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THE DISPUTE RESOLVER'S ROLE WITHIN A DISPUTE SYSTEM DESIGN: JUSTICE, ACCOUNTABILITY, AND IMPACT

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Issues of justice, accountability, and impact cross arenas in which dispute resolvers engage in Dispute System Design (DSD). This symposium addresses DSD along the policy continuum, from making policy upstream, to implementing it midstream, to the quasi-judicial or judicial enforcement of policy downstream. The many leading scholars and practitioners whose articles appear in this symposium issue have long worked to deepen and disseminate knowledge about negotiation, mediation, arbitration, and dispute resolution through teaching, public speaking, working in public service, influencing policy, and performing scholarship. This symposium provided an opportunity for these scholars to share ideas about system design and its goals. In this field, the goals always include some conception of justice, whether consciously and intentionally or as a by-product.[1] The purpose of the symposium was to inspire scholars, practitioners, and policy-makers to focus on the roles of justice, accountability, and impact in system design.

Dispute resolvers need to understand the institutional context within which they work. These institutions will vary widely; analyzing them involves DSD.[2] All stakeholders and participants in these systems are responsible for doing the work to understand the system, not just a single case within it. This means learning to take a system apart, critique it, and make the system accountable for its impacts. Some might argue this is a job for experts, not stakeholders and participants. That is wrong: these systems arise in the context of governance structures, including democracy in the United States and abroad. Are the people who host and manage the DSD

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1. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 1–50 (2008).

2. Stephanie E. Smith & Janet K. Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 123–69 (2009).

accountable for its impacts and whether it delivers justice as an outcome? Ultimately, this question is one that reflects on the quality of governance. In the United States, it reflects on the efficacy of a democracy. Unless the system's impacts are transparent, those who operate and host it are not accountable.[3] A culture of confidentiality arising from traditions and conventions in negotiation, mediation, and arbitration has built a significant, and needless, barrier to empirical research on these systems.[4]

The failure of participants to consider a system's impact on justice and to hold its sponsors accountable was the subject of a recent movie, *Spotlight*, about the Boston Globe team of journalists whose reporting took apart the system the Roman Catholic Archdiocese put in place to protect priests who engaged in sexual abuse of children in their parish.[5] Their reports described a DSD in the shadow of the formal justice system in which lawyers on both sides negotiated settlements to hide all evidence of the abuse and ensure there were no public court records that would demonstrate the pattern and practice of transferring priests repeatedly from one parish to another. As negotiators and dispute resolvers, lawyers for both sides knowingly and repeatedly participated in this system and got paid for doing so. They rationalized their participation through the lawyer code of ethics that requires attorney-client privilege.[6]

How can dispute resolvers play a role in making systems accountable? How do we define and measure accountability for DSD? This essay will advocate using lateral thinking by crossing several different silos of scholarly work in law, political science, public administration, psychology, and philosophy.[7] It introduces DSD, its history, and a related research area, Institutional Analysis and Development (IAD). It then discusses DSD as it occurs across the policy continuum through collaborative governance for public and private institutions. The article next turns to how dispute resolvers should approach justice, accountability, and impact in DSD. It introduces accountability and performance measurement of impact from

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3. Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 32–55 (2014).

4. Lisa Blomgren Bingham, *Evaluation Dispute Resolution Programs: Traps for the Unwary*, LAB. & EMP. REL. ASS'N SERIES: PROC. OF THE 59TH ANN. MEETING, 104, 104–15 (2007). It is possible to conduct quantitative empirical research on a DSD and report impacts and outcomes in the aggregate without violating the confidentiality of a participant in a given case.

5. A.O. Scott, *Review: In 'Spotlight,' The Boston Globe Digs Up the Catholic Church's Dirt*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/movies/review-in-spotlight-the-boston-globe-digs-up-the-catholic-churchs-dirt.html?_r=0.

6. This form of participation should be compared to the notion of participation in the Compendium of the Social Doctrine of the Church. PONTIFICAL COUNCIL OF JUST. AND PEACE, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

7. Lisa Blomgren Bingham et al., *Frameshifting: Lateral Thinking for Collaborative Public Management*, *in* BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT 3, 3–16 (Lisa Blomgren Bingham & Rosemary O'Leary eds., M.E. Sharpe 2008).

public administration. It explores how we might apply concepts of justice from psychology, philosophy, and jurisprudence to measure accountability.

This article will then apply these concepts to the lawyer and dispute resolver's roles in accountability for DSDs involving forced or mandatory arbitration, the systematic suppression of evidence of sexual abuse by priests of minors in *Spotlight*, and Ferguson, Missouri's systemic racism in the DSD for the local criminal justice system of police and courts. Throughout this discussion, the article will briefly introduce other pieces in this symposium issue. It concludes that as dispute resolvers, we need transparency in how DSDs promote justice; we need to build accountability and performance measurement into DSD; and we need to take responsibility for helping ensure these systems are accountable to the people who use them and to the public.

I. Dispute System Design

While humans have developed evolving systems for managing conflict in social groups for millennia, the modern field of negotiation and dispute resolution gave rise to DSD about thirty years ago.[8] In 1918, Mary Parker Follett proposed integrative negotiation as a way for people to resolve conflict, one that involved a deeper examination of what disputants truly need and want.[9] While other scholars built on her work in labor negotiation,[10] in 1981, Roger Fisher and William Ury introduced integrative bargaining to the broader public as negotiation based on interests (basic human needs like security, economic well-being, belonging, recognition, and autonomy).[11] They termed it "principled" or "interest-based" negotiation.[12] Building on this work, William Ury, Jeanne Brett, and Stephen Goldberg introduced DSD by examining how systems for managing conflict in labor relations address disputants' interests, contractual and legal rights, or respective power.[13] Historically, disputants in collective bargaining primarily used rights or power to manage conflict. Ury, Brett, and Goldberg proposed that a healthy DSD should primarily rely on addressing the parties' interests through negotiation and mediation, with rights-based approaches like griev-

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8. For a more comprehensive history, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 Ohio St. J. Disp. Resol. 1, 1–37 (2000). This discussion is adapted from Lisa Blomgren Amsler et al., *Christina Merchant and the State of Dispute System Design*, 33 (S1) Conflict Resol. Q. s7 (2015).

9. Mary Parker Follett, The New State: Group Organization the Solution of Popular Government (Penn State Univ. Press 1998) (1918).

10. Richard E. Walton & Robert B. McKersie, A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System (1965).

11. Roger Fisher & William Ury, Getting to Yes (1981).

12. Roger Fisher, William Ury & Bruce Patton, Getting to Yes (3d ed. 2011).

13. William L. Ury et al., Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988). For early evaluation work on a system's accountability, see Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 Indus. & Lab. Rel. Rev. 49, 49–69 (1983).

ance arbitration as a fallback. They advocated against using power (strikes, lockouts, etc.).

Since this birth of DSD as a field, other scholars have broadened its reach outside labor relations. Mary Rowe applied it to systems for nonunion employers through ombuds programs.[14] Using their wide experience in the public, private, and international sectors and building on the organizational development literature, Costantino and Merchant advocated DSD for all organizations based on values of openness, tolerance of diversity, learning, involvement, appreciation, and management of differences.[15] DSDs should be open systems that generate valid data and use mechanisms for feedback. They viewed DSDs as arrangements of dynamically interrelated parts influenced by their environment. Lipsky, Seeber, and Fincher used their longitudinal research on dispute resolution in large businesses like the Fortune 1000 to provide a taxonomy of organizational conflict management styles; they provided a deeper dive into the building blocks and elements of conflict management systems for employees and employers.[16] Lawyers have effectively been using DSD, for example by drafting forced, mandatory, or adhesive arbitration clauses, but without the express training they need.[17]

II.   Applying DSD

Literature in political science, law, and dispute resolution can contribute to our understanding of DSD by giving us frameworks to analyze a system and understand how to improve it.

A.   *Institutional Analysis and Development*

The late Elinor Ostrom, Nobel laureate in Economics and political economy scholar, contributed the IAD framework, a disciplined methodology for understanding the diversity of institutions that humans use to govern their behavior.[18] It provides a language and syntax to analyze all human institutions, including DSDs for managing conflict. Ostrom suggested seven

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14. Mary P. Rowe, *Disputes and Conflicts Inside Organizations: A Systems Approach*, 5 Negot. J. 149, 149–57 (1989).

15. Cathy A. Costantino & Christina Sickles Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (1996). Costantino and Merchant each had careers in the federal government, where they were early innovators in developing DSD in the Federal Deposit Insurance Corporation and the Federal Labor Relations Authority respectively.

16. David B. Lipsky et al., Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals (2003). Lipsky, Seeber, and Fincher are all faculty at the Cornell University School of Industrial and Labor Relations and have conducted longitudinal research on the use of alternative dispute resolution by the Fortune 1000.

17. A few law schools have courses and textbooks now available. *See e.g.*, Nancy H. Rogers et al., Designing Systems and Processes for Managing Disputes (2013).

18. Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (1990); Elinor Ostrom, Understanding Institutional Diversity

categories within an "action arena" that is at work in any institution, including DSDs that manage conflict: (1) participants (individual or corporate); (2) their positions or roles; (3) potential outcomes; (4) allowable actions and the outcome function; (5) individual control over this function; (6) information available to participants about actions and outcomes; and (7) costs and benefits (incentives and deterrents).[19]

Ostrom examines rules that shape human behavior in institutions, both rules on the books and rules that emerge from practice. She also places the action arena in the context of biophysical or material conditions and attributes of community.[20] Ostrom sees institutions as nested. There is a large body of empirical literature using Ostrom's work and the IAD framework to examine how stable collaborative governance structures can arise in communities managing common pool resources like forests or fisheries.[21] As dispute resolvers operate within a specific DSD, IAD can help them think about the big picture. For example, the rules of an arbitration system design shape who the participants are by determining whether to prohibit class actions.[22] These rules can also shift transaction costs to the plaintiff, thereby determining potential outcomes. Ostrom's IAD framework provides a general analytic framework for all institutions.

B.   *The Analytic Framework for DSD*

Smith and Martinez proposed an Analytic Framework for Dispute System Design specifically to help negotiators and dispute resolvers more closely analyze their specific DSD context.[23] A revised version of this framework appears below:

Figure 1. An Analytic Framework for Dispute System Design

1. Goals
   a) What do the system's decision maker(s) seek to accomplish?
   b) Which types of conflicts does the system seek to address?
2. Stakeholders
   a) Who are the stakeholders?
   b) What is their relative power?
   c) What are their interests and how are their interests represented in the system?

(2005); Elinor Ostrom, *Background on the Institutional Analysis and Development Framework*, 39 The Pol'y Stud. J. 7, 7–27 (2011).

19. Ostrom, Understanding Institutional Diversity, *supra* note 18, at 14.

20. *Id.* at 15.

21. *See generally*, Ostrom, Governing the Commons, *supra* note 18. *See also* Ostrom, Understanding Institutional Diversity, *supra* note 18.

22. Lisa Blomgren Amsler, *The Evolution of Social Norms in Conflict Resolution*, 6 J. Nat. Resources Pol'y Res. 285, 285–90 (2014).

23. Smith & Martinez, *supra* note 2, at 123–69.

3. Context and Culture
    a) How does the context of the DSD affect its viability and success?
    b) What aspects of culture (organizational, social, national, or other) affect the workings of the system?
    c) What are the norms for communication and conflict management?
4. Processes and Structure
    a) Which processes are used to prevent, manage, and resolve disputes?
    b) If there is more than one process, are they linked or integrated?
    c) What are the incentives and disincentives for using the system?
    d) What is the system's interaction with the formal legal system?
5. Resources
    a) What financial resources support the system?
    b) What human resources support the system?
6. Success, Accountability, and Learning
    a) How transparent is the system?
    b) Does the system include monitoring, learning, and evaluation components?
    c) Is the system successful?[24]

This framework specifically incorporates accountability and implicitly incorporates impact by looking to success and learning. Both public administration scholarship and DSD advocate performance measurement and accountability. However, we need a deeper discussion of how we might apply these concepts in systems for managing and resolving conflict.

The Analytic Framework also incorporates context and culture. The Chair and Convener of this Symposium, Professor Mariana Hernandez Crespo, addresses the importance of culture in DSD for international investment treaties in our increasingly globalized world.[25] She observes that a fundamental premise of globalization is a world that is more connected than ever—with a level of interconnectivity that allows people all over the world instant access to each other through videoconferencing, free calls, or virtual platforms. People no longer live in small, independent villages where they

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24. *Quoted from* LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN (forthcoming) (adding a sixth element, context and culture), *as cited in* Amsler et al., *Christina Merchant and the State of Dispute System Design*, *supra* note 8.

25. *See* Mariana Hernandez Crespo, *From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction*, *in* INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVE TO ARBITRATION II 55 (Susan D. Franck & Anna Joubin-Bret eds., 2011), http://unctad.org/en/Docs/webdiaeia20108_en.pdf.

mainly bond based on common ground; globalization has created increased interaction with those less familiar to us. For example, people in Minnesota can easily connect with people in China.

She argues it is time, in this global community, to move from mainly bonding with those who are similar to more bridging with those who are different. In this way, we can promote innovation and growth.[26] Some people may decide it is a waste of time to interact with others when there is little common ground. Some may try to engage others for business, social, or political purposes; but, if they have not developed the capacity to combine, manage conflict, or resolve disputes, they might do it ineffectively.

She observes that unequal power may cause people to deal with differences through assimilation. For a quick reference, Professor Hernandez Crespo describes assimilation as, "I need to become like you." She argues this produces stagnation and uniformity. Those with more bargaining power usually dictate what is considered "normal." Through the process of assimilation, those with less power conform to the "normal," thus producing uniformity. However, when power is more equal, it can lead to conflict.

Professor Hernandez Crespo advocates that we use DSD along the policy continuum in the context of Foreign Direct Investment (FDI) at the domestic level, so that host States can retain and expand investment. She calls this model Shared Decision System Design (SDSD), and argues that, together with Cultural Sensibility Frameworks (CSF), it can help us interact more effectively with those who are different. She suggests that this could contribute to the foreign investors and host States reaching better understanding, and, ultimately, developing a stronger business relationship. Through this model, she reasons that foreign investors and host States can better integrate their differences in a way that promotes unity and innovation.

Historically, Professor Hernandez Crespo observes a significant number of workers who immigrate to the United States have to assimilate, typically because they lack economic power. When the less powerful simply assimilate into the "normal," an opportunity for innovation and growth is squandered. However, investors from the global south are investing in each other and in developed countries in the north. For example, a company from Mexico (Grupo Bimbo) purchased a company from the United States (Sara Lee) to more effectively penetrate the American markets by buying strategic assets.

Foreign direct investors with more economic power may be less likely to assimilate and prefer to go to countries where they can more easily integrate. In our current global economy, countries compete to attract FDI,

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26. *See id.*; *see also* Mariana Hernandez Crespo, *Enough of "My Way or the Highway": Shared Decision System Design (SDSD) with Cultural Sensibility Frameworks (CSF) as a Catalyst to Promote Integration in Investor-State Relationships* (forthcoming).

since they can generate jobs and stimulate the local economy. Investors usually go where they can obtain a natural resource, gain a market share, obtain a strategic asset, or produce more cost-effective products to export. Yet, if an investor has a number of locations that offer the same economic incentives, then the quality of the interactions with the host State can become a key factor in attracting and retaining the investor. Investors might be more likely to go where they can develop strong relationships and resolve conflicts in a more effective and satisfactory way. In this context, Professor Hernandez Crespo argues that using SDSD with CSF can promote understanding and integration, thereby contributing to enhance innovation and growth.

III.   APPLYING DSD ACROSS CONTEXTS

DSD now applies outside courts and organizations; it applies to all kinds of human institutions, and in public, private, and nonprofit contexts.[27] In this symposium, Professor Jacqueline N. Font-Guzman explores using DSD for advance care planning for health care within a community.[28] She addresses cultural differences between Latinos and Caucasians in using the process to limit unwanted, futile, and painful health services and care. Examining the stakeholders (patients, caregivers, healthcare professionals, and family), she discusses how DSD can help integrate advance care planning and advance social capital within Latino communities.

DSD reaches beyond traditional courts and forums; it includes new systems to address national conflicts and repairing the fabric of civil society after ethnic, racial, or religious violence. It includes truth and reconciliation commissions such as that in South Africa. Professor Jacqueline Nolan-Haley addresses DSD to achieve justice in Northern Ireland seventeen years since the Good Friday Agreement was signed; she discusses how governance has moved to shared power in the Northern Ireland Assembly, paramilitaries on both sides have surrendered their guns, prisoners have been released, and policing practices have improved.[29] She explores the fragility in the peace process: walls separating sectarian communities in Belfast and many citizens struggling with remembering the past. The Good Friday Agreement did not address abuses of the past, leaving contested issues and disputes related to parades, policing, truth recovery, the needs of

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27. LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (forthcoming).

28. Jacqueline N. Font-Guzmán, *Closing the Gap: Embedding Advance Care Planning in a Latino Community by Using a Culturally Sensitive Dispute Systems Design Approach*, 13 U. ST. THOMAS L.J. __ (forthcoming May 2017).

29. Jacqueline Nolan-Haley, *Designing Systems for Achieving Justice After a Peace Agreement: Northern Ireland's Struggle With the Past*, 13 U. ST. THOMAS L.J. __ (forthcoming May 2017).

victims, and human rights.[30] Northern Ireland has taken an eclectic approach to DSD using multiple models: commissions, fact-finding tribunals, and dialogue projects. She assesses their potential for dealing with the legacy of the past and ultimately achieving justice.

There is no world sovereign; this raises new challenges as global trade and consumer transactions pose new questions about international and transnational justice. Colin Rule, founder of Modria, is a leader internationally in online dispute resolution. He examines dispute systems design in cyberspace as technology not only changes society but also dispute resolution by moving mediation and arbitration online. He explores DSD that functions across the globe in consumer and business transactions twenty-four hours a day and seven days a week.[31] He is part of an international working group exploring how online dispute resolution can help disputants address conflict while avoiding complex issues of jurisdiction. New online designs have the potential to provide affordable justice across international boundaries.

All international treaties are the product of negotiation. World courts as institutions for managing conflict are forms of arbitration, because the parties must agree to submit to their jurisdiction. DSD is critically important in the international arena. Professor Susan Franck applies DSD to international investment treaties; in 2010, she convened an international conference of leaders in this field to explore how to improve existing designs incorporated in these treaties.[32] The web of investment treaties now tops three thousand.[33]

In this symposium, Professor Susan Franck explored how investment treaties clarify and identify state responsibility related to investment through a new generation of treaties that grant rights providing for arbitration as a back-stop of dispute settlement.[34] The Trans-Pacific Partnership covers forty percent of the world's economy and provides direct access to substantive rights and procedural dispute settlement.[35] Shifts are underway

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30. Jacqueline Nolan-Haley & Bronagh Hinds, *Problem-Solving Negotiation: Northern Ireland's Experience with the Women's Coalition*, 2003 J. Disp. Res. 387 (2003); Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland After the Good Friday Agreement*, 22 Fordham Int'l L. J. 1372 (1999).

31. Colin Rule, *Designing a Global Online Dispute Resolution System: Lessons Learned from eBay*, 13 U. St. Thomas L.J. __ (forthcoming May 2017).

32. Investor-State Disputes: Prevention and Alternative to Arbitration II 55 (Susan D. Franck & Anna Joubin-Bret eds., 2011), http://unctad.org/en/Docs/webdiaeia20108_en.pdf.

33. *See generally* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int'l L. J. 435 (2009); Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769 (2011).

34. Susan D. Franck, Professor of Law, Washington & Lee Univ. Sch. of Law, Address at the University of St. Thomas Law Journal Symposium: Dispute System Design: Justice, Accountability, and Impact (Nov. 13, 2015).

35. Kevin Granville, *The Trans-Pacific Partnership Trade Accord Explained*, N.Y. Times (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html?_r=0.

to promote a more systematic and integrated method of investment-related dispute settlement that, one may hope, alleviate rather than create concerns about illegitimacy and justice.

A.   DSD in Collaborative Governance and Voice Across the Policy Continuum

Negotiators and dispute resolvers can use DSD in a much broader array of settings than originally conceived; they can use it at different points to hear the "voice" of the stakeholders or the public across the entire policy process. The policy process is like a stream, running from headwaters upstream in legislation to adjudication of conflicts downstream. DSD applies across this policy continuum[36] whenever institutions design and provide opportunities for voice.[37] For example, DSD applies upstream in the legislative or quasi-legislative process for making policy when sponsors design opportunities for public engagement, dialogue, and deliberation. It applies midstream in the executive branch when administrative agencies implement policy through collaborative or network public management (e.g. disaster management) and forms of dispute resolution (e.g. environmental mediation). This view of DSD's range is broader than the traditional downstream use of DSD to manage conflict through alternative or appropriate dispute resolution (ADR) in quasi-judicial (e.g. EEOC hearings), judicial (e.g. courts), or adjudicatory systems (e.g. grievance arbitration).

During the final third of the twentieth century, the way that we talk about both government and conflict evolved. Certain problems cannot be solved or solved easily by one entity acting alone[38] because they cross state, national, regional, or global jurisdictional boundaries. "Wicked problems" like environmental health and climate change challenged the capacity of a single governmental unit operating in hierarchy using command and control management strategies. Scholars shifted their emphasis to the concept of governance, rather than government.[39] Governance suggests steering rather than top-down directing.

In this symposium, Janet Martinez examines DSD in the context of a critical policy issue, Sustainable Groundwater Management in California, a state which recently adopted legislation to manage its groundwater re-

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36.   *See generally* Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 Mo. J. Disp. Resol. 269 (2009).

37.   Lisa B. Bingham, Tina Nabatchi & Rosemary O'Leary, *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 Pub. Admin. Rev. 547, 547–58 (2005). *See generally* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 Wis. L. Rev. 297 (2010).

38.   Robert Agranoff & Michael McGuire, Collaborative Public Management: New Strategies for Local Governments (2003).

39.   The Sage Handbook of Governance (Mark Bevir ed., 2011).

sources.[40] Applying a collaborative governance frame to look at DSD up-stream, midstream, and downstream in the policy process for over a hundred basins, she addresses the challenge of designing a local system to meet the goal of sustainable management. Who will be the lead governing agency? What stakeholders will be involved? How will the basin be managed? How will such policies be implemented and enforced? She discusses collective learning among decision makers, adequate technical data availability, and dispute resolution procedures, and their implications for teaching lawyers, environmental and agricultural advocates, geophysical experts, and policymakers about participating in DSD.

Dispute resolvers need to understand their context, whether they are working toward a particular policy through a city council's draft ordinance on which there is public engagement, helping agencies, churches, and NGOs negotiate their relative roles and jurisdictions in emergency management after a hurricane, or collaborating with local, state, and federal actors in negotiation over a terrorist hostage situation. Dispute resolvers and negotiators operate across the policy continuum, whether they are representing a client as a lobbyist or are inside an organization and acting as its agent in a network of other organizations.

B.   *Accountability in Public Administration*

Public administration is a field of scholarship focused on systems of governance and the role of people in them. Public servants are accountable to the public. The *Spotlight* story, discussed later, illustrates a failure of accountability in the DSD in the shadow of the civil justice system. Accountability means the obligation or willingness to be responsible for one's actions; it means being called to account for one's actions to carry out the public will and the values it embodies. It is an instrument for a higher authority to exert control. There are three key elements: 1) information provided by the accountable party, 2) discussion between the accountable party and the oversight body, and 3) the consequences for the accountable party.[41]

Public administration scholars propose frameworks for assessing a public servant's accountability.[42] Dubnick suggests six promises implicit in accountability: three instrumental promises that are means or mechanisms

40. Janet Martinez, Esther Conrad & Tara Moran, *Upstream, Midstream, and Downstream: Dispute System Design for Sustainable Groundwater Management*, 13 U. St. Thomas L.J. __ (forthcoming May 2017).

41. Gijs Jan Brandsma & Thomas Schillemans, *The Accountability Cube: Measuring Accountability*, 23 J. Pub. Admin., Res. & Theory 953, 955 (2013).

42. Melvin Dubnick, *Accountability and the Promise of Performance: In Search of the Mechanisms*, 28 Pub. Performance & Mgmt. Rev. 376 (2005); Melvin J. Dubnick & H. George Frederickson, *Accountable Agents: Federal Performance Measurement and Third-Party Government*, 20 J. Pub. Admin. Res. & Theory i143–i159 (2009); Melvin J. Dubnick & Kaifeng Yang, *The Pursuit of Accountability: Promise, Problems, and Prospects*, in The State of Public Ad-

for accountability and three intrinsic promises that are ends or virtues of accountability.[43] The means or mechanisms include control (inputs), ethical behavior/choices (processes), and performance (outcomes).[44] The ends or virtues include integrity (inputs), legitimacy (processes), and *justice* (outcomes).[45] The six promises are abbreviated and paraphrased below:

- The promise of *control* assumes standardized procedures will provide greater accountability.
- The promise of *ethical behavior* assumes agencies can prevent corruption through procedural accountability.
- The promise of *performance* assumes performance measurements will hold people to account so they will perform better.
- The promise of *integrity* assumes people want to be part of an accountable culture.
- The promise of *democracy* assumes accountability procedures will produce democratic outcomes.
- The promise of *justice* (or equity) assumes there will be fair or just outcomes when people seek justice due to some act.[46]

The three instrumental promises of control (inputs), ethical behavior/choices (processes), and performance (outcomes) imply performance measurement. Congress enacted the Government Reporting and Results Act of 1993[47] (GPRA) to provide a mechanism for ensuring that administrative agencies in the federal government engaged in systematic and strategic performance measurement to provide data to assess the effectiveness of public policy and programs. GPRA requires strategic planning, annual performance plans, and annual performance reports. These all require using performance measures. GPRA requires that indicators be quantitative, objective, and measurable. Measurement types include inputs (resources consumed), outputs (quantities produced), and outcomes (results). The Government Performance and Results Modernization Act of 2010 moved from emphasizing the production of agency performance plans and reports to focusing on goals and measures to improve the effectiveness and efficiency of Federal action. It emphasized using performance information to plan future action.

While very little of the public administration literature addresses conflict resolution programs in agencies, Professor Timothy Hedeen examines

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MINISTRATION: ISSUES, CHALLENGES, AND OPPORTUNITIES 171–86 (D. C. Menzel & H. L. White eds., M. E. Sharpe 2011).

43. Dubnick & Frederickson, *supra* note 42, at i145 (*citing* Dubnick in progress).

44. *Id.*

45. *Id.* (emphasis added).

46. *Id.*

47. Government Reporting and Results Act, 5 U.S.C. § 306 *et seq.* (2012).

organizational ombuds officers and how they occupy an oscillating space[48] between their visitors and their host organization. He argues that their role in providing information, careful attention, impartial mediation, or upward feedback confers a dynamic identity both with the visitor and with the organization.[49] As justice reformers, they need to alternate between contending purposes of their work, and determine to whom they owe allegiance, their organization or their visitor. Visitors may come to the ombuds both in their collective identity or individual identity. Ombuds serve as intermediaries providing access to justice within organizations. The ombuds may provide a forum of accountability.

IV. Can We Measure Accountability in DSD Through Varieties of Justice?

The Analytic Framework for DSD emphasizes transparency, accountability, and measuring success as key components for systems. How can we use justice, Dubnick's sixth and final intrinsic promise,[50] to measure a DSD's performance and ensure accountability? There are many definitions of justice, both in terms of process and outcome or means and ends. An over-simplified grouping of definitions includes justice related to outcomes, procedures, organizations, and communities.[51]

A. *Justice as to Outcomes*

Justice related to outcomes includes substantive, distributive, utilitarian, and social justice. Distributive justice theories provide ways to examine the pattern of outcomes or ends a DSD produces. For example, the U.S. Department of Justice's ADR program collected data on the use of ADR in litigation conducted by the Assistant U.S. Attorneys (AUSA) in their representation of federal agencies. One ongoing debate in dispute resolution is whether ADR provides second-class justice. Since the AUSAs represent the public and taxpayers, this raises a question of accountability. Often, researchers use outcomes of litigation, sometimes defined as the proportion of the claim awarded, as a measure of success. This is a form of distributive justice downstream in the judicial arena on the policy continuum. One study found no statistically significant difference in outcomes in cases in which AUSAs use ADR compared to those using traditional litigation without ADR; the study used samples of cases matched on claim, sub-

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48. Andrew Woolford & R.S. Ratner, *Nomadic Justice? Restorative Justice on the Margins of Law*, 30 Soc. Just. 177 (2003).

49. Timothy Hedeen, *Ombuds as Nomads? The Intersections of Dispute System Design and Identity*, 13 U. St. Thomas L.J. __ (forthcoming May 2017).

50. Dubnick & Frederickson, *supra* note 42.

51. For a longer yet still partial list, see Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 Ohio St. J. on Disp. Resol. 1 (2008).

ject matter, and district during the period from 1995–98 when courts were implementing ADR programs.[52]

B.   *Justice as to Procedures*

Justice related to procedures includes voice and control over processes, known as procedural justice.[53] Procedural justice provides a way to examine the process a DSD uses to produce its ends or outcomes. The U.S. Occupational Safety and Health Review Commission (OSHRC) had outside evaluators assess its Settlement Part Program, in which its pool of administrative law judges (ALJ) served either as mediators or as adjudicators.[54] OSHRC is the appellate body for Occupational Safety and Health Administration (OSHA) cases citing employers for violating the law.[55] This program is within an administrative agency and midstream in the quasi-judicial arena of the policy continuum. A survey of lawyers representing employers and OSHA used procedural justice to measure perceptions of fairness in the program. Researchers found the majority (over seventy-three percent) were satisfied with the fairness of the mediation process and that repeat players (lawyers who had multiple cases before OSHRC) preferred mediation to adjudication with an administrative law judge.[56]

C.   *Justice as to Organizations*

Justice related to organizations is also known as organizational justice, an outgrowth of procedural justice that includes components of interactional, informational, and interpersonal justice.[57] These forms of justice specifically relate to the way employees, supervisors, and managers interact in a grievance procedure or other process for managing conflict within the organization. In the U.S.P.S. REDRESS Program,[58] outside evaluators used

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52.   Lisa Blomgren Bingham et al., *Dispute Resolution and The Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24:2 Ohio St. J. Disp. Resol. 225, 262 (2009).

53.   E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); Judith Resnik et al., *In the Eye of the Beholder: Tort Litigant's Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 953, 996 (1990).

54.   Settlement Part provides settlement judges for cases entailing certain penalty citations that come to OSHRC on appeal from OSHA. 29 C.F.R. § 2200.120 (2009); Lisa Blomgren Bingham et al., Resolution in the Administrative Process: Evaluation of the Occupational Safety and Health Review Commission Settlement Part Program 9 (2013), http://www.oshrc.gov/publications/IU_Final_Report.pdf.

55.   Bingham et al., *supra* note 54, at 9.

56.   *Id.* at 78–108.

57.   For a more detailed summary of this literature, see Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 Int'l J. Conflict Mgmt. 148, 176 (2007).

58.   In 1994, the USPS was the largest civilian employer in the world with over 900,000 employees. It had substantial grievance arbitration case backlogs under union contracts; in addition, its employees filed over 24,000 individual informal employment discrimination complaints annually and this number was rising. Of these, roughly half proceeded

procedural and organizational justice measures to assess participants' perceptions of a mediation program for complaints of discrimination based on race, sex, age, disability, or other civil rights laws.[59] This program was also in the quasi-judicial arena, but within an organization and therefore upstream relative to litigation. For twelve years, evaluators reported exit survey data on employee and supervisor perceptions of and satisfaction with the mediation process by zip code region every six months as a measure of accountability.[60] Researchers found the great majority of both employees and supervisors either satisfied or highly satisfied with the mediation process, mediators, and outcomes of mediation.[61] Employees voluntarily participated in the program at the rate of seventy-five percent or higher; participants reached settlements in mediation or closed the case at the rate of seventy percent or higher. Researchers regularly reported program results to the public. Transparency in data made the program more accountable to both stakeholders and the public.[62]

Justice for a community may include corrective, retributive, deterrent, restorative, and transitional justice. DSDs use these forms of justice to address an individual's violation of norms, for example by committing a crime. Community mediation programs may permit neighborhoods to develop their own philosophies of justice independent from the public justice system, in part through representative volunteer service systems,[63] processes both for mediation of local disputes and facilitation of community

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to a formal administrative hearing, and many of these resulted in litigation, consuming time and resources. However, the USPS ultimately prevailed in 95% or more of all these cases. In this context, the USPS law department began to explore mediation. After three years of pilot programs using facilitative mediation, the U.S. Postal Service (USPS) chose transformative mediation for REDRESS (Resolve Employment Disputes, Reach Equitable Solutions Swiftly), its national employment mediation program and the largest such program in the world.

Lisa Blomgren Bingham, *Special Issue Research on Mediation Style: Transformative Mediation at the U.S. Postal Service*, 5 Negot. & Conflict Mgmt. Rev. 354, 354–55 (2012). For a history of the REDRESS Program and reports of the National REDRESS Evaluation Project at Indiana University School of Public and Environmental Affairs, see generally Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 Harv. Negot. L. Rev. 1 (2009); Tina Nabatchi & Lisa Blomgren Bingham, *From Postal to Peaceful: Dispute Systems Design in the United States Postal Service REDRESS Program*, 30 Rev. Pub. Personnel Admin. 211 (2010); Tina Nabatchi et al., *Evaluating Transformative Practice in the USPS REDRESS Program*, 27 Conflict Resol. Q. 257 (2010).

59. Rebecca T. Nesbit et al., *Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement*, 32 Rev. Pub. Pers. Admin. 260 (2012).

60. Bingham et al., *supra* note 58, at 29.

61. *Id.* at 49–50.

62. *See, e.g.*, Invited Plenary Speaker, Institut de mediation et d'arbitrage du Quebec, Montreal, Quebec, Canada, Apr. 8, 2011; the presentation was followed by an interview published on YouTube. *See* La Gestion Des Conflits au Travail: La Mediation Transformative a L'USPS. Instauration du programme de médiation REDRESS à l'US Postal Service—Me Lisa B. Bingham (Jun. 11, 2011), https://www.youtube.com/watch?v=o2xw6_jC64g.

63. Personal conversation with Terry Amsler, former Executive Director of San Francisco Community Boards and founding board member of National Association for Community Mediation.

dialogue on policy, and diverse boards of directors.[64] Victim-offender mediation programs based on restorative justice use performance data to assess both process and outcomes, for example, recidivism,[65] which can help assess deterrence as a form of justice. These are just a few examples of how various forms of justice are used as performance measures in public programs.

All of these forms of justice may provide measures of a system's impact on public policy and/or its impact on people who experience or participate in the system. In relation to the six promises of accountability, they provide performance measures relevant to each program's legitimacy and justice. In other words, varieties of justice provide a lens to assess impact and make systems accountable.

V. RESPONSIBILITY OF INDIVIDUAL NEGOTIATORS AND DISPUTE RESOLVERS AS ACTORS

Dispute resolvers shape DSDs and participate in them. The following examples illustrate how to take a critical perspective on various DSDs; dispute resolvers may practice their profession as drafters of arbitration clauses, negotiators and mediators settling civil cases, and administrators of a community's criminal justice system.

A.   *Drafters of Arbitration Clauses as Designers in DSD*

Companies are adopting forced or mandatory arbitration clauses in personnel handbooks and consumer product warranties. These arbitration clauses represent DSDs for conflicts between the company and employees over discipline or between the company and consumers over defective products. As a form of DSD, an arbitration clause is itself nested in the justice system. The justice system must apply exogenous rules as Ostrom considers them: laws enacted by Congress such as the Federal Arbitration Act.[66] At present, the U.S. Supreme Court has interpreted the FAA to permit both forced or mandatory arbitration clauses for employment and consumer disputes; it has also authorized arbitration clauses to ban class actions

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64. Beth Gazley et al., *Collaboration and Citizen Participation in Community Mediation Centers*, 23 REV. OF POL'Y RES. 843, 859–60 (2006). *See generally* Beth Gazley et al., *External Linkages, Board Diversity, and Organizational Effectiveness in Community Mediation Centers*, 70 PUB. ADMIN. REV. 610 (2010).

65. For a special double issue collecting the field and applied program evaluation on dispute resolution programs in community mediation, civil courts, employment, education, the environment, victim offender reconciliation, and family law, see generally *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. 1 (Tricia S. Jones ed., 2004).

66. Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012).

entirely, whether in court or in arbitration.[67] Many critics observe that this case law means forced or mandatory arbitration DSDs may effectively deprive employees and consumers of meaningful recourse to the public justice system.[68] Moreover, because arbitration is generally confidential and there is no transparency, there is insufficient accountability for the system.[69]

In other words, forced arbitration as a DSD is gutting public law on discrimination in employment and consumer protection. If a consumer may not join a class action to vindicate a small claim, and if the cost of an individual arbitration exceeds by far the claim's value, then the forced arbitration DSD effectively deprives consumers of economic rights enacted by our democracy through a public law on consumer protection. This represents a failure of distributive justice. Moreover, the Federal Arbitration Act as construed by the U.S. Supreme Court since the *Gilmer* decision in 1991[70] dramatically restricts judicial review in consumer and employment arbitration cases; an arbitrator's error of law is not grounds to overturn the award. This too is a failure of accountability.

There are alternatives. Corporations have other ways to resolve conflict with employees and consumers. In this symposium, Professor John Lande addressed corporations' use of Planned Early Dispute Resolution (PEDR).[71] PEDR refers to systematic attempts to deal with problems proactively and/or take initiative to handle disputes early in their life cycle.[72] Corporations do not yet routinely use ADR (or PEDR), which is perplexing since it should promote efficiency and other benefits.[73] Professor Lande explores why PEDR is not more common through interviews with corporate leaders familiar with PEDR systems, explaining the reasons they were adopted and other factors related to their institutionalization. He posits a "prison of fear" causing them to stick with litigation-as-usual and explains how some corporations escape it. PEDR has the potential to provide a perhaps more interest-based alternative to corporate use of mandatory arbitration for employment and consumer disputes.

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67. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309, 1320–22 (2015).

68. *Id.* at 1322. *See also* Lisa Blomgren Amsler, *The Evolution of Social Norms in Conflict Resolution*, 6 J. Nat. Resources Pol'y Res. 285, 285 (2014); *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, *supra* note 3, at 41.

69. *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, *supra* note 3, at 42.

70. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

71. John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 U. St. Thomas L.J. __ (forthcoming May 2017).

72. *Id.*

73. *Id.*

In his article for this symposium, Professor Rafael Gely turns to collective bargaining, which is a dispute system that is the origin of DSD.[74] He argues that collective bargaining, despite the decline in unionism, is a much broader system than the grievance procedure piece on which scholars traditionally focus.[75] He determines that we can expand concepts of negotiation and grievance arbitration to see that collective bargaining writ large encompasses a variety of dispute resolution processes that apply in a nonunion organization: avoidance, negotiation, corporate campaigns, mediation, factfinding, arbitration, strikes, sickouts, trial, violence/war.

Lawyers shape DSD in their capacity as elected officials and legislators. The major recent legislative initiative to address mandatory or forced arbitration award is the Dodd-Frank Act and Consumer Financial Protection Bureau ("CFPB"), a product of efforts to regulate the financial industry after the 2008 financial crisis.[76] Dodd-Frank banned the use of mandatory arbitration in mortgage and home equity loan contracts.[77] The CFPB adopted regulations to address banning mandatory arbitration clauses in mortgage documents.[78] CFPB's mission included undertaking a study of the use of mandatory or adhesive arbitration in credit card and consumer debt agreements.[79] It maintains a database of credit card agreements, many of which include arbitration clauses.[80] In a recent CFPB study, the agency found significant growth in use of adhesive arbitration.[81]

At this symposium, Professor Nancy Welsh examines DSD in the context of the significant controversy over the mandatory pre-dispute arbitration clauses that organizations impose upon consumers, patients, nursing home residents, clients, employees, and others.[82] She starts with *Ross et al.*

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74. URY ET AL., *supra* note 13.

75. Rafael Gely, *Collective Bargaining and Dispute System Design*, 13 U. ST. THOMAS L.J. __ (forthcoming May 2017).

76. For a more detailed analysis of its genesis, see generally Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856 (2013).

77. *Id.* at 907 (*citing* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414(a), § 129C(e)(1), 124 Stat. 1376, 2151 (2010) (codified at 15 U.S.C. § 1639c(e)(1) (Supp. IV 2011))).

78. Bureau of Consumer Financial Protection, 12 C.F.R. pt. 1026, Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z) (2015). *See* 12 C.F.R. § 1026.36(h) (2013).

79. Zywicki, *supra* note 76, at 907–08.

80. Consumer Financial Protection Bureau Credit, *Credit Card Agreement Database*, http://www.consumerfinance.gov/credit-cards/agreements/ (last visited June 21, 2014).

81. Consumer Financial Protection Bureau Credit, *Arbitration Study Preliminary Results To Date* (Dec. 12, 2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (on page 5, the report observes "[S]ection 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructs the Consumer Financial Protection Bureau (the "Bureau") to study the use of pre-dispute arbitration contract provisions in connection with the offering or providing of consumer financial products or services, and to provide a report to Congress on the same topic.").

82. Nancy A. Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. __

v. American Express et al., in which credit card-issuing banks allegedly violated federal anti-trust laws through a complicated series of group meetings, email exchanges, telephone calls, and in-person conversations, among other events, by including mandatory pre-dispute arbitration clauses and class action waivers in their contracts with consumers.[83] While the judge failed to find anti-competitive collusion, he concluded that the credit card issuers agreed to make mandatory pre-dispute class action-barring arbitration the industry norm. Professor Welsh explores whether the events in this case represented DSD, and whether the CFPB may also engage in DSD if it regulates mandatory pre-dispute consumer arbitration clauses in contracts for financial services and products. What role should dispute resolution professionals and organizations play in the use of class action-barring mandatory pre-dispute consumer arbitration clauses? Should that role be as designers or as stakeholders?

B.   *DSD and Sexual Abuse of Children:* Spotlight *and the Church, or Coaches and Children in Sport*

The Analytic Framework for DSD empowers negotiators and dispute resolvers to get clarity on the forces that are shaping the negotiation. For example, the Roman Catholic Archdiocese in Boston as portrayed in the movie *Spotlight* is a powerful player in local governance. The Archdiocese designed a system that operated in the shadow of the courts. Its goals appeared to be preserving the reputation of the Church as an institution, minimizing exposure to liability for sexual assault of children by priests through prompt confidential settlements, transferring priests from the relevant parish, and providing priests with leave and/or treatment. However, parents and children as parishioners were also stakeholders in the system. Their interests were not effectively represented in this system. The context and culture of the Catholic Church both affected the system and fostered its effectiveness; that culture is hierarchical and patriarchal. Many of those injured as children spoke of priests as respected authority figures whom they did not question. In Boston, the formal legal system, starting with the police, helped the Church manage these disputes by providing an early alert and opportunity for the Church to negotiate with victims before formal charges were filed. Many members of the police force in Boston were Catholics and members of the same church culture. The Church had tremendous economic resources and specialized legal counsel to handle these disputes, contrasted with low-income parishioners, most of whom lacked resources. The system was entirely private, and publicity about cases was

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(forthcoming May 2017).

    83. Ross v. American Express Co., 35 F.Supp. 3d 407 (S.D.N.Y. 2014), *aff'd*, 630 F.App'x 79 (2d Cir. 2015).

effectively suppressed through collaboration between the Church, courts, police, and news media.

As portrayed in the film, it took an outsider, Martin Baron, as the new editor for the Boston Globe—who was not a member of the Catholic Church but instead raised in a different faith, Judaism—to urge the *Spotlight* team to question the system in its totality rather than focus on an individual case of sexual abuse. Lawyers operating as negotiators and settling cases within the system had grown to accept a system that privatized the abuse through settlement agreements, rationalizing that the Church does much good in communities. It took reporters months to study the only public records—directories of priests put on leave and being transferred from parish to parish in the greater Boston area—before they saw the scope of the systemic impacts of this DSD.

In this symposium, Professor Maureen Weston examines the DSD for youth sports and the sexual exploitation of children by adults.[84] She observes that these sports require a team of dedicated parents, coaches, others, and organizations to support young athletes and make it possible for them to achieve excellence or develop as an Olympic or elite athlete. Coaches can engender unique bonds by spending a significant amount of time with young athletes in training, coaching, and mentoring; they can make a difference in the life of an athlete. However, the athlete-coach relationship provides an opportunity for exploitation and abuse that can cause significant trauma, as the press reported in acts of child sexual abuse by former Pennsylvania State University Assistant Coach Jerry Sandusky. The United States Olympic Committee (USOC) President has said that "preventing sexual abuse among athletes is the agency's most important role."[85] Professor Weston examines the DSD of a new agency, the U.S. Center for Safe Sport, which the USOC commissioned in 2014 to address the issues concerning sexual abuse in sports.[86] She analyzes SafeSport's dispute system design and proposes changes in the DSD to educate, prevent, facilitate, and adjudicate issues concerning misconduct and abuse in sport. She examines critiques of SafeSport's existing efforts and offers recommendations for a dispute system design to address abuse in sport.[87]

C.   *Dispute Resolvers and Oversight: Ferguson's Police and Courts*

The events in Ferguson, Missouri in 2014 provide a dramatic example of systemic failure of accountability in a local government DSD. Michael

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84.   Maureen A. Weston, *Tackling Abuse in Sport through Dispute System Design*, 13 U. St. Thomas L.J. __ (forthcoming May 2017).

85.   Wesley G. Pipper, *Olympic Committee President Calls Preventing Sexual Abuse Most Important Role*, The Nat'l Press Club (Oct. 21, 2014), http://www.press.org/news-multimedia/news/olympic-committee-president-calls-preventing-sexual-abuse-most-important-role.

86.   Weston, *supra* note 84.

87.   *Id.*

Brown, a young, unarmed African American man, was shot to death in the street by a police officer after a shoplifting incident. Witnesses claimed Brown had his empty hands up when shot. Mainstream media, smart phone video, and social media gave rise to "Hands up Don't Shoot" and massive protests in Ferguson,[88] which in turn was covered by "Black Lives Matter."[89] The USDOJ Civil Rights Division conducted a year-long investigation into Ferguson police, local government, and municipal courts in response to protests and the grand jury's failure to indict the police officer. It found systemic racism in the police force, city government policies, and municipal court procedures.[90]

Ferguson has a DSD for addressing allegations of criminal conduct and violations of law. That system included the police department, the finance department, and the municipal court, nested within local government and state government. When we look at what happened in Ferguson, Missouri and the U.S. Department of Justice's report on civil rights violations there, we see a systemic failure of accountability. Figure 2 illustrates each of Dubnick's six promises[91] as applied to Ferguson's Police Department in its institutional and DSD context in 2014.

FIGURE 2: THE SIX PROMISES OF ACCOUNTABILITY IN FERGUSON, MISSOURI

The Nightmare Scenario:
FERGUSON POLICE AND COURTS

	MEANS: MECHANISMS	ENDS: VIRTUES
INPUTS	CONTROL: POLICE CONTROL VIOLATIONS OF LAW, MINOR INFRACTIONS OF CODES	INTEGRITY: POLICE ACT WITHIN THEIR TECHNICAL AUTHORITY BUT BIASED ENFORCEMENT
PROCESSES	ETHICAL BEHAVIOR: ARRESTS BY POLICE AND CONTEMPT ENFORCEMENT BY MUNICIPAL COURT	DEMOCRACY: UNDER-REPRESENTATION BY RACE IN ELECTED OFFICIALS AND POLICE HIRING; CONVICTIONS DISENFRANCHISE VOTERS
OUTCOMES	PERFORMANCE: COLLECTION OF REVENUE TO SUPPORT GOVT. WITH PERFORMANCE OF POLICE MEASURED BY CITY	JUSTICE/EQUITY: SYSTEMIC PERVASIVE VIOLATION OF CIVIL RIGHTS AND RACISM DISCRIMINATION BY CLASS AND RACE

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88. Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protest, Hashtag Ethnography, And The Racial Politics of Social Media in the United States*, 42 AM. ENTHNOLOGIST 4, 8 (2015).

89. Alicia Garza, *A Herstory of the #BlackLivesMatter Movement by Alicia Garza* (Oct. 7, 2014), https://news.northseattle.edu/sites/news.northseattle.edu/files/blacklivesmatter_Herstory .pdf.

90. UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), http://www.justice.gov/sites/default/files/opa/press-re leases/attachments/2015/03/04/ferguson_police_department_report.pdf.

91. Dubnick & Frederickson, *supra* note 42, at 144–45.

Ferguson illustrates a public administration theory, called 'the New Public Management,' run amok. Beginning in the 1980s, the New Public Management (NPM) was viewed as a reform movement to let public agencies move from a rigid separation between public and private and toward accountability based on results rather than compliance with rules and processes.[92] In NPM, government agencies should behave more like private sector companies and find ways to become more economically efficient and generate revenue from people and organizations that use their services. NPM employs performance measures, tools such as output controls, competition, and market-like instruments in public administration to achieve public values of efficiency and results-based accountability. Critics observe that NPM's privatization of public work removes legal oversight, thereby threatening democratic values such as accountability and citizen participation.[93]

Ferguson's DSD succeeded in generating substantial revenue. In terms of means or mechanisms, police kept their promise of control by issuing tickets for various violations of law, including traffic and housing code infractions.[94] The police in concert with the municipal court kept their promise of ethical behavior by submitting infractions to the municipal court for adjudication; this was not vigilante justice. When defendants failed to show up or pay fees, they were held in contempt of court and subject to additional fees. Ferguson met the promise of performance through the collection of revenues in this DSD and measuring police productivity based on numbers of citations for infractions.

However, this system failed in regard to ends, or virtues. While police acted within their technical authority, there was racially selective bias in enforcement and hence the system failed to demonstrate integrity. The system did not produce democratic outcomes in that racialized policing produces a disproportionately high proportion of African-American voters who are disenfranchised by a felony conviction, which in turn leads to underrepresentation by race in local elected office and in the hiring of police. Finally, the system failed to produce justice; instead, the U.S. Department of Justice found it guilty of pervasive and systemic violations of civil rights and discrimination by class and race, in violation of the Fourteenth Amendment.

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92. Christopher Hood, *A Public Management for All Seasons?*, 69(1) PUB. ADM. 3, 4–5 (1991); Christopher Hood, *The "New Public Management" in the 1980s*: *Variations on a Theme*, 20 ACCT., ORGS. & SOC'Y 93, 93 (1995); David Osborne and Ted Gaebler, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

93. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–46 (2000). Rosemary O'Leary reports on how full implementation of NPM has created agency silos in New Zealand and interfered with interagency collaboration. ROSEMARY O'LEARY, IAN AXFORD FELLOWSHIP, NEW ZEALAND GOVERNMENT, COLLABORATIVE GOVERNANCE IN NEW ZEALAND: IMPORTANT CHOICES AHEAD (2014).

94. UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *supra* note 90, at 4–5.

Notably, no internal system held this DSD accountable. It was only rendered accountable to the public by virtue of an external investigation by the federal government and extensive interviews and data collection. Where were the negotiators in this system? Police had an opportunity to negotiate before they wrote a ticket or arrested someone. Prosecutors were negotiating plea bargains. Judges had discretion in finding people in contempt of court. Ferguson municipal courts have only recently adopted a system for working with people who owe fines instead of jailing them, yet they are refusing to comply with a settlement negotiated with the U.S. Department of Justice to correct systemic racism.[95] Negotiators at any point could have stepped back and looked at what the system was producing. They could have gone to the press or sought a public hearing. They could have sought data under the public records laws. We do not know what they did or did not do when they found themselves in this system.

What should we be teaching the next generation of negotiators and dispute resolvers to do? Professor Andrea Schneider addresses how law faculty can use DSD to teach about community conflict and to enable difficult conversations.[96] She applies DSD to police incidents causing the death of minority citizens that have drawn media attention and resulted in protests and controversies in communities such as Ferguson, Baltimore, Milwaukee, and Cincinnati. How can the study of DSD permit such a conversation in the law school classroom? There are longstanding citizen boards and systems created only in response to an incident. Professor Schneider examines the dispute resolution systems that were in place in these communities prior to an incident and evaluates what changes, if any, were made to systems after community incidents. It provides pedagogic ideas for either a single class session or multiple classes on DSD and justice. Debating the potential DSDs allows a full discussion and dialogue in a neutral and safe space of the different perspectives. She shows how using DSD as a lens allows law students to discuss a challenging situation and justice.

Ferguson also illustrates generational changes in public engagement. Increasingly, the millennial generation is resorting to mass protest instead of traditional public participation through three minutes at the microphone.[97] In response to growing evidence of systemic bias in the criminal justice system and absence of effective voice in the political system, what some have called a new civil rights movement, Black Lives Mat-

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95. Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), http://www.nytimes.com/2016/02/11/us/politics/justice-depart ment-sues-ferguson-over-police-deal.html?_r=0.

96. Andrea Kupfer Schneider, *How Does DSD Help Us Teach About Community Conflict (And How Can Community Conflict Help Illustrate DSD)?*, 13 U. ST. THOMAS L.J. __ (forthcoming April 2017).

97. Lisa Blomgren Amsler, *The Next Generation's Voice: Community, Conflict, and Democracy*, 31 OHIO ST. J. DISP. RESOL. 151 (2016).

ter, was born.[98] Through video of police shootings or killings of unarmed black men travelling swiftly through social media, the rate of protests has been steadily accelerating. Professor Jennifer Reynolds discusses modern activists as designers of (and participants in) dispute systems that are multiple and temporary, involving both external parties as well as internal constituencies.[99] She explores the various systems and system interfaces of modern activism, emphasizing specific design strategies that activists use to mobilize and organize.

VI.   CONCLUSION

Elinor Ostrom observed that we need to use a common language of institutional design to build shared meaning about institutions.[100] If we do not, we will end up with empirical studies that talk past each other because they do not use the same frame for analysis. She called this a babbling equilibrium, where we compare apples and oranges. The field of dispute resolution has experienced this in our efforts to evaluate the effectiveness of mediation and arbitration programs in courts, employment, the environment, education, communities, families, and criminal justice.[101] Often, researchers fail to control for the actual structural variations in a DSD. They are also handicapped by the absence of data. We need to incorporate accountability and performance measurement into DSDs. We need transparency in how designs promote justice, and which kind. Controlling for its structure, context, and culture, we need to measure what results a justice system produces. As dispute resolvers, both scholars and practitioners, we owe it to the public to work toward greater accountability and justice in DSDs.

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98. Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how -black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/; *see also* TAVIS SMILEY, THE COVENANT WITH BLACK AMERICA: TEN YEARS LATER, 148–52 (2016) (discussing the issue).

99. Jennifer W. Reynolds, *The Activist Plus: Dispute System Design and Social Activism*, 13 U. ST. THOMAS L.J. __ (forthcoming April 2017).

100. OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY, *supra* note 18.

101. *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, *supra* note 65.