), <http://www.dailykos.com/story/2014/12/5/1349715/-Graduate-Teaching-Fellows-at-the-University-of-Oregon-go-out-on-strike-form-a-picket-line-on-campus>.

6. Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y REV. 709, 714–15, 729 (1988).

7. See *id.*; see also Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1091–92 (2011) (describing the early ADR movement as driven in part by a desire to “transform ordinary people from passive subjects into empowered ones” who did not need help from legal institutions).

8. See, e.g., Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 480–81 (2012) (arguing that the “utopian promise” of ADR responds to perceived dystopian features of traditional law, such as arbitrary or coercive process); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 36 (2000) (emphasizing that alternative practice does not necessarily promote compromise but instead can foster “creative solutions and integrative outcomes”).

With all this in mind, the larger project presents multiple possible directions for further exploration. If activism is indeed a source of law and part of democracy itself, then ADR scholars and practitioners who are committed to self-determination and social justice should ask themselves whether and how they might interact productively within conversations and activities around activism.<sup>9</sup> It makes sense for those working with alternative processes to study what activists do and what impacts they have; to theorize their work within ADR frameworks; to interrogate ADR frameworks and assumptions with respect to activism; and to create curriculum that may critically inform and enrich the efforts of those who become activists or who work with (or against) them.

### *The Small but Important Part*

Within this larger project, this article contemplates the possible analytical and practical benefits of adopting a dispute systems design (DSD) lens when thinking about activism. DSD is an ADR subspecialty that applies “systems thinking” to diverse conflict-prone settings that require allocating scarce resources, managing interpersonal relationships, rebuilding communities, handling risk effectively, and tackling complex decision-making in various public and private contexts—the same challenges, in fact, that activists confront on a regular basis. Might this systems thinking be useful to activists in some way? And could there be reciprocal benefits to law schools and law faculty that come from retooling DSD curriculum and methods to encompass activism and activists?

This article does not report on work already completed but instead imagines what might be, proceeding along the following lines: Part I provides working definitions for activism and for dispute systems design. Part II then explores how analysts might use DSD to describe activism. Finally, Part III envisions how activists might use DSD to refine and strengthen their campaigns, what role law schools might have, and how this connection might transform how law schools engage with activism and social movements.

#### I. BASIC DEFINITIONS: ACTIVISM AND DISPUTE SYSTEMS DESIGN

Words like “activism” and “design” are fairly expansive. For example, although this article uses the term “activism,” it is really only concerned with social activism, not investor activism or judicial activism or any other

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9. Some ADR faculty are engaging these conversations directly. For example, the Program on Dispute Resolution at Ohio State has started the Divided Community Project, which, among other things, strives “to synthesize the insights of dispute resolution interveners, advocates, and community leaders regarding the use of collaborative approaches to community division.” *Divided Community Project*, OHIO ST. U. MORITZ C. OF L., <http://moritzlaw.osu.edu/program-on-dispute-resolution/resources/the-divided-community-project/> (last visited Apr. 2, 2016).

type of activism.<sup>10</sup> Before considering the strategic possibilities of using DSD to support activism, therefore, it may be useful to provide some working definitions.

A. *What is social activism?*

Social activism is not as easy or exciting to define as one might initially think. Basically, social activism is any “activity that . . . seeks to address [a] problem through the indirect action of influencing others, such as governments, NGOs, or consumers.”<sup>11</sup> Social activists “are people whose activity is not obligatory in any way.”<sup>12</sup> They choose to “come together to change society[.]”<sup>13</sup> often outside formal political or legal processes.

But what of promoting and perfecting democracy? What of championing social justice? Although many social activists appeal to these rationales in their work, they are not ideas that are intrinsic to social activism.<sup>14</sup> Social activism encompasses a universe of divergent and sometimes incompatible identities, activities, values, agendas, and aspirations. Imagine surveying a group of people about social activism, with the goal of developing more clarity around who activists are, what activists do, and what impact activists have. You are likely to hear rather incommensurate responses.

<b>Your questions</b>	<b>Their possible responses</b>
<i>What kind of people are activists?</i>	<i>Liberals, conservatives, idealists, young people, disgruntled people, people against guns (or whatever), people for guns (or whatever), unemployed people, educated people, homeless/crazy people, housewives, anarchists . . .</i>
<i>What do activists do?</i>	<i>March with signs, burn flags, burn bras, write letters, boycott businesses, hold sit-ins, chain themselves to bulldozers, make fools of themselves, make martyrs of themselves . . .</i>
<i>What impacts do activists have?</i>	<i>Raise awareness, change the law, polarize people, frame the debate, muddy the waters, work for progress, impede progress, push for change, make things better, make things worse . . .</i>

10. Other types of activism may also benefit from a DSD perspective, but that investigation is outside the scope of this article.

11. Justin Blount & Patricia Nunley, *What is a “Social” Business and Why Does the Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278, 293 (2014). Similarly, Hahrie Han has defined associational activism as “intensive voluntary activity with a civic association that has the intent or effect of influencing decision-makers with power.” HAHRIE HAN, HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS AND LEADERSHIP IN THE 21ST CENTURY 32 (2014).

12. HAN, *supra* note 11, at 32.

13. KATHLEEN M. BLEE, DEMOCRACY IN THE MAKING: HOW ACTIVIST GROUPS FORM 3 (2012).

14. *Id.* at 4 (“Not all grassroots civic activism is democratizing, a reality often overlooked in the rush to herald civic engagement as the safeguard of democracy.”).



Fig. 2. Gun-rights activists greeting President Obama after the shooting at Umpqua Community College in Roseburg, Oregon.<sup>15</sup>

Such definitional ambiguity makes it difficult to determine whether there are distinctive markers of social activism and social activists, and how these markers might helpfully differentiate social activism from other advocacy or change-focused entities and initiatives.<sup>16</sup> For the purpose of this article, however, a broad definition—“people coming together to change society”—works well because it enables us to envision how dispute systems design might be relevant to a wide variety of initiatives and campaigns.

### B. What is dispute systems design?

Dispute systems design (DSD) is “the design of processes and of systems for preventing and managing disputes” within organizations, between people, and among more loosely affiliated or temporary entities.<sup>17</sup> Whenever someone attempts to systematize, at any level of formality and perma-

15. Lee Stranahan, *Roseburg, Oregon Protests Obama Visit: ‘Chicago Needs You’*, BREITBART (Oct. 9, 2015), <http://www.breitbart.com/big-government/2015/10/09/roseburg-oregon-protests-obama-visit-chicago-needs-you/>.

16. I am grateful to my colleague, Michael Musheno, for this insight.

17. NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 3–4 (2013); see generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996); see also WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

nence, a process for managing conflicts, preventing or dealing with disputes, or making decisions, that person is engaged in DSD.<sup>18</sup>

For example, an organization might use DSD when designing grievance processes or workplace policies for employees. In designing such a system, the organization would go through some predictable steps, as Nancy Rogers and her colleagues describe in a recent DSD casebook:

Determine the goals and scope of the system, along with available resources.

Assess the current situation, including finding out who the stakeholders are, what concerns and hopes the stakeholders have, what relevant processes or policies already exist, and what challenges and opportunities are present.

Design processes and policies that address the goals, respect the scope and resources, and include stakeholders in a meaningful way.

Create and implement the design, with sufficient time built in for incorporating feedback, dealing with unexpected issues, and possibly undertaking redesign of some (or all) of the system.

Evaluate whether the new system meets the goals.<sup>19</sup>

Note that these are not new ideas or practices. The core components of DSD—scope, assess, design, implement, evaluate—are commonplace in various contexts, such as business, information technology, project management, and organizational development.<sup>20</sup> Indeed, one of the great contributions of DSD is that it raises and makes relevant a set of general management and project management practices within the context of conflict and recurrent disputes.

For lawyers, DSD is a paradigm shift away from one-off interactions such as representing a client or serving as a mediator. Although these interactions can also be somewhat “designed” in that they proceed according to intentional choices and professional norms, they are not generally thought of as examples of the systems-level thinking characteristic of DSD. DSD helps lawyers envision interactions and processes as part of a system that, although open and therefore somewhat chaotic, is amenable to basic design principles. Perceiving individual disputes and grievances as part of a larger

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18. In this article, I use “DSD” interchangeably with “systems design,” and I also refer generally to systems thinking and systems analysis. All of these practices draw on the same analytical skills and approaches.

19. See ROGERS ET AL., *supra* note 17, at 6; see also FREDERICK P. BROOKS, JR., *THE MYTHICAL MAN-MONTH: ESSAYS ON SOFTWARE ENGINEERING*, ANNIVERSARY EDITION 115–23 (1995) (arguing that successful systems design always requires designers to “throw one away,” that is, redesign the system in light of the improved understanding around the actual goals and purposes of the system that is only available after implementing the first design and, upon evaluation, observing the ways in which it falls short).

20. DSD scholars and practitioners recognize this overlap. See, e.g., Cathy A. Costantino & Melinda R. Lewis, *What Dispute Systems Design Can Learn from Project Management*, 31 *NEGOT. J.* 175 (2015).



ecology, designing deliberative processes that involve multiple constituencies, facilitating large-scale decisions and planning, and taking a longer, more strategic view of deal implementation are just some examples of how lawyers who understand systems design provide additional value to clients.<sup>21</sup>

C. *How might these definitions interrelate?*

If activism is “people coming together to change society,” and if DSD is a structured approach to making some sort of change happen, then activism and DSD would appear to have promising affinities. Two possibly significant analytical benefits from considering the concepts in tandem jump to mind.

First, systems design thinking may help analysts, activists, and others better describe what activists do. More precise language describing what activists do might, in turn, help better delineate the markers and contours of social activism and thus make it easier to understand how social activism compares and interacts with other institutions and dynamics. Additionally, such language (and accompanying frameworks) may make it easier for activists to organize themselves and what they are already doing more sensibly and strategically. For example, when approaching potential allies, activists who are proficient systems designers may have an easier time identifying stakeholder interests, developing agreements around support, and coordinating the involvement of outsiders.

Second, and related to this latter point, systems design thinking may help identify potential areas of growth and capacity-building for activists. Mapping activities within a system can make it easier to see what is working well, what is working poorly, and what is entirely missing. Note that many activists already undertake these kinds of organizational self-analyses, and indeed much activist literature contains information about strategies and campaigns that is entirely consistent with the precepts of DSD. Thinking about activism and system design together does not reveal new and never-before-considered directions, but instead serves as an important reminder of, and possible framework for, developing the multiple competencies that successful activists need to be effective.

With these general definitions and potential benefits in mind, the article now examines more closely each of these potential benefits in turn: first, how DSD helps describe what activists do; and second, how DSD suggests new capacities and growth opportunities for activists.

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21. See, e.g., ROGERS ET AL., *supra* note 17, at 11 (advising students of DSD that “[o]nce you know how to work collaboratively to design a new process or system of processes, you may be surprised by the opportunities you will then recognize to bring about an improvement in the ways that people, organizations, communities, courts, and governments manage their conflicts.”).

## II. DESCRIBING ACTIVISM WITH DSD

As mentioned above, considering activism and DSD together provides considerable descriptive benefits. By thinking about what activists do, it is possible to use the language and framing of DSD to describe and explain their activities within larger systems.

Perhaps it goes without saying that activists are active, in the sense that they must do many different kinds of things to achieve their goals. Even the most basic change initiative—like campaigning for gender-neutral bathrooms at work, protesting a tuition increase, or attempting to stop highway pesticide spraying—requires people to come together. Once people are rallied around a cause, the group must figure out schedules, discuss resources, identify decision-makers and other influential stakeholders, and settle on a strategy or set of approaches. More complex or far-ranging social movements require, of course, more planning, involvement, and decisions.<sup>22</sup>

All these activities of activism fall somewhere along a continuum of internal (inside the group) and external (the outside world, including outcomes<sup>23</sup>). Given everything that activists must do to be successful, and regardless of the scope or scale of the activism, DSD provides a framework not just for identifying what internal or external activities are taking place, but also for understanding how these activities fit together as part of a system (or, more accurately, systems). These systems either exist already (and so may be described) or must be created by the activists. Put another way, activists must understand and use existing systems and/or design new systems that will help activists address the challenges and sequence the activities associated with managing internal and external constituencies and events. To illustrate how DSD may be used to describe what activists already do, two examples may be helpful.

### *Designing internal systems*

First, consider an example from Occupy Wall Street. One of the most salient features of Occupy Wall Street culture was the movement's consen-

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22. Many examples exist, and here is one that may interest current student activists: During the 1960s, the radical student activist group, Students for a Democratic Society ("SDS"), protested numerous international and domestic injustices, such as the war in Vietnam, the global nuclear weapons race, racial discrimination, and economic disparity in the United States. Although the SDS ultimately splintered into various factions and had significant organizational and ideological challenges, members gathered together to clarify an agenda, assign roles, recruit members and develop leaders, produce manifestos, call for (and participate in) teach-ins and sit-ins across the country, organize protests, and stage huge anti-war demonstrations. For an outstanding first-hand account of the SDS, see MARK RUDD, UNDERGROUND: MY LIFE WITH SDS AND THE WEATHERMEN (2009).

23. See HAN, *supra* note 11, at 93 (discussing the difference between "transactional" and "transformational" outcomes).

sus-based culture.<sup>24</sup> Organizers had to design and implement communication and governance structures that were consistent with the priorities of the movement and feasible as a practical matter. Accordingly, they promulgated a set of hand signals that would allow large groups of people to participate in discussion and decision-making without devolving into chaos.<sup>25</sup>

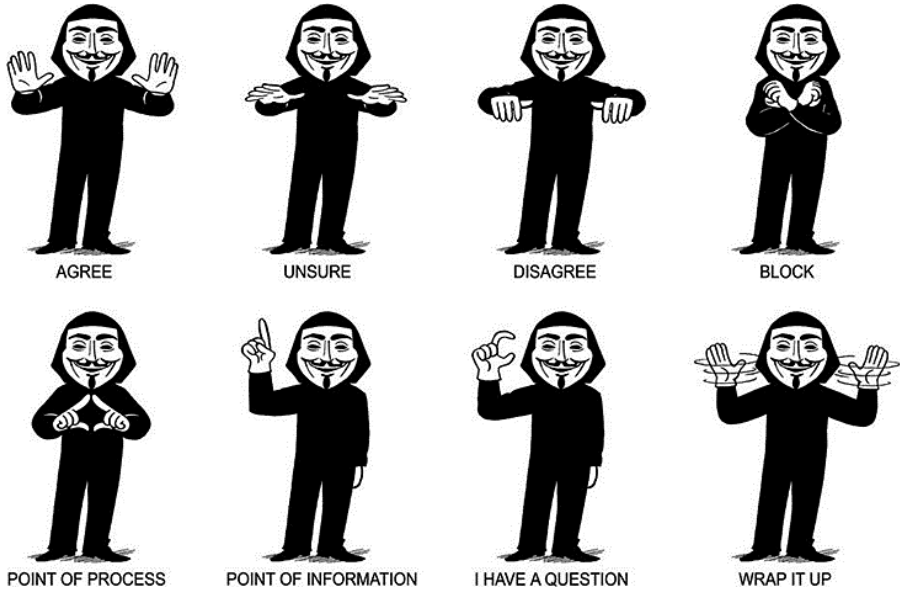


Fig. 3. Occupy Wall Street hand signals.<sup>26</sup>

From the perspective of DSD, these hand signals may be thought of as design elements in support of the larger design goal for the entire movement: radically inclusive, egalitarian, consensus-based community.<sup>27</sup> Occupy Wall Street was about giving the 99% a voice, and so to reinforce that value within the group, organizers designed group interactions to provide everyone with an opportunity to participate. It was a clever design, considering that other options for large-scale participation (e.g., Robert's Rules of Order) were not possible given the size of the crowd and the number of issues to cover.

Not everyone liked this design; indeed, some commentators have identified downsides to Occupy Wall Street's focus (for them, oppressive focus)

24. See, e.g., Zephyr Teachout, *Legalism and Devolution of Power in the Public Sphere: Reflections on Occupy Wall Street*, 39 *FORDHAM URB. L.J.* 1867, 1874 (2012) (describing Occupy Wall Street "temperature checks" and other mechanisms for assessing consensus).

25. I am grateful to Florrie Darwin for encouraging me to include this example.

26. Xení Jardin, *Occupy Wall Street Hand Signals, An Illustrated Guide by Ape Lad*, *BOINGBOING* (Dec. 17, 2011, 8:05 PM), <http://boingboing.net/2011/12/17/occupy-wall-street-hand-signal.html>.

27. See, e.g., David Graeber, *Occupy Wall Street's Anarchist Roots*, in *THE OCCUPY HANDBOOK* 141, 144–45 (Janet Byrne ed., 2012).

on egalitarian process.<sup>28</sup> It is difficult, after all, to make every decision available at all levels in an open forum, which in turn suggests that the movement's commitment to transparency of governance likely was, in practice, imperfect at best.<sup>29</sup> As a descriptive matter, such critiques are easily transposed into the language of DSD, considering that identifying and managing downsides and handling exceptions are typical of system design and redesign. Put another way, the critiques of Occupy Wall Street's hand signals are more than just philosophical disagreements. They are comments on system design—specifically, that the design does not meet its stated objectives—and such comments could generate further design discussions on whether redesigning the hand signals is necessary or feasible.

### *Designing External Systems*

The Occupy Wall Street hand signals are one example of how systems thinking can support the development of internal systems of communication and exchange. In that case, the activists implemented a design that made it easier for them to reach consensus despite the conditions (sprawling, noisy, and crowded). Systems thinking can also make it easier to describe what happens when activists interact with the outside world, working with and/or against external constituencies. How will they make their statement—doing what, where, with whom, for whom, with what possible consequences and recourses, and why? And what is the difference between acting proactively (e.g., raising awareness) or reactively (e.g., responding to an event implicating part of the activists' agenda)? Clearly, the development of external systems depends a great deal on circumstances, although some common design concerns arise regardless of context.

One such common design concern for external systems is identifying and assessing stakeholders. Effective activism depends to some degree on how well the activists have assessed stakeholder needs and managed external communication channels. Activists do not have the unilateral power to make the change they want to see; if they did, they would not need activism. Instead, activists push for change by persuading others. They must take into account decision-makers, like city councils or corporate managers; non-decision-making stakeholders who may nonetheless be able to block or facilitate persuasion, such as police<sup>30</sup> or co-workers; and other potentially

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28. Teachout, *supra* note 24, at 1894 (remarking that consensus process tended toward “fetishizing” of process itself, leading “away from action towards legalism”).

29. *Id.* at 1884–85 (“[I]t is easy to imagine that decisions could have been made outside this process.”).

30. For many activists, the police and local officials are an important constituency and careful planning around their involvement is a key strategic consideration. “The Occupy movement’s best success stories often involve the cooperation of local officials.” Janos D. Marton, *Representing an Idea: How Occupy Wall Street’s Attorneys Overcame the Challenges of Representing Non-Hierarchical Movements*, 39 *FORDHAM URB. L.J.* 1107, 1134 (2012). Reenvisioning how activists and others work with police is an essential part of community justice. “[I]n community policing,

interested or indirectly affected parties, such as local businesses or members of the public, depending on the nature and scope of the issue at hand. Once activists know whom to persuade, they then must make decisions around positive approaches (e.g., writing white papers that provide decision-makers with empirical and other evidence supporting the proposed change), negative approaches (e.g., disrupting meetings with uncivil outbursts and/or behavior), and normative approaches (e.g., sending letters to newspapers appealing to common feelings of morality; perhaps hunger strikes and other self-harm) to persuasion.<sup>31</sup>

This brings us to our second example, Sizzle Pie. Sizzle Pie is a pizza restaurant in Eugene, Oregon, located across the street from Kesey Square, a public area in which many homeless people and others congregate. Recently, some of these Kesey Square congregators began gathering in the space right outside Sizzle Pie and engaging in questionable, sometimes dangerous activities.<sup>32</sup> Debates and discussions ensued about the character of the downtown area. City officials responded by issuing sidewalk permits to business owners so that they could more easily control the area outside their establishments.<sup>33</sup> Debates and discussions ensued about the social, moral, and constitutional implications of such permits.<sup>34</sup> In the meantime, the owner of Sizzle Pie installed a sign outside, lettered on one side like so:

SIZZLE PIE STARTS HERE

PLEASE RESPECT OUR NEIGHBORS

The other side of the sign indicates that SIZZLE PIE ENDS HERE and again PLEASE RESPECT OUR NEIGHBORS.

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law enforcement must look to community members not merely as complainants and witnesses, but as ‘stakeholders’ who not only help police identify community concerns, but also help develop and even implement responsive strategies.” Alafair Burke, *Policing, Protestors, and Discretion*, 40 *FORDHAM URB. L.J.* 999, 1010 (2013).

31. Here, I am adapting Richard Shell’s rubric of positive, normative, and negative leverage, from G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2nd ed. 2006).

32. What has happened at Sizzle Pie is not unusual in Eugene, which, like many cities, has been engaged in an ongoing conversation and struggle with how to manage the homeless and others downtown. See Sherri Buri McDonald, *Eugene Business Owners Object to ‘Aggressive’ Homeless People in Kesey Square*, MENTAL HEALTH ASS’N OF PORTLAND (Dec. 1, 2013), <http://www.mentalhealthportland.org/eugene-business-owners-object-to-panhandling-drug-deals-mental-illness-in-kesey-square/>.

33. For activist commentary on the rule, see Alley Valkyrie, *Renting Sidewalks? Eugene Permit Program Abuses Homeless*, *EUGENE WEEKLY* (Oct. 23, 2014, 12:00 AM), <http://www.eugeneweekly.com/20141023/mic-check/renting-sidewalks>.

34. See, e.g., Art Bollman & The Occupy Eugene Library Committee, *Is This Eugene? OE Committee Challenges Eugene’s Sidewalk Policy*, *EUGENE WEEKLY* (Jan. 29, 2015, 12:00 AM), <http://www.eugeneweekly.com/20150129/mic-check/eugene>.



Fig. 4. The owner of Sizzle Pie in Eugene, Oregon, standing next to a sign attempting to demarcate the space in which the homeless are not welcome. Across the street is Kelsey Square, a public area in which many homeless people and others gather.<sup>35</sup>

From the perspective of DSD, this sign provides a remarkable example of how stakeholder interests shape systems. The potential stakeholders around the issue of what to do with the sidewalk in front of Sizzle Pie include Sizzle Pie itself, other local businesses, the homeless and others who are in the area but not purchasing anything (“loiterers”), homeless activists, business supporters, patrons of Sizzle Pie and neighboring businesses, businesses in other parts of Eugene, and members of the public generally. It is easy to imagine that these various stakeholders will have different priorities when it comes to the sidewalk outside Sizzle Pie, and this sign (a design element that embodies the city’s sidewalk permit rule) may be seen as an effort to address these divergent interests.

How does the sign work? First, the sign designates a boundary between business and public space, thus responding directly to the larger question of who is allowed to be where in the downtown area. With its sign, Sizzle Pie is apparently claiming a portion of sidewalk space, thus meeting some stakeholder interests (including its own) but also necessarily having an adverse impact on competing interests of other stakeholders. To mitigate this adverse impact, the sign frames the boundary as “STARTS HERE” and “ENDS HERE” (and not just “STARTS HERE” on only one side with the other side blank). Declaring the start *and* the end of the Sizzle Pie sidewalk space perhaps makes Sizzle Pie’s claim seem more modest and reasonable,

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35. McDonald, *supra* note 32.

less like corporate overreach or the privatizing of public goods. Indeed, having the sign at all suggests to visitors that the space outside Sizzle Pie was always part of Sizzle Pie, which may over time recalibrate community expectations around what is private and public space on the sidewalks.

Second, for those stakeholders who might balk at such recalibration, the sign makes clear that the boundary is meant as part of a larger and workable civic ecology with the humanizing phrase: PLEASE RESPECT OUR NEIGHBORS. This is a curious part of the sign because it is not immediately obvious what Sizzle Pie's boundary has to do with neighbors, or what it means by "our." Sizzle Pie's neighbors? The surrounding area's neighbors (which presumably would include Sizzle Pie, in which case the statement would mean PLEASE RESPECT US)? Perhaps it is a general appeal to social and interpersonal norms, meant to placate those stakeholders who may be concerned that their claims are wrongfully compromised by Sizzle Pie's carve-out of the sidewalk. In any event, PLEASE RESPECT OUR NEIGHBORS serves generally to reinscribe the boundary as a necessary part of respectful co-existence in community.

The Sizzle Pie sign is a small but instructive design component emerging from a larger ongoing conversation and municipal rule-making around downtown space, a conversation in which local activists on different sides are key participants. The sign is instructive because it serves as a tangible example of how the often-incompatible interests of stakeholders may ultimately be accounted for. Not every change effort ends in a march on the capitol, after all. Often activists must work within (or create) systems of interaction and exchange between various external parties—to be part of the discussion that leads to a small sign on a sidewalk, for example—to push forward their more ambitious agenda for change. Given that the sidewalk permit program now exists, activists who oppose the Sizzle Pie sign specifically, and the permit program generally, must now think through what would pressure decision-makers to repeal the rule authorizing the sign, which will require, among other things, thorough analysis of what various constituencies want.<sup>36</sup>

The Occupy Wall Street hand signals and the Sizzle Pie sign are two examples of how activist activities and environments can be described in terms of systems analysis and design. Additionally, the example of Sizzle Pie demonstrates how systems thinking is not always a proactive stance for activists. Sometimes activists must respond to changes in the system with an analytical approach that diagnoses why the change happened and, if the activists believe that the change is undesirable, how they might design a counterstrategy.

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36. Simply making the legal argument is unlikely to have the biggest positive impact for activists, even if the legal argument prevails, because the core problem (how to manage the space given the legitimate divergent interests of stakeholders) will remain. Accordingly, activists should consider how to address the core human problem, not just the legal one.

### III. SUPPORTING ACTIVISM WITH DSD: CURRICULAR IMAGININGS

But why does it matter that we can use “systems thinking” to describe how activists approach their work? Why would we care about sorting the internal and external activities associated with activism into the major DSD stages of assessment, design, and implementation? Two possible reasons come to mind.

First, using DSD to describe activism makes it easier to see how all the various activities within activism fit together as part of the complex, dynamic, and multidimensional systems that must be managed or created by activists. Even activists engaged in fairly small or straightforward campaigns must work with multiple highly diverse stakeholders within a shifting legal and political landscape that is plagued with widespread apathy on the one hand and entirely captured interests on the other. Activists often work with few resources and with members who come and go. They usually have no formal structural authority or power. Moreover, as activists work through their design of their own campaigns, they must interface continually with existing corporate or state systems—walking out during the workday, speaking during the public comment portion of a municipal meeting, getting arrested at a sit-in—even as they strive to create new systems between people and institutions.

For example, in the wake of student protests at various universities over the past year, some student activists have produced lists of demands.<sup>37</sup> Separate from the content of these demands, the demands themselves may be understood as an effort to install a new system of communication between students and administrators, and to create a space for real negotiation and exchange that did not exist before. Additionally, because these demands often include specific system-level changes (such as hiring more faculty of color, for example), they may be seen as efforts to improve existing systems by way of new infrastructure intended to recalibrate how the existing system operates in the future. In this way, as the previous section argued, DSD thinking provides a more differentiated and comprehensive *descriptive* understanding of the many competencies activists require to work effectively on many fronts.

A second and related reason to apply DSD principles to activism is that taking a systems approach may help activists, as well as those who work with or against activists, better evaluate strengths and weaknesses in their strategic approach. The remainder of this section focuses on this *pre-scriptive* benefit to systems thinking in activism, in that DSD might en-

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37. See, e.g., Andrew M. Duehren & C. Ramsey Fahs, *Law School Students Issue Demands on Diversity to Minow*, HARV. CRIMSON (Dec. 7, 2015), <http://www.thecrimson.com/article/2015/12/7/law-school-students-demands/> (reporting that students demand, among other things, “that Harvard prioritize recruiting and promoting more minority staff members”).



hance the activists' abilities to further their causes and their opponents' abilities to thwart their work.<sup>38</sup>

My own experience working with activists in Eugene suggests not only that providing DSD training would be helpful to activists, but also would create a foundation upon which to build new relationships between activists and law schools. On this first point, my work with activists has consisted primarily of what might be thought of as discussions about systems design. How do we reach out to the stakeholders? How do we structure proposed agreements? What is the best way to develop leverage? Who are the key decision-makers? What tools and methods are available, given the group's resources and membership? How can we prevent something happening in the camps or near businesses that will alienate the public and undermine progress? What do we do if that bad thing happens? Thinking through one's goals with a design focus has been a useful way to organize and assess priorities, people, risks, and contingencies.

It is a way of thinking that is both familiar and unfamiliar to many activists, especially those who are new to activism. Most activists understand on some level that they are working within multiple systems and under various pressures, and that the history of the problem is complicated and felt differently by different people. They know that message is important, both as a matter of organizing the internal activist membership, as well as shaping perceptions and managing external constituencies. They know that they cannot succeed without support from outside individuals and organizations. Many of them struggle with the competing demands of organizing and mobilizing. People fall away, people come back.



Fig. 5. Masked protestors; University of Missouri hunger strike. What makes a person become an activist? What could make that activist more effective? What assumptions are implicit in asking these questions?<sup>39</sup>

Experienced activists have written guides and developed training that are wonderfully helpful, practical tools for both new and seasoned activi-

38. Sometimes one might find oneself opposing activists, for whatever reason, and so that counts as a prescriptive benefit as well.

39. Mazarine Treyz, *WILD WOMAN FUNDRAISING*, <http://wildwomanfundraising.com/noticed-2/> (last visited Apr. 2, 2016); *Mizzou Football – All Hail the Pigskin God*, UNKNOWN BUDDHIST (Nov. 9, 2015), <http://unknownbuddhist.com/2015/11/> (last visited Apr. 2, 2016).

ists.<sup>40</sup> This work is largely consistent with the foundational principles of DSD, even if it frames concepts with different language and emphasis.<sup>41</sup> But even though these resources exist, it may still be beneficial to create DSD curriculum specifically with activism in mind. Such curriculum would help students (who may or may not themselves be activists) develop the tools to assess the challenges facing activists in a systematic, diagnostic way. These tools would not be taught in a vacuum, but instead would be grounded in historical case studies so that students may better appreciate how circumstances affect design choices and outcomes. That said, it is also true that some basic DSD problem-solving concepts will be applicable in multiple settings because they are fundamental to successful change management. Seeing these core concepts appear and reappear in case studies will reinforce how essential they are.

Activists who develop systems design capabilities not only will be better prepared to take a strategic approach to their work, but also may be able to take on new roles in implementing and evaluating solutions around particular causes. Put another way, systems-oriented activists not only raise awareness and push for change, they also could help with planning, risk assessment, roll out, and review/revisions of that change. Activists who are promoting ideas that are not familiar in their communities (for example, the tiny house movement in homeless activism<sup>42</sup>) may have better success pushing for these solutions if they can partner with other stakeholders around implementation. Sometimes that partnership could be based on substantive expertise, and sometimes it could be based on the change management capabilities that come from a thorough understanding of systems design. This expanded and cooperative role will not be desirable or possible for all activists and activist groups,<sup>43</sup> of course, but some activists may be

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40. See, e.g., Joshua Russell, *Resources for Organizers*, PRAXIS MAKES PERFECT, <https://joshuahahnussell.wordpress.com/resources-for-activists-and-organizers/> (last visited Feb. 12, 2016) (compiling various resources for activists that demonstrate both the depth and breadth of these practice materials).

41. See, e.g., Hillary Rettig, *THE LIFELONG ACTIVIST: CAREER AND LIFE STRATEGIES FOR JOYFUL ACTIVISTS AND PROGRESSIVES*, <http://www.lifelongactivist.com/> (last visited Feb. 12, 2016). Although Ms. Rettig frames her strategies differently (namely, as managing mission, time, fears, and relationships with self and others) than DSD, her specific advice around needs assessment and a “marketing” mentality fits well with DSD’s focus on stakeholder assessment and implementation. *Id.*

42. See, e.g., Noah Phillips, *Activists Work to End Homelessness One Tiny House at a Time*, VOICE OF AM. (Feb. 27, 2015, 11:41 AM), <http://www.voanews.com/content/activists-work-to-end-homelessness-one-tiny-house-at-a-time/2661799.html>.

43. Some radical activist groups are not interested in incremental or cooperative change within the existing political infrastructure.

As Sharon Beder observes, “For dark green environmentalists, there is no short cut to power and influence through compromise. They believe that green values can only be incorporated into a policy making system which emerges after a paradigm shift.” Sharon Beder, *Activism Versus Negotiation: Strategies for the Environment Movement*, 10 Soc. ALTERNATIVES 53, 55 (1991). See also Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to*

able to advance their causes more adeptly by bringing systems analysis and design skills to the table. On this view, activists can do much more than raise awareness and demand change: they can bring real solutions forward and assist in realizing them.<sup>44</sup>

Activists who learn DSD (or any structured analytical approach) therefore will be better equipped to promote their causes. It also follows that others who learn DSD (or any structured analytical approach) will have an easier time analyzing activist strategies and figuring out where areas of strength or weakness might be, thus enabling them to mount a parallel strategy or counterattack, depending on the situation. For both these groups, studying DSD develops skills and perspective useful to their goals.

Imagining activists and others studying DSD brings us to the law school and ADR—in other words, back to the larger project mentioned at the start.

What if the law school offered a course in activism that had a historical component and a skills-building component in systems design? Such a course would teach skills in context, expressly acknowledging that activism is a highly varied practice space and the systems involved are not closed, contained systems. Case studies would allow students to practice systems analysis while learning about social movement traditions, and would also afford opportunities to critique design methods, negotiation, ADR, and the law and legal institutions more broadly.<sup>45</sup> Perhaps this will be a course for non-law-student activists (so outside the traditional schedule), or for law students only, or for some combination of the two. If creating a hybrid student/non-student course is not feasible, the course could still engage activist perspectives by partnering law/ADR faculty with adjuncts who are activists. Another way to accomplish this activist-student integration may be to have an affiliated clinic with the course that would establish longer-term relationships with local activist groups and peel off specific projects that provide practice in assessing stakeholders, identifying existing and

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*Human Rights*, 39 WASH. U. J.L. & POL'Y 257, 258 (2012) (describing the concern of human rights activists who worry that conflict resolution methods, such as negotiation, are more about restoring peace than realizing justice).

44. See, e.g., ROGER FISHER ET AL., COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION 16–26 (1997) (asserting that the activist perspective is solution-oriented, not just an abstract dissatisfaction with the way things are). Incorporating dispute systems design thinking into the work of activism promotes this conception of “thinking like an activist.”

45. Since many activists do not trust “the establishment” (which would include law schools) (see, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982)), such a course would provide an opportunity to interrogate some of the assumptions of legal education and perhaps re-envision what it might be. Must the law school be the reproducer of hierarchy, or could it be something else? See, e.g., Julie Macfarlane, *Bringing the Clinic into the 21st Century*, 27 WINDSOR Y.B. ACCESS TO JUST. 35, 35 (2009) (describing how modern clinics serve vulnerable populations).

needed system elements, designing pieces of systems, formulating strategies, and even coaching in conflict management and negotiation.

If an entire course or clinic on DSD and activism with activists attending as teachers and students sounds too ambitious as a regular offering, what if the law school instead intentionally integrated studies of activism and social movements more deliberately into the curriculum?<sup>46</sup> Although many parts of the curriculum would benefit from increased attention to these topics, certainly ADR would be an area that would enjoy some of the most rewards. New simulations and case studies on activism, renewed focus on the complexities of multilateral negotiation, and a greater appreciation for “wicked problems”<sup>47</sup> in context would be among some of the intellectual and pedagogical advantages of increased focus on activism in existing ADR classes.

Finally, instead of (or in addition to) formal coursework, the law school could start providing space and facilitators for local activists planning campaigns or holding meetings. DSD-trained facilitators could walk through the stages of systems design to assist with strategy, or could serve as meeting facilitators for groups. The law school could provide training for law students and outreach to local activist organizations. For law students, guiding a group analytically and deliberately through a strategy session or meeting would be an extraordinary professional development opportunity. For activists, having access to space and outside facilitation is an additional resource that some activist groups may find valuable. And for law schools, especially public law schools, making the law school and the law more relevant and accessible to the community is quite simply our civic duty.<sup>48</sup>

## CONCLUSION

Expanding upon that last point, law schools today can do more for non-student community members than just offer information on landlord-tenant law and provide legal aid clinics (though these are important). The modern law school is home not only to traditional doctrine and formal legal practice, but also to alternative, informal, and extralegal methods. Commu-

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46. See Guinier & Torres, *supra* note 1, at 2802 (“[M]any lawyers and law professors still focus on legal cases and judicial opinions without necessarily considering the social, political, and historical forces that influence the development of legal doctrine.”).

47. See, e.g., Christopher Honeyman & James Coben, *Navigating Wickedness: A New Frontier in Teaching Negotiation*, in *VENTURING BEYOND THE CLASSROOM: VOLUME 2 OF THE RE-THINKING NEGOTIATION SERIES* (Christopher Honeyman et al. eds., 2010).

48. CHRIS HEDGES & JOE SACCO, *DAYS OF DESTRUCTION, DAYS OF REVOLT* 240–41 (2012) (castigating, in the context of the Occupy movements, the “timidity of those tasked with protecting our Constitutional rights—the media, elected officials, judges, the one million lawyers in this country, and the thousands of law school professors and law school deans . . .”) (emphasis added). Even if the law school offered no formal coursework or student-focused support services around activism, it should, at a minimum, sponsor regular forums for those engaged in public conflict, or for those wanting to talk about ongoing conflicts and developments around social movements.

nity members seeking change would benefit from greater exposure to the foundational assumptions and methods of the alternative dispute resolution movement. Likewise, faculty and students studying ADR would benefit from more interaction with people such as activists who are trying to effect change from a position of structural powerlessness.

When student activists were protesting at the University of Missouri last year, one of my ADR colleagues wondered whether law school dispute resolution faculty members have any role in or responsibility for “help[ing] manage the conflict . . . more constructively” especially given that “[t]hose of us in academia . . . may not have the skills, experience, or time to intervene directly.”<sup>49</sup> This is insightful phrasing because it recognizes an inherent design problem with how law schools and academics (structured) interact with the outside world (chaotic). Perhaps the real promise of DSD as applied to activism is that it develops more overall capacity not just to imagine how activists might be more effective or how law schools and faculty might engage with and support activism, but also to contribute to the ongoing “conversation about how lawyer-citizens working with social movement activists authorize new meanings for lawmaking and thus challenge existing centers of power in service of democracy”<sup>50</sup>—in other words, to deepen our understanding of and capacity for change.

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49. John Lande, *How Can We Help in Major Social Conflicts, if at All?*, *INDISPUTABLY: LINKING DISP. RESOL. SCHOLARSHIP, EDUC., & PRAC.* (Nov. 11, 2015), <http://www.indisputably.org/?p=7795>.

50. Guinier & Torres, *supra* note 1, at 2752–54.