II. Designing Justice: Legal Institutions and Other Systems for Managing Conflict in the Public Sector and Beyond

Lisa Blomgren Bingham*

Lawyering has changed. We no longer just advise and represent clients in courts and administrative agencies; we design justice.

A conflict, issue, dispute, or case submitted to any institution for managing conflict, including one labeled alternative or appropriate dispute resolution (ADR), exists in the context of a system of rules, processes, steps, and forums. In the field of ADR, this is called dispute system design (DSD). In its initial usage, DSD was applied to systems for managing ripe conflicts such as grievances that ordinarily would be submitted to the quasi-judicial forum of labor arbitration in either private employment or the public sector.[1]

DSD is a lens through which to examine not only domestic justice systems but also emerging global ones. In the absence of an authoritative global sovereign, all dispute resolution for conflict that crosses national borders depends upon consent, either of nation states through treaties or disputants through contracts. Treaties incorporate conciliation, mediation, or arbitration for disputes, sometimes through new international courts.[2] Moreover, entities such as the European Union (EU) are fostering the creation of private dispute resolution infrastructure for perceived competitive advantage.[3] The World Bank[4] and USAID[5] are

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*Keller-Runden Professor of Public Service, Indiana University, School of Public and Environmental Affairs, Bloomington, Indiana, and Visiting Professor of Law at the University of Nevada at Las Vegas Boyd School of Law, Las Vegas, Nevada. This is an abridged version of an article previously published in the *Ohio State Journal of Dispute Resolution*, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 Ohio St. J. on Disp. Resol.1 (2008).

[1] *See* William L. Ury, et al., Getting Disputes Resolved: Designing Systems to Cut The Cost of Conflict (Jossey-Bass, Inc., 1988).

[2] *See, e.g.*, International Court of Justice, http://www.icj-cij.org. *See also* World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

[3] *See* http://www.adrmeda.org.

[4] *See* the World Bank's website on Law and Justice Institutions, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20746216~menuPK:2025641~pagePK:210058~piPK:210062~theSitePK:1974062,00.html (last visited Aug. 3, 2008).

[5] *See generally*, USAID Office of Democracy and Governance, Alternative Dispute Resolution Practitioners Guide (1998), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/ pdfs/pnacp895.pdf.

pressing for private dispute resolution systems as an element of basic legal infrastructure for the rule of law.

My purpose with this essay is to raise, not to answer, this question. First, I briefly introduce the field of institutional analysis and design in social science. Second, I describe the field of DSD and apply elements of institutional analysis. Third, I survey how scholars have discussed varieties of justice in relation to legal institutions and other systems for managing conflict.

I. Institutional Design

Elinor Ostrom builds on earlier work[6] to explore and explain the wide diversity of institutions that humans use to govern their behavior.[7] Examples of this diversity include "regularized social interactions in markets, hierarchies, families, sports, legislatures, elections,"[8] among others. DSDs create institutions for resolving conflict.[9] These resulting conflict resolution institutions, too, are amenable to institutional analysis.

Institutions arise, operate, evolve, and change. Ostrom attempts to identify an underlying set of universal building blocks and to lay out a method for researching institutions and how they function. She argues that these universal building blocks are arranged in layers that one can analyze using the Institutional Analysis and Development framework. Most often, this framework will help researchers focus on the simplest unit of analysis—the action situation.[10] Researchers analyze the situation, decide what assumptions to make about participants, predict outcomes, and test the predictions empirically.

However, if the data does not support the predictions, it may be necessary to examine the deeper layers within which the action situation is embedded. For example, structures are nested; families, firms, communities, industries, states, nations, transnational alli-

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[6] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge University Press, 1990).

[7] *See generally*, ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (Princeton University Press, 2005). The study of institutional design is the subject of literature in political science, economics, sociology, public affairs, and policy analysis.

[8] *Id.* at 5.

[9] Kenneth M. Ehrenberg, *Procedural Justice and Information in Conflict-Resolving Institutions,* 67 ALB. L. REV. 167, 175 (2003).

[10] Ostrom focuses on two holons in the action arena, which is defined as a unit of analysis in which participants (first holon) and the action situation (second holon) interact in ways affected by other outside variables and produce outcomes. Ostrom, *supra* note 7, at 13.

ances, and others are all structures that can be viewed in isolation or as part of a larger whole. Thus, Ostrom borrows from complex adaptive systems literature the concept of the holons—"nested subassemblies of part-whole units." To apply this concept to DSD, one might consider a court-connected mediation program as a holon nested within the structure of the court, which is nested in the judicial branch, which in turn is nested within the structure of the state or federal government.

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

> (1) the set of participants [single individuals or corporate actors], (2) the positions to be filled by participants, (3) the potential outcomes, (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages], (5) the control that an individual has in regards to this function, (6) the information available to participants about actions and outcomes and their linkages, and (7) costs and benefits—which serve as incentives and deterrents—assigned to actions and outcomes.[11]

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

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

[11] *Id.* at 32; *and see generally* Chapter 2, at 32–68. Ostrom explains how to operationalize these concepts using game theory to structure experiments in a laboratory in Chapter 3, at 69–98.

arena that follows in sequence upon a failed civil or commercial mediation.

Lawyers tend to focus more on the rules than on the other two categories of variables. Ostrom's discussion of rules is central to understanding DSD. She defines rules for the purpose of Institutional Analysis and Development as "shared understandings by participants about *enforced* prescriptions concerning what actions (or outcomes) are *required, prohibited,* or *permitted.*" She describes how rules can emerge through processes of democratic governance, or through groups of people who organize privately, such as corporations or membership associations, or within a family or work team.[12] Rules can evolve as working rules that are a function of what individuals decide to do in practice. In other words, her concept of rules would encompass rules in DSD structures that governments create, those that parties mutually negotiate, and those that one corporate player imposes on a weaker party in an economic transaction.

Rules may or may not be predictable and may or may not produce stability in human action. Compliance with rules is a function of monitoring and enforcement.

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

The second cluster of exogenous variables concerns the biophysical and material world. These encompass not only what is actually physically possible but also notions of goods and services, costs and benefits. Goods and services, particularly in the economics literature, are categorized by whether they are excludable (how hard it is to keep others from having or using them) or subtractable (whether if you use them there are fewer or less for everyone else).[13] Low excludability creates the free-rider problem. High subtractability requires effective rules.

These categories can be viewed as contexts within which people experience conflict or as things over which people have disputes.

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[12]Ostrom *supra* 7, at 19.

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

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

The third cluster of variables involves community. Of particular relevance are generally accepted values of behavior (sometimes called culture), the level of shared or common understanding about the structure of the action arena, the homogeneity of their preferences, the size of the community, and the level of income or asset inequality.

Institutional analysis provides a structure that we need to apply systematically and rigorously to DSD. Absent the capacity to do systematic, comparative institutional evaluations, recommendations for reform are based on normative judgments rather than analysis of performance. Institutional analysis can bring to the field of dispute resolution a higher level of conversation, beyond a debate over evaluative, facilitative, or transformative mediation, beyond a debate over whether mandatory arbitration is right or wrong, but toward an understanding of process in context.

In addition to using institutional analysis, DSD analysts should be examining the performance and outcomes of a particular design in relation to its impact on some conception of justice.

II. Dispute System Design

As a field, DSD is correctly understood as a form of institutional design. Perhaps it is best understood as applied institutional design, or institutional design in practice. First, this section will sketch the evolution of DSD as a field. Second, I present an evolving catalogue of structural variables that researchers have used to compare designs in the field of ADR. Third, I describe the problem of control over DSD and argue it is one to which researchers should pay more attention. In each section, I give examples of how we might use institutional analysis to deepen our understanding of DSD.

A. DSD in Organizations

Although DSD applies to a wide variety of systems, as a field it emerged in the context of organizational conflict and workplace disputes. Historically, organizations reacted to conflict—they did not systematically plan how to manage it. They used existing administrative or judicial forums to address it.[14] Organizations became dissatisfied with traditional time-consuming and costly processes that often did not produce satisfactory outcomes. Workplace conflict often resulted in inefficiency; a quality conflict management system was essential. Lipsky, Seeber, and Fincher suggest that the rise of ADR in the workplace reflects a changing social contract between employers and employees. In the first part of the twentieth century, employers dictated workplace rules. Through collective bargaining protected by law, unions began to change the top-down workplace structure; these negotiations yielded the private justice system of grievance arbitration. Today, with unionism in decline, a new system of conflict resolution is emerging.

These changes have led to the concept of DSD, a term coined by Professors William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization to manage conflict through a series of steps or options for process.[15] They argued that dispute resolution processes can focus on interests, rights, or power,[16] but that organizational conflict management systems will function better for the stakeholders if they focus primarily on interests. A healthy system should

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[14]DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 6 (Jossey-Bass Inc., 2003). They also observe that DSD may serve as a union avoidance strategy.

[15]WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 41–64 (1988). Interest-based systems focus on the disputants' underlying needs (interests), such as those for security, economic well-being, belonging to a social group, recognition from others, and autonomy or control. Rights-based processes focus on legal entitlements under the language of a contract, statute, regulation, or court decision. Power-based systems are least effective as a basis for resolving conflict; workplace examples include strikes, lockouts, and corporate campaigns. Their work on dispute system design grew from experience with industrial disputes in the coal industry. After a series of wildcat strikes, it became clear that the traditional multistep grievance procedure culminating in binding arbitration was not meeting the needs of coal miners, unions, and management. Ury, Brett, and Goldberg suggested an experiment: grievance mediation. This involved providing mediation, a process for resolving conflict based on interests, as soon as disputes arose. The addition of the grievance mediation step changed the traditional rights-based grievance arbitration dispute system design to one including an interest-based "loop-back," i.e., a step that returned the disputants to negotiation, albeit with assistance.

[16]*Id.* at 3–19. Recent experimental work empirically supports the emphasis on interests in DSD. *See* Jean Poitras & Aurelia Le Tareau, *Dispute Resolution Patterns and Organizational Dispute States*, 19 I.J.C.M. 72, 84 (2008).

only use rights-based approaches (arbitration or litigation) as a fallback when disputants reached impasse; parties should not generally resort to power.

Organizational DSDs can take a myriad of forms, including a multistep procedure culminating in mediation and/or arbitration, ombudspersons[17] programs giving disputants many different process choices,[18] or simply a single step binding arbitration design. The field of dispute resolution broadly adapted the concept of DSD beyond organizations with employment conflict and courts to other legal and administrative contexts. There are growing numbers of conflict management or dispute resolution programs in the substantive areas of education; the environment, criminal justice, community, or neighborhood justice; domestic relations and family law; and in settings ranging from federal, state, and local governments to a variety of private and nonprofit organizations.[19]

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

We can use Ostrom's framework to better understand and identify the elements of DSD. If one surveys program evaluations on

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[17]An ombudsperson program is an organizational dispute system design in which one person, generally with direct access to upper management, serves as a contact point for all streams of conflict in the organization and assists employees and consumers with identifying an appropriate process for addressing disputes. *See* International Ombuds Association, http://www.ombudsassociation.org; *see* Mary P. Rowe, *The Ombudsperson's Role in a Dispute Resolution System,* 7 Negotiation J. 353 (1991).

[18]Some argue that best practice in institutional DSD is represented by the integrated conflict management system, a system in which there are multiple points of entry and parallel processes suited to the variety of conflicts in the organization, whether with employees, suppliers, service providers, contractors, consumers, customers, clients, community, or the broader public. *See generally*, Cathy A. Costantino & Christina Sickles Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (Jossey-Bass, 1996); Association for Conflict Resolution, http://www.acr.org.

[19]For review articles on field studies and evaluation of the uses of mediation and DSD in the contexts of employment, education, criminal justice, the environmental, family disputes, civil litigation in courts, and community disputes, *see* Tricia S. Jones, ed., *Conflict Resolution in the Field: Special Symposium*, 22 Conflict Resol. Q. 1, 1–320 (2004). DSD occurs within and outside the context of a single organization. Courts and administrative agencies engage in DSD when they adopt alternative dispute resolution programs or supervise mass tort claim systems. For extensive background on DSD efforts in the federal government, *see* Interagency Alternative Dispute Resolution Working Group, http://www.adr.gov/. For evaluation reports reflecting the results of DSD in the federal courts, *see* Federal Judicial Center, http://www.fjc.gov/. For similar reports reflecting DSD in state courts, *see* National Center for State Courts, http://www.ncsc.org. DSD has addressed the design of legal institutions and constitutions. Stephanie Smith and Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 Harv. Negotiation L. Rev. (2009 p. 123).

both court-annexed[20] and stand-alone ADR programs, one can identify a number of distinct structural variables and/or choices that make up a DSD. These include, but are not limited to:

1. The sector or setting for the program (public, private, or nonprofit);
2. The overall dispute system design (integrated conflict management system, silo or stovepipe program, ombuds program, outside contractor);
3. The subject matter of the conflicts, disputes, or cases over which the system has jurisdiction;[21]
4. The participants eligible or required to use the system; [22]
5. The timing of the intervention (before the complaint is filed, immediately thereafter, after discovery or information-gathering is complete, and on the eve of an administrative hearing or trial);
6. Whether the intervention is voluntary, opt out, or mandatory;
7. The nature of the intervention (training, facilitation, consensus-building, negotiated rulemaking, mediation, early neutral assessment or evaluation, summary jury trial,[23] nonbinding arbitration, binding arbitration) and its possible outcomes;
8. The sequence of interventions, if more than one;
9. Within intervention, the model of practice (if mediation, evaluative, facilitative, or transformative; if arbitration,

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[20]An excellent resource on DSD in the federal courts is Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in Federal District Courts: A Sourcebook for Judges and Lawyers (Washington, D.C.: Federal Judicial Center, 1996). For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, *see* The Resolution Systems Institute, http://aboutrsi.org/publications.php?sID=9.

[21]*E.g.*, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center,* 40 AM. CRIM. L. REV. 1573 (2003) (for neighborhood disputes).

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

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

rights or interests, last-best offer, issue-by-issue or package, high-low, etc.);
10. The nature, training, qualifications, and demographics of the neutrals;[24]
11. Who pays for the neutrals and the nature of their financial or professional incentive structure;[25]
12. Who pays for the costs of administration, filing fees, hearing fees, hearing space;
13. The nature of any due process protections (right to counsel, discovery, location of process, availability of class actions, availability of written opinion or decision);
14. Structural support and institutionalization with respect to conflict management programs or efforts to implement; and
15. Level of self-determination or control that disputants have as to process, outcome, and dispute system design. Is it both parties together, one party unilaterally, or a third party for them?

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

Ostrom argues that there are three related concepts: strategies, norms, and rules: "[I]ndividuals adopt strategies in light of the norms they hold and within the rules of the situation within which they are interacting."[26] Even when we limit our use of rules to regulation or prescription subject to enforcement, there are nevertheless many types of rules. Arguing that we need to use simplified, broad, and general types or classes of rules to accumulate comparable research and advance the field of institutional design, Ostrom proposes seven kinds of rules: rules regarding positions, boundaries, choice, aggregation, information, payoff, and scope.[27]

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[24] *See, e.g.*, Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 Fla. St. U. L. Rev. 511, 512–17 (2005).

[25] On one mechanism for handling arbitration costs, *see* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 Vand. L. Rev. 729 (2006) (arguing that arbitration costs are generally not a barrier to asserting a claim in arbitration).

[26] Ostrom *supra* note 8, at 175.

[27] *Id.* at 190. Ostrom provides very general definitions:

Position rules create positions (e.g. member of a legislature or a committee, voter, etc.). Boundary rules affect how individuals are assigned to or leave positions and how one situation is linked to other situations. Choice rules affect the assignment of particular

Using Ostrom's categories, designers identify who is eligible to use the program; this is a position rule. For example, some federal-sector employers have adopted mediation programs that only people who file an Equal Employment Opportunity complaint may invoke.[28] Designers identify what cases the design will cover; this is a boundary rule. For example, some federal agencies only permit mediation of discrimination complaints, while others broaden their program to encompass a wider variety of workplace conflict, such as mentoring disputes outside of EEO law.[29] An ADR program may be voluntary, mandatory, or opt out; this is a choice rule because it defines what action or action set a person/position has in the program. For example, some courts have mandated nonbinding arbitration as a prerequisite to a civil trial.[30]

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

DSDs that restrict discovery, as in some of the early abuses in mandatory, adhesive employment arbitration programs, are clearly rules about what information participants can use in the DSD to

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action sets to positions. Aggregation rules affect the level of control that individual participants exercise at a linkage within or across situations. Information rules affect the level of information available in a situation about actions and the link between actions and outcome linkages. Payoff rules affect the benefits and costs assigned to outcomes given the actions chosen. Scope rules affect which outcomes must, must not, or may be affected within a domain.

Id.

[28]The largest employment mediation program in the world is the U.S. Postal Service's REDRESS® Program, which is open to EEO complainants. Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise R. Walker, & Won Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace,* 13 HARV. NEGOT. L. REV. (forthcoming 2009); *see also* Lisa B. Bingham, MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE (IBM Center for the Business of Government 2003); Lisa Blomgren Bingham, Cynthia J. Hallberlin, & Denise A Walker, *Mediation of Discrimination Complaints at the USPS: Purpose Drives Practice,* PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 268 (Paul F. Gerhart & Stephen F. Befort, eds., 2007).

[29]Howard Gadlin is the Ombudsperson for the National Institutes of Health and has written extensively about ombuds programs that have this broader scope. Susan Sturm and Howard Gadlin, *Conflict Resolution and Systemic Change*, 1 J. DISP. RESOL. 1 (2007).

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

persuade the neutral or the other participants.[31] DSDs can also limit the award or outcome of the process or intervention, which represents a payoff rule. For example, some arbitration plans have high–low provisions that determine at the outset the maximum and minimum award an arbitrator may order.[32] The early version of the Administrative Dispute Resolution Act,[33] which authorized federal agency use of ADR, provided that the federal agency could reject the supposedly "binding" arbitration award; the other party could not.[34] Using Ostrom's categories, this rule imposed additional process costs on the nonfederal party. Not surprisingly, parties were reluctant under this rule to agree voluntarily to arbitrate with the agency, and under the statute, agencies could not mandate arbitration. Subsequently, this rule was changed to improve the functioning of federal DSDs involving arbitration.

When the DSD entails mediation, that choice of process is a form of scope rule; it determines that the neutral does not have the authority to take the action of imposing an outcome on the disputants.[35] Cooling off periods that allow the parties to reject a tentative agreement reached in mediation within a certain period are also scope rules in that they define the range of possible outcomes of the DSD.[36]

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[31]Mei L. Bickner, Christine Ver Ploeg, & Charles Feigenbaum. *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs,* 52 Disp. Resol. J. Am. Arb. Ass'n 8, 80 (1997).

[32]*See, e.g.,* Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach,* 11 Harv. Negot. L. Rev. 1, 14 (2006) ("a party may want the recovery not to be larger or smaller than a certain number and will agree to a resolution only within that range (high–low arbitration)").

[33]Alternative Means of Dispute Resolution in the Administrative Process, 5 U.S.C.A. §§ 571–84 (2008) [hereinafter ADRA].

[34]Cynthia B. Dauber, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies,* 9 Admin. L.J. Am. U. 165, 185–86 (1995); Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?* 6 J. Publ. Adm. Res. and Theor. 383 (1996); Jeffrey M. Senger, Federal Dispute Resolution: Using ADR With the United States Government (Jossey-Bass Inc., 2003).

[35]For detailed descriptions of alternative mediation practices, *see* Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict (Jossey-Bass Inc., 3d ed., 2003) (facilitative mediation), and Robert A. Baruch Bush & Joseph Folger, The Promise of Mediation: The Transformative Approach to Conflict 41–84 (Jossey-Bass, 2005) (transformative mediation).

[36]Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 Harv. Negot. L. Rev. 1, 186–89 (2001) (advocating a cooling off period to counter undue mediator pressure to settle).

There have been efforts to evaluate and assess dispute resolution that take into account elements of DSD. Research reviews examine court programs[37] and programs in employment.[38]

However, we need to do a much closer reading of the actual designs. At present, much DSD literature is normative and advocates "good process" in creating the design rather than addressing the substance and outcomes of the rule choices.[39] For example, commentators on DSD discuss how we should involve stakeholders in design and evaluation[40] rather than the fundamental power imbalance between employer and employee that shapes the underlying at-will employment contract[41] or that defines the ability of an employer to relocate union work to another country.[42] DSD analysis should include rules that define substantive rights in the system. The collective bargaining agreement's requirement for just cause for discipline is a choice rule in Ostrom's framework; it affects the assignment of particular action sets to positions. Under a just cause rule, the position of employer is no longer free to fire

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[37]For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, *see* The Resolution Systems Institute (RSI), http://aboutrsi.org/publications.php?sID=9 (last visited Sept. 11, 2008); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004); for a recent review of court-connected ADR using DSD as its organizing frame, *see* Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RES. Q. 55 (2004); Lande, *infra* note 40.

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

[39]*See, e.g.,* COSTANTINO, *supra* note 18, at 49–66, 73–92, 96–116, 168–86 (Jossey-Bass Inc., 1996) (discussing the role of the consultant or contractor, the use of focus groups to involve stakeholders, the need to do an organizational assessment, and the need to build in evaluation to foster continuous innovation and improvement). This is not to suggest that "good process" is a bad thing, only that it is necessary but not sufficient.

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

[41]*See, e.g.,* Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers,* 3 U. PA. J. LAB. & EMP. L. 65, 66–84 (2000).

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

an employee at will, with or without cause, for no reason or any reason except those prohibited by law.[43]

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

Ostrom tested and refined a set of design principles that characterize robust institutions, defined as institutions that persist, are stable, and adapt to changing circumstances. These design principles include clearly defined boundaries of the resource and clearly defined rights of individuals who can take it, proportional equivalence between benefits and costs, collective choice arrangements, monitoring, graduated sanctions, conflict-resolution mechanisms, minimal recognition of rights to organize, and nested enterprises in which appropriation, enforcement, monitoring, conflict resolution, and governance are nested in layers.

Collective choice arrangements are those in which people who are subject to the rules are included in the group who can make or change the rules. This is functionally the same as what I previously characterized as control over DSD.[44] Dispute systems vary across two separate dimensions of disputant self-determination or control: control over the full system design and control over a given case using a specific process provided by that design. Control over DSD includes the power to make choices regarding the rules that create the design: for example, what cases are subject to the process, which process or sequence of processes are available, what due process rules apply, and other structural aspects of a private justice system in the list provided above. Within a DSD, control over a given case can address process and/or outcome. One or more parties may give control over the process to a mediator, while they both retain control over the outcome. In mediation, the outcome may be impasse or a voluntary, negotiated settlement. In

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[43]Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts,* 68 Chi-Kent L. Rev. 117, 145 (1992) ("Control over employment termination is a major determinant of workplace power. The debate over employment at-will focuses on the appropriate approach to the legal regulation of this power.").

[44]Lisa B. Bingham, *Control Over Dispute System Design and Mandatory Commercial Arbitration*, 67 Law & Contemp. Probs. 221 (2004) (arguing that control over dispute system design shifts the settlement value of cases in commercial mandatory arbitration); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration,* 56 U. Miami L. Rev. 873 (2002) (arguing that control over dispute system design changes outcomes in employment arbitration).

arbitration, one or more parties may give control over outcome to a third party to issue a binding decision.

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

For example, historically, the public civil justice system is the product of design by a third party: the judicial branch with funding from the legislative branch acting for the benefit of disputants.[45] In a sense, this is a system designed through collective choice rules in that it is designed under the auspices of a constitutional form of government in which voters elect legislators who provide appropriations for the judicial branch. There are at least minimal rights to organize in that court-connected DSDs allow people to have the representation of their choice. Public interest litigants can participate. There can be mediation of a class action or built into a mass tort.[46] Moreover, there is monitoring in third-party designs.[47] The government tracks its systems.[48] Courts monitor mediator misconduct.[49] Courts enforce the outcomes of the

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[45]For a number of downloadable publications evaluating ADR programs in a variety of federal courts, see the website of the Federal Judicial Center, *available at* http://www.fjc.gov (last visited Sept. 12, 2008).

[46]Hensler, *supra* note 30; Francis E. McGovern, *Settlement of Mass Torts in a Federal System,* 36 WAKE FOREST L. REV. 871 (2001); Francis E. McGovern, *The Tragedy of the Asbestos Commons,* 88 VA. L. REV. 1721 (2002); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process,* 31 LOY. L.A. L. REV. 513 (1998); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road,* 80 CORNELL L. REV. 1159 (1995); Barbara J. Rothstein, Francis E. McGovern, & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience,* 54 DRAKE L. REV. 621 (2006).

[47]*See* RSI, *supra* note 37.

[48]*See generally* the website of Florida State Courts Alternative Dispute Resolution program, http://www.flcourts.org/gen_public/adr/RRindex.shtml (last accessed Oct. 30, 2008); *see also* the website of New York State Uniform Court System Alternative Dispute Resolution Program, http://www.courts.state.ny.us/ip/adr/publications.shtml#AnnualReport (last accessed Sept, 26, 2008).

[49]*See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation,* 11 HARV. NEGOT. L. REV. 43 (2006).

DSD.[50] They adopt consent decrees[51] and enforce rules on confidentiality.[52] There is some ongoing debate as to the costs and benefits of court-connected DSDs, but their widespread adoption and institutionalization would suggest that these are in rough balance.

Traditionally, private justice systems arise when both or all parties to a dispute have negotiated dispute system design in their contracts, for example in labor relations or commercial contracts. Moreover, they have done so in the shadow of the public justice system, specifically, the courts and administrative agencies that are third-party DSDs. Thus, labor relations DSDs both entail their own collective choice rules, and they are nested within a constitutional government that provides through other collective choice rules a legal framework in labor law that enforces their agreements.[53] Participants have the right to self-organize. There is transparency, allowing them to monitor the results of their DSD over time. Moreover, the disputants themselves can determine whether the costs and benefits of their system are in balance; they can change their standing arbitrator panel, or their third-party service provider, or determine to adopt a rule that shifts arbitrator fees to the losing party. Private justice systems in the diamond[54] and cotton[55] industries are robust in Ostrom's sense; they are enduring, stable, adaptive, participatory, characterized by collective choice rules in a private democratic membership structure, subject to monitoring by that membership association, and self-governing.

However, in the past three decades, a new phenomenon has emerged and flourished. A single disputant with superior economic power has taken unilateral control over designing a dispute system for conflicts to which it is a party. Moreover, often such disputants have elected DSDs that effectively restrict recourse to the public civil justice system through adhesive binding arbitration

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[50] *See* Lande, *supra* note 40 (reviewing case law in which courts consider rules requiring good faith participation in court-connected mediation).

[51] Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities,* 88 Colum. L. Rev. 1796 (1988).

[52] Coben & Thompson, *supra* note 49, at 57–73.

[53] Patrick Hardin, John E. Higgins, Jr., Christopher T. Hexter, John T. Neighbours (eds.), The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act (5th ed. 2006).

[54] Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry,* 21 J. Leg. Stud. 115 (1992).

[55] Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001).

clauses.[56] These DSDs do not have meaningful collective choice rules within the holon that is the arbitration program.[57] They are nested in a legal framework for arbitration in interstate commerce, specifically, the Federal Arbitration Act, which was adopted through collective choice rules in a constitutional form of government, namely, our democracy. However, the degree of personal participation in collective choice at the level of national government is attenuated. There are limited or no rights to self-organization in the context of adhesive arbitration. For example, plans attempt to prohibit or preclude class-action litigation or arbitration. Some plans prohibit the use of legal counsel, which might otherwise be considered a form of self-organization or freedom of association.[58] Moreover, there is limited transparency in adhesive arbitration because awards generally are confidential unless the parties mutually agree to their publication.[59] Even where states

[56]Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004) (arguing that some employers use mandatory arbitration to manage risk, and that repeat players should pay more for the privilege); *see also* Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 IND. & LAB. REL. REV. 375 (2003) (finding that rising individual rights litigation and increased judicial deferral to nonunion arbitration are institutional factors leading to increased adoption of mandatory arbitration in the workplace); Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581 (2004); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1593 (2005) (arguing that risks of compelled ADR include the "likelihood that adhesion contract drafters will use arbitration clauses and related requirements to short-circuit existing legislation with newly drafted provisions protective of their special interests, that contract drafters will, in some cases, go even further and use their drafting power to squelch all claims, and that ADR providers will be sorely tempted to cast their lot with adhesion contract drafters in order to win and retain valuable business"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005) (surveying the emergence of mandatory arbitration in lieu of civil litigation for employment and consumer claims and concluding that it is unjust).

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

[58]*See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (holding that there is no first amendment right to freedom of association with legal counsel within an administrative proceeding established to support veterans seeking benefits for injuries).

[59]*See* Lisa Blomgren Bingham, *Evaluation Dispute Resolution Programs: Traps for the Unwary*, in LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING, 104 (2007); David B. Lipsky, Ronald L. Seeber, Ariel C. Avgar, & Rocco M. Scanza, *Managing the Politics of Evaluation: Lessons From the Evaluation of ADR Programs*, *in* LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING 116 (2007).

attempt to regulate arbitration to require reporting of outcomes, compliance and enforcement are problematic.[60]

The argument over mandatory arbitration as a DSD imposed on one party by the other boils down to an argument over some form of distributive justice. The Supreme Court has enforced this form of arbitration on the theory that it is a mere substitution of forum, not a change in the substance of the remedy.[61] As the above discussion shows, there are reasons to believe this may not be true. Arbitration outcomes may differ systematically from litigation outcomes. Rigorous empirical research might answer this question. However, there are obstacles to that research. These obstacles operate as barriers to improving DSD.

This brief discussion is intended only to illustrate the usefulness of an empirically tested, theoretically grounded framework for rigorously analyzing how well DSDs function as institutions.

III. Varieties of Justice in Legal Institutions and Other Systems for Managing Conflict

How should we compare civil and criminal "justice" systems and justice in ADR? There are a number of arguments that proponents advance to support both settlement and ADR. Galanter and Cahill (2002) provide the best catalogue of these arguments in their Table 1 and critique them.[62] Interestingly, this catalogue does not expressly refer to justice. Instead, many of the arguments relate to the *administration* of justice; this is particularly true of the cost reduction arguments.[63] However, part of the dialogue on dispute resolution revolves around whether it delivers justice. There are many different forms, names, definitions, and varieties of justice depending on context.[64] Table 1 reflects the current results of my ongoing effort to collect these varieties of justice.

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[60]Lisa Blomgren Bingham, Jean R. Sternlight, & John C. Healey, *Arbitration Data Disclosure in California: What We Have and What We Need.* Paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles, April 2005 (copy on file with author).

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

[62]Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 57 Stan. L. Rev. 1361 (2005).

[63]It is nevertheless possible to use some of these arguments as indicators or measures of the presence of certain forms of justice. For example, satisfaction measures are often related to theories of procedural and distributive justice from social psychology. Superior outcome arguments suggest better distributive or substantive justice. Arguments for creativity suggest Pareto Optimality as used by Rawls in his theory of justice as fairness. John Rawls, A Theory of Justice 67–69 (Belknap Press 1971).

[64]*See infra at* 132–37.

TABLE 1: Varieties of Justice (table abridged)

Name	Source	Definition
Substantive justice	Rawls[65]	Distributive justice.
Distributive justice	Posner citing Aristotle[66]	The state distributes money, honors, things of value.
Distributive justice	Thibaut and Walker[67]	Equity theory: An allocation is equitable when outcomes are proportional to the contributions of group members.
Egalitarian justice	Rawls,[68] Posner citing Ackerman[69]	Distributive justice to allow for compensating undeserved inequalities of birth (affirmative action).
Allocative justice	Rawls[70]	When a given collection of goods is to be divided among definite individuals with known desires and needs, and the individuals did not produce the goods, justice becomes efficiency unless equality is preferred. Leads to classical utilitarian view.
Justice as fairness	Rawls	Inequality justified by improving the situation of the least advantaged person in an ordinal ranking.
Justice as fairness	Thibaut and Walker[71]	Equality or needs based allocation.

[65]RAWLS, *supra* note 63, at 59.
[66]RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 335 (Harvard University Press, 1990).
[67]JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 85–94 (Lawrence Erlbaum Inc., 1975).
[68]RAWLS, *supra* note 63, at 100.
[69]POSNER, *supra* note 66, at 338.
[70]RAWLS, *supra* note 63, at 88 .
[71]THIBAUT & WALKER, *supra* note 67, at 122–24.

Name	Source	Definition
Social justice	Posner[72]	Purely public noncompensatory remedy that views harm as social and not individual entitlement.
Macrojustice	Lipsky et al.[73]	Pattern of outcomes from the DSD.
Restitutionary justice	Posner[74]	Strict liability; justice as restitution for harm that one causes, regardless of wrong, a form of distributive justice.
Perfect procedural justice	Rawls[75]	Procedure designed to render perfect distributive justice, e.g., person who cuts cake must take last piece.
Pure procedural justice	Rawls	Distributing goods based on random procedure, as in odds, dice, gambling.
Imperfect procedural justice	Rawls	Criminal trials; human error.
Procedural justice	Thibaut and Walker as cited by Tyler and Lind[76]	Satisfaction and perceived fairness in allocation disputes are affected substantially by factors other than whether the individual has won or lost the dispute.

[72]Posner, *supra* note 66, at 335.

[73]David B. Lipsky, Ronald L. Seeber, & Richard D. Fincher, Emerging Systems for Managing Workplace Conflict: Lessons From American Corporations for Managers and Dispute Resolution Professionals 6 (2003).

[74]Posner, *supra* note 66, at 324–27.

[75]Rawls, *supra* note 63, at 85.

[76]Thibaut & Walker, *supra* note 67, as described in E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 7–40 (Melvin J. Lerner ed., Plenum Press, 1988).

Name	Source	Definition
Procedural justice	Tyler and Lind[77]	When procedures are in accord with fundamental values of the group and the individual, a sense of procedural justice results. Value-expressive function of voice. People value participation in the life of their group and their status as members.
Procedural justice	MacCoun[78]	Fairness Heuristic Theory: People value fair procedure as a shortcut to deciding whether outcome is fair in a position of uncertainty.
Organizational justice	Folger and Cropanzano[79]	Procedural justice in the context of the workplace and grievance procedures.
Interactional justice	Folger and Cropanzano[80]	Quality of interpersonal treatment received during the enactment of organizational procedures, concerns about the fairness of the nonprocedurally dictated aspects of interaction, including interpersonal justice and informational.
Informational justice	Bies, Shapiro, Colquitt[81]	Explanations about the procedures used to determine outcomes.
Interpersonal justice	Colquitt[82]	Degree to which people are treated with politeness, dignity, and respect by authorities.

[77] E. Allen LIND & Tom R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 7–40 (1988).

[78] Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness,* 1 ANN. REV. L. SOC. SCI. 171–201 (2005).

[79] *See generally* ROBERT FOLGER & RUSSELL CROPANZANO, ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT (1998).

[80] *Id.*

[81] *See generally* Jason A. Colquitt, *On the Dimensionality of Organizational Justice: A Construct Validation of a Measure*, 86(3) J. APPLIED PSYCHOL. 386–400 (2001).

[82] *Id.*

Name	Source	Definition
Microjustice	Lipsky et al.[83]	Perceptions of justice on a subjective level.
Formal justice	Posner[84]	Reasonable rule, equal treatment, public justice, procedure to establish facts.
Formal justice	Rawls[85]	Justice as regularity, treating similar cases similarly, rule of law in legal institutions, impartial and consistent administration of law and institutions.
Personal justice A	Posner[86]	Corruption, judge resolves dispute based on his/her personal stake in the dispute as a parent, investor, or other interested party.
Personal justice B	Posner	Judge resolves dispute based on the personal characteristics of the disputants.
Personal justice C	Posner	Judge resolves substantive dispute based on particulars of case, using general standard and not rule; ad hoc.
Injustice	Rawls[87]	Inequalities not to the benefit of all.

[83]Lipsky, Seeber, & Fincher, *supra* note 73, at 6.
[84]Posner, supra note 66, at 332–34.
[85]Rawls, *supra* note 63, at 58–59.
[86]Posner, *supra* note 66.
[87]Rawls, *supra* note 63, at 62.

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

In dispute resolution, the terms "substantive justice" and "distributive justice" tend to be used interchangeably to reflect the justice of an outcome produced by a decision process. Posner characterizes Aristotle's concept of distributive justice as being produced when the state distributes money, honors, and other things of value.[88] Rawls distinguishes between substantive justice, reflected in the assignment of fundamental rights and duties and the division of advantages from social cooperation,[89] and formal justice, which is regularity of process.

However, substantive justice is also related to social justice. Rawls describes social justice as encompassing the basic structures of society and arrangement of major social institutions into one scheme of cooperation. In order to understand the substantive justice produced by a DSD, one must then examine the underlying substantive law defining rights and obligations. For example, employment-at-will is a rule of law that shapes the substantive justice of a DSD involving adhesive arbitration.

Distributive justice generally pertains to the distribution of outcomes in a society or within that microcosm of society which is a justice system. Rawls refers to it in connection with the distribution of advantages in a society. He describes a form of distributive justice as allocative justice that occurs when a given collection of goods is to be divided among definite individuals with known desires and needs, when the individuals did not produce the goods. He observes that justice becomes efficiency unless equality is preferred and that this view of distributive justice is related to classical utilitarianism. In this sense, it relates to macrojustice, which is the pattern of outcomes produced by an institution, system, or DSD. Rawls argues for a form of distributive justice that is "justice as fairness." Starting from a social system of equal citizenship and varying levels of income and wealth, he argues for a form of distributive justice in which inequality is only justified by improving the situation of the least advantaged person in an ordinal ranking in a situation where no one knows whether he or she will be the least advantaged person.

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[88] POSNER, *supra* note 66, at 339.
[89] RAWLS, *supra* note 63, at 58.

In social science, distributive justice has roots in social equity theory.[90] It posits that social behavior occurs in response to the distribution of outcomes. Distributive justice emphasizes fairness in the allocation of outcomes. An allocation is equitable when outcomes are proportional to the contributions of group members.[91] Thus, in mediation research, distributive justice suggests that satisfaction is a function of outcome, specifically the fact and content of a settlement or resolution. In theory, participants are more satisfied when they believe that the settlement is fair and favorable. There is a substantial body of empirical research that supports the distributive justice model as an explanation of satisfaction.[92] The research suggests that distributive justice is a better explanation for satisfaction related to conflicts over resource allocation (such as wage disputes) than other cases in which fairness matters.

Related to distributive justice are arguments for particular distributions in light of fairness. For example, egalitarian justice entails compensating people for undeserved inequalities, for example, by reason of birth.[93] One example includes consent decree DSDs providing for affirmative action to compensate for historic discrimination based on race, ethnicity, or gender. One might also view DSDs providing for classwide reparations in this light.[94] Restitutionary justice imposes strict liability as restitution for harm that one causes, regardless of wrong. It, too, is a form of distributive justice justified on public policy grounds to reduce risk of harm.[95]

B. Procedural Justice

Procedural justice has multiple definitions. Within the fields of philosophy and jurisprudence, it tends to refer to a method of arriving at distributive justice. Within social psychology and organizational behavior, it refers to individual participant perceptions of fairness of the processes used in resolving conflict. For example, Rawls discusses perfect procedural justice, pure procedural

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[90]This discussion of justice in social psychology and organizational behavior is drawn from Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials,* 2006 J. Disp. Resol. 131, 131 (2006).

[91]Thibaut & Walker, *supra* note 76, at 122–24.

[92]*See* Dean G. Pruitt, Negotiation Behavior (Academic Press 1981); Howard Raiffa, The Art and Science of Negotiation (Harvard University Press, 1982); Jeffrey Rubin & Bert R. Brown, The Social Psychology of Bargaining and Negotiation (Academic Press, 1975).

[93]Rawls, *supra* note 63, at 100; Posner, *supra* note 66, at 318.

[94]William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace and Justice,* 27 Am. Indian L. Rev. 1 (2002).

[95]Posner, *supra* note 66, at 324–27.

justice, and imperfect procedural justice. Perfect procedural justice is a procedure designed to render perfect distributive justice, for example, the rule that the person who cuts the cake must take the last piece.[96] Pure procedural justice entails distributing goods based on random procedure such as odds, dice, or gambling.[97] In contrast, imperfect procedural justice refers to the inevitable human error factor in trials, for example, the problem of false convictions of innocent people in criminal trials.[98]

In contrast, social psychologists and socio-legal scholars have developed theories of distributive, procedural, and interactional justice in contexts ranging from the courts[99] to the workplace based on participant perceptions of fairness and their satisfaction with various processes. Justice theory in social science examines perceptions of fairness in, and satisfaction with, the process and outcome of institutions to resolve conflict. Procedural justice refers to participants' perceptions about the fairness of the rules and procedures that regulate a process.[100] Thibaut and Walker argued that satisfaction and perceived fairness in allocation disputes are affected substantially by factors other than whether the individual has won or lost the dispute.[101] In contrast to distributive justice, which suggests that satisfaction is a function of outcome (the content of the decision or resolution), procedural justice suggests that satisfaction is a function of the process (the steps taken to reach that decision). Tyler and Lind theorized that when procedures are in accord with the fundamental values of the group and the individual, a sense of procedural justice results due to the value-expressive function of voice;[102] people value participation in the life of their group and their status as members.

Among the traditional principles of procedural justice are impartiality, voice or opportunity to be heard, and grounds for

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[96]RAWLS, *supra* note 63, at 86.

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

[98]RAWLS, *supra* note 63, at 85.

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

[100]WILLIAM G. AUSTIN & JOYCE M. TOBIASEN, *Legal Justice and the Psychology of Conflict Resolution, in* THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES (R. Folger, ed., 1984); THIBAUT & WALKER, *supra* note 67, at 122.

[101]THIBAUT & WALKER, *supra* note 67, at 122.

[102]LIND & TYLER, *supra* note 76.

decisions.[103] Procedural issues such as neutrality of the process and decision maker,[104] treatment of the participants with dignity and respect,[105] and the trustworthiness of the decision-making authority[106] are important to enhancing perceptions of procedural justice. Extensive literature supports procedural justice theories of satisfaction in a variety of contexts involving both courts and dispute resolution.[107] In general, research suggests that if organizational processes and procedures are perceived to be fair, participants will be more satisfied, more willing to accept the resolution of that procedure, and more likely to form positive attitudes about the organization.[108]

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

Beginning in the 1980s, researchers adapted procedural justice to the context of an organization. These organizational justice researchers developed the notion of interactional justice, defined as the quality of interpersonal treatment received during the enactment of organizational procedures.[109] In general, interactional justice reflects concerns about the fairness of the nonprocedurally dictated aspects of interaction.[110] Research has identified two components of interactional justice: interpersonal justice and informational justice.[111] These two components overlap considerably. However, empirical research suggests that they should be

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[103]Michael D. Bayles, Procedural Justice: Allocating to Individuals 19–85 (Kluwer Academic Press, 1990).

[104]Tom R Tyler & E. Allan Lind, *A Relational Model of Authority in Groups, in* Advances in Experimental Social Psychology 25, 115–92 (M. Zanna, ed., Academic Press, 1992) [hereinafter Tyler, *Relational Model*].

[105]Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness, in* Research on Negotiation in Organizations, 43–55 (R. J. Lewicki et al., eds., 1986) [hereinafter Bies, *Interactional Justice*]; Lind & Tyler, *supra* note 76.

[106]Tyler, *Relational Model*, *supra* note 104.

[107]Lind & Tyler, *supra* note 76; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experience in the Civil Justice System,* 24 Law & Soc'y Rev., 953–96 (1990).

[108]Lind & Tyler, *supra* note 76; Tyler, *Relational Model*, *supra* note 104.

[109]Bies, *Interactional Justice*, *supra* note 105, at 44.

[110]*See* Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice,* 21 Ohio St. J. on Disp. Resol. 281 (2006) (discussing how interactional justice interacts with psychological biases that create impediments to settlement).

[111]Robert G. Folger & Russell Cropanzano, Organizational Justice and Human Resource Management (Sage Publications, 1998); Tom Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice, in* Applied Social Psychology and Organizational Settings 77–98 (J. Carroll ed., 1990) [hereinafter Tyler and Bies, *Formal Procedures*].

considered separately as each has differential and independent effects upon perceptions of justice.[112]

Informational justice focuses on the enactment of decision-making procedures. Research suggests that explanations about the procedures used to determine outcomes enhance perceptions of informational justice.[113] Explanations provide the information needed to evaluate the structural aspects of the process and how it is enacted.[114] However, for explanations to be perceived as fair they must be recognized as sincere and communicated without ulterior motives,[115] be based on sound reasoning with logically relevant information,[116] and be determined by legitimate rather than arbitrary factors.[117]

Interpersonal justice reflects the degree to which people are treated with politeness, dignity, and respect by authorities. The experience of interpersonal justice can alter reactions to decisions, because sensitivity can make people feel better about an unfavorable outcome.[118] Interpersonal treatment includes interpersonal communication,[119] truthfulness, respect, propriety of questions, and justification, and honesty, courtesy, timely feedback, and respect for rights.

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

[113]Robert J. Bies, *The Predicament of Injustice: The Management of Moral Outrage*, *in* RESEARCH IN ORGANIZATIONAL BEHAVIOR 9, 289–319 (L. Cummings & B. M. Staw, eds., 1987); Robert J. Bies, & Debra L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676–85 (1988); Jerald Greenberg, *Organizational Justice: Yesterday, Today, and Tomorrow*, 16 J. MGMT 399–432; Debra L. Shapiro, *Reconciling Theoretical Differences Among Procedural Justice Researchers by Re-Evaluating What It Means to Have One's Views "Considered": Implications for Third-Party Managers*, *in* JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT 51–78 (1993); Tyler and Bies, *Formal Procedures*, *supra* note 111, at 77–98.

[114]Colquitt et al., *Millennium*, *supra* note 112; Jerald Greenberg, *The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice*, *in* JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT (Russell Cropanzano ed., 1993) [hereinafter Greenberg, *Social Side*]; Jerald Greenberg, *Using Socially Fair Treatment to Promote Acceptance of a Work Site Smoking Ban*, 79 J. APPLIED PSYCHOL. 288–97 (1994) [hereinafter Greenberg, *Smoking Ban*].

[115]Robert J Bies, Debra L. Shapiro, & L. L. Cummings, *Causal Accounts and Managing Organizational Conflict: Is It Enough to Say It's Not My Fault?*, 15 COMM. RES. 381–99 (1988).

[116]Debra L. Shapiro & H. B. Buttner, *Adequate Explanations: What Are They, and Do They Enhance Procedural Justice Under Severe Outcome Circumstances?* (Paper presented at the annual meeting of the Academy of Management, Anaheim, CA, 1988).

[117]Robert Folger, D. Rosenfield, & T. Robinson, *Relative Deprivation and Procedural Justification*, 45 J. PERSONALITY & SOC. PSYCHOL., 268–73 (1983).

[118]Colquitt et al., *Millennium*, *supra* note 112; Greenberg, *Social Side*, *supra* note 114; Greenberg, *Smoking Ban*, *supra* note 114.

[119]Bies, *Interactional Justice, supra* note 105.

Three psychological models explain these research results: control theory,[120] group value theory,[121] and fairness heuristic theory.[122] Control theory is related to social-exchange theory and posits that decision control allows disputants to shape the final outcome while process control allows them to present evidence and arguments that will in turn affect outcome.[123] Group value theory suggests that people value fair process (neutrality and respectful, dignified treatment) because it signals their value and standing within a social group.[124] In early models, the trustworthiness of the third-party authority was an element of perceived fairness.[125] Most recently, fairness heuristic theory suggests that people use information about perceptions of fair outcome or fair process as a shortcut, or heuristic, in deciding whether an authority can be trusted.[126]

Most evaluation research does not directly ask participants to evaluate justice. Some authors have termed the forms of justice based on individual perceptions as "microjustice."[127]

D. Formal Justice, Personal Justice, and Injustice

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

Formal justice has two different definitions. Posner suggests it entails a reasonable rule, equal treatment, public justice, and a procedure to establish the facts.[128] Essentially, Professor Hensler's critique of court-connected mediation amounts to an observation that it lacks sufficient formal justice because it fails to provide an

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[120]Thibaut & Walker, *supra* note 67.

[121]Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model,* 57 J. Personality & Soc. Psychol. 830 (1989) [hereinafter Tyler, *Group Value Model*].

[122]Kees van den Bos & Allan Lind, *Uncertainty Management by Means of Fairness Judgments,* 34 Advances in Exp. Soc. Psychol. 1 (2002). For a review of the literature, see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness,* 1 Ann. Rev. L. & Soc. Sci. 171–201 (2005).

[123]MacCoun, *supra* note 122.

[124]Tyler and Lind, *Relational Model, supra* note 104.

[125]Tyler, *Group Value Model, supra* note 121 at 831.

[126]Kees van den Bos, *Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness*, 80 J. Personality & Soc. Psychol. 931 (2001); *see also* MacCoun, *supra* note 78.

[127]David B. Lipsky, Ronald L. Seeber, & Richard D. Fincher, Emerging Systems for Managing Workplace Conflict: Lessons From American Corporations for Managers and Dispute Resolution Professionals (2003).

[128]Posner, *supra* note 66.

adequate fact and law-based process.[129] Rawls describes formal justice as regularity, treating similar cases similarly, implementing the rule of law in legal institutions, and impartial and consistent administration of law and institutions.[130] By definition, dispute resolution processes such as mediation and most commercial arbitration do not create rules of law or binding precedent. Due to rules on confidentiality, it is difficult to determine whether similar cases have similar outcomes in mediation and arbitration. There is a limited notion of persuasive precedent in certain forms, such as labor arbitration of grievances and rights, but this precedent is generally not binding on other arbitrators.[131]

Personal justice can take three forms. First, Posner suggests it entails corruption, in which a judge resolves a dispute based on his or her personal stake in the "dispute as a parent, investor, or other interested party."[132] Studies of mandatory arbitration based on the repeat player status of employers and corporations explore whether the economic incentive to obtain repeat business from the party in a position to refer future cases to the neutral amounts to a corrupting bias.[133] A second form entails a judge who resolves

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[129]Hensler, *supra* note 30, at 96–97. *Id.*; Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127 (2002) (arguing that the appropriate comparison is not between mediation and trials, but between mediation and the litigation process, which usually does not result in a trial).

[130]RAWLS, *supra* note 63, at 58–59.

[131]*See* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS (Alan Miles Ruben ed., 6th ed. 2003).

[132]POSNER, *supra* note 66.

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

a dispute based on the personal characteristics of the disputants.[134] Studies of gender[135] or racial[136] differences in dispute resolution outcomes explore this form of personal justice.

Lastly, the judge can resolve the substantive dispute ad hoc based on the particulars of the case using a general standard and not a specific rule.[137] This is actually one of the arguments proponents use to advocate for dispute resolution; it allows the parties to craft a form of justice (arbitration) or a specific outcome (mediation) that suits their specific needs and context. Proponents of mediation and interest-based negotiation argue that it permits creativity not available in courts. A related concept is pragmatic justice in which judges must be allowed to change their minds, even though the consequence is arbitrary justice.[138]

And then there is injustice, which Rawls defines as inequalities "not to the benefit of all."[139]

Conclusion[140]

Lawyers and dispute system designers are effectively designing justice. Therefore, we need to be systematic in our approach to

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Path for Empirical Research, 57 Stan. L. Rev. 1557 (2005) (exploring a variety of hypotheses for the repeat player effect, including:

> (1) [A]n employer will choose an arbitrator who found for the company because it perceives the arbitrator as being pro-employer, (2) employers will choose an arbitrator who found against the company because they believe the arbitrator will not find against their companies twice, (3) arbitrators will find against the same company twice, (4) arbitrators will not find against the same company twice, and (5) any effect of a repeat arbitrator is explained by the existence or absence of a DRP policy. *Id.* at 1571.

[134] Posner, *supra* note 66.

[135] *See, e.g.*, Debra J. Mesch, *Arbitration and Gender: An Analysis of Cases Taken to Arbitration in the Public Sector*, 24 J. Coll. Negot. in the Pub. Sector 207 (1995) (suggesting that women charged with felonies are treated more leniently than men); Elizabeth A. Hoffmann, *Law in the Workplace: Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 Law & Soc'y Rev. 51 (2005) (finding that a cooperative setting empowered men and women to use different approaches to conflict, with men using informal processes and women choosing formal ones); *see also* Lisa B. Bingham & Debra J. Mesch, *Decision-Making in Employment and Labor Arbitration*, 39 Indus. Rel. 671 (2000) (finding no gender differences in arbitration outcomes in a hypothetical case).

[136] Josefina M. Rendon, *Under the Justice Radar?: Prejudice in Mediation and Settlement Negotiations*, 30 T. Marshall L. Rev. 347 (2005) (discussing racial prejudice in mediation outcomes).

[137] Posner, *supra* note 66.

[138] *Id.*

[139] Rawls, *supra* note 63, at 62.

[140] I wish to acknowledge the helpful comments on early versions of this manuscript I received from colleagues at the University of California Hastings College of the Law faculty workshop, Janet Martinez, Stephanie Smith, and Tina Nabatchi. I am also grateful for the time I spent at the Center for the Study of Law and Society at the University of California Berkeley and many wonderful conversations with colleagues there while I was working on the manuscript.

institutional design in conflict resolution. We must become more mindful of how we affect justice when we design institutions and systems to manage conflict; we should move more knowingly and intentionally to research, deliberate on, and assess justice in DSD; and we owe it to the next generation of lawyers to teach them how to serve ethically when they design justice.