

# Dispute Systems Design, Neoliberalism, and the Problem of Scale

Amy J. Cohen\*

## I. INTRODUCTION

This essay critically explores whether techniques that emerge out of individual dispute resolution paradigms can provide a socially compelling vision for the resolution of larger-scale conflict. To that end, it examines the methods of dispute systems design (DSD) and some of the background social and political conditions that influenced DSD's emergence. In the late 1980s and 1990s, dispute resolution scholars began to expand the methods of alternative dispute resolution (ADR) and apply them to disputes involving not only individuals but also groups, organizations, and public and private entities in a variety of settings.<sup>1</sup> Over the last decade, scholars and practitioners

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\* Assistant Professor of Law, The Ohio State University Moritz College of Law. For conversations, comments, and helpful criticisms, I wish to thank Eric Biber, Bob Bordone, Jim Brudney, Cathy Costantino, Tommy Crocker, Ellen Deason, Howard Gadlin, Ilana Gershon, Garry Jenkins, Genevieve Lakier, Zina Miller, Marc Spindelmann, Josh Stulberg, Peter Shane, Larry Susskind, Steve Walt, Annecoos Wiersema, and participants at the Quinnipiac-Yale Dispute Resolution Workshop. I also wish to thank Zeke Reich for fabulous editorial assistance and Catharine Adkins and Nicole Swift for excellent bibliographic assistance.

1. For two foundational works on DSD, see WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996). See also Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 *NEGOT. J.* 207, 207 (2001) (“In the practice of dispute resolution, an evolution – some would say a revolution – is occurring. The field has moved well beyond the settlement of individual disputes to a growing phenomenon . . . which represents a comprehensive, systems approach to the prevention, management and resolution of conflict.”); Frank E.A. Sander, *Some Concluding Thoughts*, 17 *OHIO ST. J. ON DISP. RESOL.* 705, 709 (2002) (describing the “[d]evelopment of the field of Dispute Systems Design” as among “a splendid fallout of other ADR-like practices that hold great promise”); Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 *HARV. NEGOT. L. REV.* 133, 138 (2003) (“[M]uch of [DSD] literature extends the ADR approach by applying it to organizations outside of the legal system.”).

have designed proposals to address repetitive grievances in labor and employment contexts<sup>2</sup> (including in many large multinational corporations<sup>3</sup>), to improve the resolution of investment treaty and other forms of commercial disputes,<sup>4</sup> and to enhance the capabilities of public institutions to manage political conflict.<sup>5</sup> Alongside these initiatives, there has also been a proliferation of other dispute resolution forms. In 2008, the American Bar Association Section of Dispute Resolution added a committee on “Public Policy, Consensus Building, and Democracy” to capture practices of dispute resolution that “foster integrative solutions to public policy disputes” and that contribute to ideals such as “deliberative democracy” and “collaborative governance.”<sup>6</sup> Some scholars thus describe DSD capaciously – as a new field of theory and practice to address conflicts that extend beyond bounded individual disputes.<sup>7</sup>

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2. See, e.g., Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005); Peter Robinson, Arthur Pearlstein & Bernard Mayer, *DyADS: Encouraging “Dynamic Adaptive Dispute Systems” in the Organized Workplace*, 10 HARV. NEGOT. L. REV. 339 (2005).

3. See, e.g., 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); KARL A. SLAIKEU & RALPH H. HASSON, *CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION* 65-74 (1998) (describing dispute management systems in General Electric, Shell Oil, and Halliburton); Nancy A. Welsh, *Institutionalization and Professionalization*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 487, 489 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing dispute management systems in corporations such as Motorola).

4. See, e.g., Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007); Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004).

5. See, e.g., Shariff, *supra* note 1.

6. ABA Section of Dispute Resolution: Public Policy, Consensus Building, and Democracy, *Who We Are*, <http://www.abanet.org/dch/committee.cfm?com=DR037000> (last visited September 21, 2008).

7. Robert Bordone, for example, uses the term DSD to describe intentional efforts to manage conflict in organizational settings (such as international institutions, companies, universities, government agencies, and non-profits) as well as in transactional settings (such as mass torts, class actions, natural disasters, terrorism, and repatriation). Robert Bordone, *Dispute System Design: An Introduction* 5, Presentation at the Harvard Negotiation Law Review Symposium (Mar. 7, 2008), <http://blogs.law.harvard.edu/hnmcp/files/2008/03/dsdintroduction3-7-08.pdf>. Cathy Costantino describes “systems design” and “public policy consensus building” as “very similar” in terms of their methods and principles, with the former applicable to “smaller groups” and the latter to conflict in “the governance arena.” Panel Discussion, *Problem-Solving Mechanisms To Achieve Consensus: How Do We Ensure Successful Resolution?*, 35 FORDHAM URB. L.J. 205, 211-12 (2008).

But when, in the 1970s, U.S. dispute resolution scholars and practitioners created institutional mechanisms to resolve individual disputes by providing alternatives to the direct application of state law, they did so at a time when our relation to the state was, in important ways, different from our relation today. ADR was created in the United States within and against an understanding of state law as the primary producer of dispute resolution. By contrast, contemporary dispute resolution scholars are transforming alternative principles for managing individual disputes into principles for managing larger-scale conflict against a backdrop marked by shifting forms of state power due, in part, to decades of neoliberal policies in the United States and elsewhere. These shifts have helped to reshape some of our background ideas of dispute resolution; in Alfred Aman's pithy summary, "if injustices in the 1970s were greeted with the slogan 'there ought to be a law,'" social problems today are greeted "with a new refrain: 'there ought to be a market.'"<sup>8</sup> Aman argues that this change reflects the fact that "we now live in an increasingly neo-liberal state" that relies more on markets than on politics and law to resolve social conflict.<sup>9</sup>

This essay, then, is an effort to locate DSD discursively and politically within a dominant neoliberal rationality of our time. Because DSD applies to conflicts that span levels of social organization, I use an analytic of scale – a term I employ chiefly to capture how we conceptualize levels of social organization (individuals, groups, institutions, corporations, communities, societies, states) and the distinctions and similarities among them.<sup>10</sup> I suggest that when

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8. Alfred C. Aman, Jr., Abstract, *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State* (Mar. 27, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=975311](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975311); see also Alfred C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y.L. SCH. L. REV. 801 (2007) [hereinafter Aman, *Law, Markets and Democracy*].

9. Aman, *Law, Markets and Democracy*, *supra* note 8, at 804.

10. Within legal scholarship, the term "scale" is often used to explain how any one particular problem can affect and be affected by actors and conditions at multiple jurisdictional/geographical levels (local, regional, national, global) as well as within multiple spatial systems (consider, to draw on Bradley Karkkainen's work, how a plant community inhabiting a single estuary interacts with "adjacent coastal waters . . . and nearby shore lands," and with the ocean and the freshwater basin of which the estuary is a part). Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 208 (2002). Scholars thus argue that how we construct the jurisdictional and spatial contexts against which we understand a problem (and how we construct the interactions among these contexts) shapes how we resolve that problem. See generally *id.* at 206-12. For a careful analysis of jurisdictional and spatial concepts of scale, see Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 53 VILL. L. REV. 117, 145-49 (2008). I fully agree that attention to how we frame or "scale" a problem

viewed through an analytic of scale, both neoliberal ideologies and the methods of DSD can appear insensitive to distinctions in social organization in analogous ways. I suggest further that to the extent projects of DSD are unfolding against a backdrop of neoliberal ideas and practices, this structural similarity stands to strengthen some of these ideas and practices, and with them attendant forms of social inequality. I conclude by sketching some research questions and examples of case analyses that may contribute to a scale-sensitive approach to DSD.

## II. FROM ADR TO DSD UNDER CONDITIONS OF NEOLIBERALISM

ADR's pioneering legal architects sought to reform top-down and state-centric practices of individual dispute resolution. As several scholars have illustrated, in the 1970s and early 1980s, ADR comprised a tri-part endeavor dedicated to rationalizing the court system, enhancing access to dispute resolution for disadvantaged populations, and empowering individuals and communities to resolve disputes in ways that were qualitatively different from the sorts of resolutions achieved through public adjudicatory processes.<sup>11</sup> Reformers within the legal establishment focused on making the delivery of public dispute resolution services more efficient and also more accessible and relevant to ordinary users.<sup>12</sup> More radical reformers outside the legal establishment focused on creating grassroots dispute resolution initiatives to empower individuals and communities to resolve their conflicts without relying on professional judges and state authority.<sup>13</sup>

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is critical to any reflexive problem-solving practice; here, however, I use the term scale primarily for a different purpose.

11. See generally Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 445-56 (1989); see also Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 714-23 (1988). For a brief overview of this history as well as for references to scholarship that traces ADR's earlier antecedents, see Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 301-09 (2006).

12. See, e.g., JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 123-24 (1983) (discussing the role of Chief Justice Burger in the development of ADR); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 FED. RULES DECISIONS 111, 111-14 (1976).

13. See generally Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 75 (Richard L. Abel ed., 1982); Raymond Shonholtz, *The Citizens' Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS AM. ACAD. POL. & SOC. SCI. 42 (1987). Some ADR entrepreneurs looked to community moots and collective bargaining to

ADR's early critics argued against these reforms in parallel fashion. Most prominently, Laura Nader described ADR as an intentional "effort to quell the rights movements (civil rights, women's rights, consumer rights, environmental rights)" by replacing public concern for state-enforced rights with private social norms (or interests) and by replacing access to public institutions with private technologies of dispute management.<sup>14</sup> Alongside the early argument that ADR undermined rights guaranteed by the state, critics also argued that ADR provided the state with the means of expanding its reach into previously less accessible spaces in order to manage conflictual populations (the poor, minorities, women) and preserve the existing social order.<sup>15</sup> In fact, most critics cast ADR as either undermining the emancipatory power of state law by eroding rights (in terms similar to the argument that Nader put forth), or as extending the coercive power of state governance by expanding social control through an illusion of voluntary empowerment, or both.

Today, however, some of the forms and functions of state power are shifting in ways that compel us perhaps to extend, but also to think beyond, ADR's early defenses and critiques. Whereas ADR's early proponents primarily designed institutional alternatives to the state adjudication of individual disputes, changes in de- and re-regulatory forms of state power are creating new opportunities for dispute

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promote alternatives to adjudication. See Silbey and Sarat, *supra* note 11, at 442-44. According to Silbey and Sarat, however, "[b]y the mid-1980s, the hopes of those who had joined the critique of adjudication from the community empowerment perspective had largely been dashed." *Id.* at 456.

14. Laura Nader, *From Legal Process to Mind Processing*, 30 FAM. & CONCILIATION CTS. REV. 468, 468, 472 (1992); see also AUERBACH, *supra* note 12, at 121-29 ("Nothing, it seemed, propelled enthusiasm for alternative dispute settlement like a few legal victories that unsettled an equilibrium of privilege."); CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 96-99 (1985) (characterizing the application of mediation to consumer, family, and minor criminal disputes as "a reaction to rights movements"); Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2072 (1987) (suggesting that ADR may be a response to "new users in the courts," bringing undesirable claims about "domestic violence, neighborhood harassment, sexual harassment on the job, discrimination, faulty goods, shoddy medical service, and deteriorated rental housing").

15. Richard L. Abel, *Introduction* to 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE, *supra* note 13, at 1, 6 (arguing that informal dispute resolution, which typically relies on the state for case referrals, enables the state to expand "its control so as to manage capital accumulation and defuse the resistance this engenders"); see also AUERBACH, *supra* note 12, at 144 ("Alternatives are designed to provide a safety valve, to siphon discontent from courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced.").

systems designers to apply their horizontal problem-solving techniques not only in adjudicative, but also in organizational, legislative, and administrative settings. Many legal scholars have argued that in the United States we are witnessing “very basic changes in economy, polity, and society,” that include greater “devolution [of regulatory power] to the states, increased public-private partnerships, attacks on the use of litigation, and the emergence of new managerial technologies.”<sup>16</sup> Some indeed suggest that “we are living in times of profound governance transformation as a matter of empirical fact.”<sup>17</sup> Although neoliberalism “has not been the only discourse” underlying these transformations, as Scott Burris, Michael Kempa, and Clifford Shearing suggest, “it certainly has been the most influential [one] in Britain, the United States, Canada, and Australia.”<sup>18</sup>

I intend the term “neoliberal” to refer both to a set of market-based reforms and to a larger set of political-economic ideas and practices that has helped to reshape contemporary governance. As one legal scholar explains:

The general neoliberal consensus has three core dimensions. The first involves a commitment to freer trade and investment, financial liberalization, and the internationalization of production. The second relates to fiscal reform issues, such as the adoption of tighter budgetary discipline, lower levels of taxation, and a more structural approach to monetary policy. The third concerns a change in the character of public and private governance, represented by a shift away from the administrative [and welfare] state towards the strategies of the ‘new regulatory state.’<sup>19</sup>

In its third form as a praxis of governance, neoliberalism champions efficiency-maximization as the primary means of providing for social welfare and “proposes that human well-being can best be advanced

16. David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 542-43 (2007).

17. Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 12 (2008). Or, to draw on a popular (albeit sensational) source, think of *New York Times* columnist Thomas Friedman’s argument that in recent years “the world has gone from round to flat. Everywhere you turn, hierarchies are being challenged from below or transforming themselves from top-down structures into more horizontal and collaborative ones.” THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 45 (2005).

18. Burris et al., *supra* note 17, at 46.

19. David Szabrowski, *John Willis and the Challenges for Public Law Scholarship in a Neoliberal Globalizing World*, 55 U. TORONTO L.J. 869, 873 (2005) (citation omitted).

by liberating individual entrepreneurial freedoms and skills.”<sup>20</sup> Accordingly, it figures the competitive market as the optimal mechanism for “maximizing overall resources and individual responsibility.”<sup>21</sup>

Many scholars trace these ideas to the work of economic philosopher Friedrich von Hayek and his attack on Keynesian economic policy, government planning (or intervention in the market and economic affairs in general), and the welfare state.<sup>22</sup> Hayek argued that centralized planning is a form of tyranny because it aims “to organize the whole of society and all its resources for [a] unitary end” and thus refuses “to recognize autonomous spheres in which *the ends of the individuals* are supreme.”<sup>23</sup> He reasoned further that planning is intrinsically inefficient not only because it “undermines individual freedom and the ‘vitality of [individual] abilities,’ both of which are necessary for the prosperity of all,” but because it requires a central planner to possess complex and contingent knowledge about individual interests and preferences only accessible to individuals themselves as they evolve these interests in market relations with others.<sup>24</sup>

The role of the neoliberal state is therefore to improve the conditions for individual freedom and efficient market exchange by adopting policies such as deregulation, downsizing of the public sector, or privatizing publicly-owned entities and industries.<sup>25</sup> In addition to

20. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005).

21. Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783, 785 (2003).

22. See Rachel S. Turner, *The ‘Rebirth of Liberalism’: The Origins of Neo-Liberal Ideology*, 12 *J. POL. IDEOLOGIES* 67, 69-71 (2007). Hayek himself acknowledges that “Americans have done me the honour of considering the publication of *The Road to Serfdom* as the decisive date . . . [of bringing] about the rehabilitation of the idea of personal freedom especially in the economic realm.” *Id.* at 78. He, however, roots the genesis of these ideas in a series of conferences with like-minded intellectuals.

23. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 56 (1944) (emphasis added), quoted in KATHARINE NEILSON RANKIN, *THE CULTURAL POLITICS OF MARKETS* 16 (2004). Elsewhere, Hayek writes:

The defence of the free society must therefore show that it is due to the fact that we do not enforce a unitary scale of concrete ends, nor attempt to secure that some particular view about what is more and what is less important governs the whole of society, that the members of such a free society have as good a chance successfully to use their individual knowledge for the achievement of their individual purposes as they in fact have.

Friedrich A. Hayek, *The Principles of a Liberal Social Order*, in *THE ESSENCE OF HAYEK* 363, 368 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) [hereinafter Hayek, *Liberal Social Order*].

24. RANKIN, *supra* note 23, at 16 (citations omitted).

25. Harvey explains that under conditions of neoliberalism:

facilitating the activities of private market actors in this way, the neoliberal state may also adopt market principles, such as business norms of “productivity and profitability,” as criteria of governance.<sup>26</sup> For instance, government managers may present health care not as a distributive entitlement but rather as a tactical decision “to divert dollars from taxpayers’ income or employers’ productivity,” and therefore as a decision that “is best debated as a calculation of the relative costs and benefits (health and otherwise) of such a policy.”<sup>27</sup> Even more, the state may aim to instill within its citizens the capacities and desires to govern themselves according to this market logic. Wendy Brown, for example, argues that in the United States, neoliberalism has figured citizens as “individual entrepreneurs and consumers” capable of meeting their needs (for health and otherwise) by engaging in a deliberative calculation of costs and benefits and, moreover, as individuals whose “moral autonomy is measured by [this] capacity for ‘self-care.’”<sup>28</sup>

Of course, precisely where and how neoliberal ideas and practices have occurred and to what actual effects are subjects of voluminous scholarship. To offer just one (partial) example, Ian Ayres and John Braithwaite’s review of governance policies in the United States during the Reagan Administration in areas including “the environment, occupational health and safety, nursing homes, financial institutions, securities and futures markets, defense contracting, tax enforcement, antitrust, consumer product safety, and food standards” led them to characterize our present era not as one of purely *deregulation* but rather one in which “dramatic regulatory, deregulatory,

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The role of the state is to create and preserve an institutional framework appropriate to [neoliberal ideas and practices]. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.

HARVEY, *supra* note 20, at 2.

26. Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 *POL. THEORY* 690, 694 (2006).

27. McCluskey, *supra* note 21, at 795.

28. Brown, *supra* note 26, at 694.

and re-regulatory shifts are occurring simultaneously.”<sup>29</sup> As a possible illustration of what Ayres and Braithwaite call “regulatory flux,”<sup>30</sup> consider that today both ordinary citizens and private regulated entities are called upon to participate in negotiated processes of federal rulemaking – regulatory processes that were once the sole domain of the state.<sup>31</sup>

It is against this broad backdrop that dispute systems designers are finding new opportunities to design problem-solving systems made possible by shifts in our legal, political, and economic order. But as the debates surrounding even discrete practices of negotiated rulemaking suggest, the participatory problem-solving systems that result are in no way guaranteed (and by some accounts are unlikely) to produce outcomes that are socially progressive.<sup>32</sup> In the last decades of the twentieth century, we have witnessed a marked rise in social inequality in the United States and elsewhere at the same time that we have witnessed a decline of the activist welfare state.<sup>33</sup> In A

29. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 7 (1992).

30. *Id.*

31. The Negotiated Rulemaking Act of 1990 provides an alternative to traditional rulemaking in federal agencies by enabling a committee of interested and affected stakeholders to reach a negotiated consensus about a proposed agency rule. See 5 U.S.C. §§ 561-570 (2006). For an overview of negotiated rulemaking, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33-40 (1997).

32. For criticisms of negotiated rulemaking, see William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1382-87 (1997) (arguing that negotiated rulemaking processes can subordinate the public interest to the interests of parties engaged in regulatory negotiations); Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1296 (1994) (arguing for a cautionary approach to negotiated rulemaking for environmental policy problems based on an analysis of German consensual procedures that suffer from limited public accountability). But see Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 132-33 (2000) (viewing empirical data “as support for the proposition that [negotiated rulemaking] reduces conflict and increases agreement, but without hampering public participation”).

33. Harvey writes:

After the implementation of neoliberal policies in the late 1970s, the share of national income of the top 1 per cent of income earners in the US soared, to reach 15 per cent . . . by the end of the century. The top 0.1 per cent of income earners in the US increased their share of the national income from 2 per cent in 1978 to over 6 per cent by 1999, while the ratio of the median compensation of workers to the salaries of CEOs increased from just over 30 to 1 in 1970 to nearly 500 to 1 by 2000. . . .

The US is not alone in this: the top 1 per cent of income earners in Britain have doubled their share of the national income from 6.5 per cent to 13 per cent since 1982. And when we look further afield we see extraordinary concentrations of wealth and power emerging all over the place.

*Brief History of Neoliberalism*, David Harvey suggests that “[r]edistributive effects and increasing social inequality have in fact been such a persistent feature of neoliberalization as to be regarded as structural to the whole project.”<sup>34</sup> The question I therefore propose in the part that follows is whether DSD is participating (purposefully or inadvertently) in neoliberal projects.

### III. OBSERVING NEOLIBERALISM AND DSD THROUGH AN ANALYTIC OF SCALE: SEEING “STAKEHOLDERS” AS INDIVIDUALS

By taking scale into account, it becomes possible to perceive similarities between neoliberal ideologies and some of the methods of DSD. Neoliberalism encourages us to think of individuals (and the interactions among them) as the basic, or perhaps the only, unit in society.<sup>35</sup> In Margaret Thatcher’s famous formulation: “There is no such thing as society. There are individual men and women, and there are families.”<sup>36</sup> Or as Hayek argues, “what are called ‘social ends’ are . . . merely identical ends of many individuals.”<sup>37</sup> Hayek, in fact, argues that there is no “separate ‘social justice’” (by which he means collective responsibility for the social effects of market orders).<sup>38</sup> Rather “[t]here is only a justice of individual conduct” and there is “treatment under the same rules.”<sup>39</sup> Within these classic neoliberal imaginaries, society is thus comprised of individuals and their ends.

As a result, for thinkers like Hayek, distinct forms of social organization – the institution, the corporation, the community, the municipality, even the nation-state – are understood as simply composites of the individuals that comprise them,<sup>40</sup> and *like* a

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HARVEY, *supra* note 20, at 16-17.

34. *Id.* at 16.

35. These ideas are indebted to many conversations with Ilana Gershon.

36. THE COLLECTED SPEECHES OF MARGARET THATCHER 576 n.1 (Robin Harris ed., 1997) (quoting an interview published in *Woman’s Own* on October 31, 1987).

37. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 60 (1944).

38. Hayek, *Liberal Social Order*, *supra* note 23, at 379.

39. *Id.*

40. One can easily see the relevance of public choice theory to neoliberal conceptualizations of social organization. As Edward Rubin explains:

Public choice theory treats legislators and the chief executive as reelection maximizers. They are perfectly rational as individuals, since reelection maximizes each individual’s self-interest, but the behavior of the institutions that they comprise is determined simply by the sum of their uncoordinated individual efforts. The institution, therefore, has no capacity to pursue public policy goals in a rational manner; in fact, it has no collective purpose whatsoever.

(neoliberal) individual in their entirety.<sup>41</sup> That is, these entities are understood as willful and bounded actors capable of occupying a seat at the negotiation table, creating alliances, managing risk, making choices, and ultimately pursuing their own strategic ends. Hayek, for example, explains that

[w]hen individuals combine in a joint effort to realize ends they have in common, the organizations, like the state, that they form for this purpose are given their own system of ends and their own means. But any organization thus formed remains *one "person" among others*, in the case of the state much more powerful than any of the others, it is true, yet still with its separate and limited sphere in which *alone its ends are supreme*.<sup>42</sup>

Hayek here envisions all units of social organization, including the state, as “persons” pursuing their ends in ways that are structurally similar to individuals. Or as anthropologist Ilana Gershon explains, neoliberal conceptions of agency cast “individual people [as] simply smaller versions of corporations, communities [as] interchangeable with small businesses . . . . At all levels, the units and their interactions are supposedly organized and intertwined in the same way.”<sup>43</sup>

DSD stands similarly to envision multiple forms of social organization as structurally analogous to individuals. But this is not due to any explicit commitment to neoliberal ideology (that I can discover); rather it flows from a commitment to interest-based dispute resolution (IBDR). Dispute resolution scholars regularly advise that DSD should build upon interest-based processes.<sup>44</sup> In their foundational work, William Ury, Stephen Goldberg and Jeanne Brett argue that the “first principle” of DSD is to “[p]ut the focus on interests” and to

Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Micro-analysis of Institutions*, 109 HARV. L. REV. 1393, 1399 (1996). For a general analysis of law and economics’ relation to neoliberalism, see UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 88-100 (2008).

41. Cf. NIKOLAS ROSE, *INVENTING OUR SELVES: PSYCHOLOGY, POWER, AND PERSONHOOD* 153 (1996) (“In the writings of ‘neoliberals’ like Hayek . . . well-being of both political and social existence is to be ensured . . . through the ‘enterprising’ activities and choices of autonomous entities – businesses, organizations, persons – each striving to maximize its own advantage by inventing and promoting new projects by means of individual and local calculations of strategies and tactics, costs and benefits.”).

42. HAYEK, *supra* note 37, at 60 (emphasis added).

43. Ilana Gershon, *Neoliberal Agency*, CURRENT ANTHROPOLOGY (forthcoming 2010).

44. See, e.g., Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 371 (“The core idea of [dispute systems design] is to apply the techniques and sensibility of interest-based negotiation to the identification, prevention, management, and resolution of conflict within organizations.”).

design mechanisms aimed at “reconciling the interests of the disputants.”<sup>45</sup> In another pioneering book, Cathy Costantino and Christina Sickles Merchant recommend “interest-based conflict management systems design” to replace power-based and rights-based processes.<sup>46</sup> In a similar fashion, Peter Robinson, Arthur Pearlstein and Bernard Mayer assert that “[a]s much as possible, [DSD] should allow and encourage parties in conflict to make decisions and resolve conflicts on the basis of needs and interests.”<sup>47</sup> To offer one recent application, Susan Franck proposes that DSD could “promote creative problem solving to resolve [investment treaty] disputes according to the parties’ interests,” where the parties are governments, foreign investors, and NGOs.<sup>48</sup>

IBDR, however, is a paradigm based on individuals. It is modeled on a heuristic of formally equal individuals (individuals are both subject to and entitled to the same procedural forms of social exchange). And it uses the methods of value creation or interest maximization as a primary means of dispute management. I will argue that this heuristic and set of methods tend to be insensitive to differences in levels of scale. But in many contexts both are nonetheless sensible and apt. They allow mediators, negotiation trainers, and other dispute resolution professionals to enable individuals to achieve voluntary and mutually advantageous agreements at the level of interpersonal interaction. To take a proverbial ADR example, when two sisters fight over an orange, the dispute resolution practitioner hopes only to reveal that although the sisters’ positions may conflict (because they both want the same finite good), if they can transform their primary ends or their positions (the orange) into secondary ends or underlying interests (baking a cake, making juice), then they can satisfy those interests through secondary means (the

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45. URY ET AL., *supra* note 1, at 42.

46. COSTANTINO & MERCHANT, *supra* note 1, at 49-54. In addition, they recommend providing “low-cost rights and power back-ups” as supplements to interest-based processes. *Id.* at 60 (building on URY ET AL., *supra* note 1, at 52-60). See also Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207 (1996).

47. Robinson et al., *supra* note 2, at 360 (they refer to their method of DSD as Dynamic Adaptive Dispute Systems). See also ALLAN J. STITT, *ALTERNATIVE DISPUTE RESOLUTION FOR ORGANIZATIONS: HOW TO DESIGN A SYSTEM FOR EFFECTIVE CONFLICT RESOLUTION* 19 (1998) (“Generally, disputes are resolved more effectively and satisfactorily for disputants if they use an interest-based approach to the resolution of conflict.”).

48. Franck, *supra* note 4, at 182, 224-27.

rind, the pulp).<sup>49</sup> In this paradigm, a multitude of social and structural factors are irrelevant: the location of these sisters in a social hierarchy, their class privilege in relation to each other, the value of using one's time to bake cakes and make juice, and the material, historical, and environmental factors that make it feasible for sisters to use oranges in this way. Instead, in this example, IBDR aims, quite sensibly, to achieve at an interpersonal level what neoliberalism aims to achieve writ large: to take bounded individuals as the basic unit of analysis and to encourage them to pursue their interests in relation to the interests of others in order to achieve their maximum overall good.

To be sure, many dispute resolution scholars have developed methods of interest-maximization that are far more sophisticated than the seamless orange story suggests.<sup>50</sup> And we can debate the applications of IBDR methods to real-world disputes involving individuated conflict.<sup>51</sup> But what if instead of two sisters sharing fruit, we shift to conflict that implicates multiple levels of scale? Consider a small Central American country in which a majority of small citrus farmers who grow oranges for export are locked in conflict with a minority of large citrus farmers who have colluded with multinational citrus processors to keep prices paid to growers and workers below those of world markets – with minimal regulation by the state.<sup>52</sup> Add to this conflict a weakened union that represents harvesters, dock loaders, and factory workers, that is willing to negotiate wage increases on behalf of some of these occupations at the expense of

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49. The “orange story” likely owes its popularity to ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 59 (1981). On the origins of the orange story, see Deborah M. Kolb, *The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?*, 11 *NEGOT. J.* 339, 339 (1995).

50. For an overview of techniques (adding issues, subtracting issues, substituting issues, and logrolling) designed to enhance the value of negotiated agreements for all parties, see RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 129-34 (2002).

51. See, e.g., Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 *OHIO ST. J. ON DISP. RESOL.* 27, 79-80 (2002) (“The problem with [the orange] allegory is that it over promises the benefits of mediation, creating in the parties unrealistic expectations regarding the mediator’s ‘magic’ and unrealistic assumptions regarding their own need to compromise . . . Having touted an interest-based process spawning win-win solutions, we [mediators] are sometimes stymied when the parties and their counsel expect us to deliver a solution that requires no compromise on their part.”).

52. See generally Mark A. Moberg, *Class Resistance and Class Hegemony: From Conflict to Co-optation in the Citrus Industry in Belize*, 29 *ETHNOLOGY* 189 (1990).

others, and whose members are themselves divided along ethnic, political, and occupational lines.<sup>53</sup>

We should see our orange story begin to strain as we shift scales in this way. But this is not because integrative outcomes in this second scenario are implausible or undesirable.<sup>54</sup> Rather it is because IBDR's heuristic and methods presuppose human characteristics and therefore may not fully capture differences in social organization in settings where we do not deal exclusively with individuals but rather with individuals who find themselves constrained to manage tenuous alliances with qualitatively distinct public and private entities (the union, the corporation, the state). IBDR classically envisions a human person – one with interests – who stands to find creative ways to satisfy her interests not knowable before social exchange. This vision owes its force to the idea that a central decision-maker cannot fully understand and therefore cannot fully address an individual's interests, and also to the idea that individuals can sometimes formulate their interests through social interaction with others.<sup>55</sup> Or, in Hayek's terms, it is not that "each man knows his interests best," but rather "that nobody can know *who* knows best and that the only way by which we can find out is through a social process in which everybody is allowed to try and see what he can do."<sup>56</sup> Within dispute resolution literature, this vision often includes a third idea we less frequently make explicit: individuals should *want* to evolve interests that they can achieve through social exchange.<sup>57</sup> A conceptual analogy of collective entities to (albeit more powerful) persons with these

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53. *Id.*

54. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 93-94 (1986) (extending the lessons of the orange story to a complex dispute between a utility company and conservationists over the building of a hydro-power dam).

55. Here is how Gabriella Blum and Robert Mnookin explain it: "through the process of negotiation people's priorities and interests can sometimes change and evolve" but "*ex ante*, people may overlook or underestimate this possibility." Gabriella Blum & Robert H. Mnookin, *When Not to Negotiate*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 101, 108 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

56. Friedrich A. Hayek, *Individualism: True and False*, in *THE ESSENCE OF HAYEK*, *supra* note 23, at 131, 140.

57. Indeed, the very plausibility of achieving joint gains often depends on the willingness of individuals to transform the ends they hold prior to a conflict into interests that hold value to others and therefore serve a mutually advantageous good. Consider a dispute about proposed economic development in a blighted city. A dispute systems designer will likely begin by inviting a range of "stakeholders" – the city, the development corporation, the environmental group, various citizens' groups – to participate in a series of facilitated negotiations about how their joint resources should be used. To produce value across divergent positions, however, these entities

characteristics greatly facilitates our ability to apply the methods of IBDR to larger-scale conflict.

Of course, many dispute resolution scholars conceptualize individual interests not only as material desiderata but also as symbolic, dignitary, ideological, and emotional ones.<sup>58</sup> And when, for example, an individual homeowner sits down to negotiate with an individual representative of a corporation or city, this can look like a negotiation between complex human people – one that would benefit from a range of IBDR techniques designed to enable individuals not only to maximize their material interests, but also to address dignitary needs, deal with emotions, minimize cultural differences, surmount cognitive biases, and manage a number of other such human obstacles to dialogue and exchange. Yet as we apply our toolkit to this negotiation to enhance the capacities of individuals to negotiate with others, we also potentially further conceal the differences in levels of scale that I am suggesting are this negotiation’s crucial (if, at times, invisible) subtext: neither the corporation nor the city “has” needs, emotions, or even interests in the ways that individual people do.

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must be willing to engage as buyers and sellers in a horizontal market, dealing in commodities that are cognizable on that market. To that end, for example, residents could become willing to translate their desires to preserve their homes into interests in relocation, and environmental activists could become willing to translate their desires to preserve ecological integrity into a risk assessment pegged to a monetary amount designated for remediation if ecological damage ensues. If, instead, these actors insist their welfare flows from the enforcement of other incommensurable ideals (for example, a long-term view of ecosystem preservation that resists commodification via an assessment of risk), then gains from trade become far more difficult to envision. Proponents of neoliberalism offer the market as the solution to this problem of disparate valuation. As one of Hayek’s students explains, “the *free* market, in which the price mechanism is left alone to work itself out, means that in this market every person is allowed to act in accordance with his or her own standard of values” rather than values imposed by somebody else. Chiaki Nishiyama, *Introduction to THE ESSENCE OF HAYEK*, *supra* note 23, at xxvii, lv. That said, to participate within existing markets, one’s standard of values must be cognizable and value-able to others. Elsewhere, I have argued that IBDR techniques aim normatively to render individuals capable and desirous of making their ends commensurable, fungible, and thus subject to reciprocal trades in light of the extant valuations of others. Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 522-27 (2008).

58. For a review of some of this literature, see Kevin Avruch, *Toward an Expanded “Canon” of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic*, 89 MARQ. L. REV. 567 (2006). Avruch supplements interest-based negotiation’s “canonical” heuristic of a buyer and seller with “second-generation” negotiation models that consider values, ideologies, beliefs, and basic human needs (needs that are putatively universal and therefore nonfungible). *Id.* at 568, 572-78. Building on these second-generation models, he proposes an alternative, but purposefully individuated negotiation heuristic: two married spouses of different faiths that must negotiate their spiritual divide. *Id.* at 578-80.

Thus by observing that neoliberalism and IBDR both take the individual as their starting point of analysis, I am not suggesting that IBDR compels simplistic applications of efficiency-maximization or that all proponents of these techniques believe that all human interests reduce to economic preferences – both propositions are plainly wrong. Nor am I suggesting that dispute resolution scholars should conceptualize people in particular ways (for example, as irrational people with values and needs versus rational people with interests<sup>59</sup>). My argument is far more conditional: against a backdrop of neoliberal ideas and practices, we should consider how IBDR, like neoliberalism, can elide differences in levels of scale in contexts where agents must traverse levels of scale to reach negotiated agreements – for example, where an individual must negotiate with a corporation or a city.

Depending on background social practices, institutional settings, settled expectations, and plausible alternatives, we may find no reason to object to the application of IBDR to larger-scale conflict. In other contexts, we could endorse IBDR yet decide that qualitative differences between individuals and collectives require explicit methodological responses. For example, designers could seek to limit the human dimensions of conflicts involving individual, corporate, and state actors by using representatives to negotiate on behalf of individuals – for reasons of distribution, not efficiency.<sup>60</sup> Or we could grapple more systematically with the challenges of organizing individuals

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59. It is worth observing that Hayek envisions individuals as “very irrational and fallible being[s], whose individual errors are corrected only in the course of a social process.” Hayek, *supra* note 56, at 136. For Hayek, that individuals cannot possess more than partial reason or knowledge forms the basis of his argument that the market (rather than “rational” planners) should organize society because the market allows man to “be guided in his actions by those immediate consequences which he can know and care for.” *Id.* at 139. And by taking “part in a process more complex and extended than he could comprehend,” man can potentially be “made to contribute ‘to ends which [are] no part of his purpose.’” *Id.* at 140.

60. Consider, on this point, Nancy Welsh’s work on procedural fairness. Welsh reports that people in a negotiation “who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, even if it is unfavorable [to their distributive interests].” Nancy A. Welsh, *Perceptions of Fairness*, in *THE NEGOTIATOR’S FIELDBOOK*, *supra* note 55, at 165, 171. Yet in negotiations between parties of unequal status, “the lower-status negotiator is more likely to be satisfied with an unfavorable outcome, as long as she is treated in a procedurally just manner,” whereas the higher-status negotiator is “less likely to allow process fairness to soften the blow of an unfavorable outcome.” *Id.* Perhaps the lower-status people in Welsh’s dataset placed greater value on dignitary goods like procedural fairness because they were less likely than higher-status people routinely to receive them – a valuation that may not serve their distributional good as they negotiate directly with powerful institutional and corporate actors.

into collectives and the complexities of collective representation<sup>61</sup> – challenges, I would argue, that remain understudied within the field of dispute resolution.<sup>62</sup> Or we could more extensively research the social, historical, and legal conditions that shape how individuals and collectives become parties to conflicts and consider whether DSD can contribute to changing these conditions in order to enhance the possibilities for equitable exchange.<sup>63</sup>

For proponents of neoliberalism, however, a reductive focus on the individual is both an ideological and political commitment – a normative vision of what society (and social justice) should be. There are some dispute resolution scholars who may share these commitments, even if they rarely make them as explicit as I am doing here.<sup>64</sup> Dispute systems designers, moreover, regularly argue that horizontal decentered flexible design is more efficient than top-down approaches to resolving conflict. DSD, they suggest, can lower transaction costs, minimize power struggles, increase productivity, and produce higher satisfaction and compliance rates with agreements in the various contexts in which it is applied.<sup>65</sup> To the extent designers are concerned only or even primarily with reducing the costs of resolving

61. See, e.g., Lawrence E. Susskind, *Consensus Building, Public Dispute Resolution, and Social Justice*, 35 *FORDHAM URB. L.J.* 185, 193-94 (2008).

62. Owen Fiss made this point in his classic critique of ADR. He argued that ADR's practices of representation and consent overlook the fact that "many parties are not individuals but rather organizations or groups." Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1078 (1984). Cf. ROBERT M. COVER, OWEN FISS & JUDITH RESNIK, *PROCEDURE* viii (1988) (questioning the sensibility of "traditions of individuality and autonomy" that shape how we understand parties to legal disputes "in a world full of injuries suffered by groups – users of desecrated environments, consumers of illegally priced goods, patients confined to hospitals that provide no care"). Fiss in fact argued that "what is needed to protect the individual is the establishment of power centers equal in strength and equal in resources to" corporations and state bureaucracies. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 43-44 (1979).

63. See *infra* Part IV.

64. For one explicit application of Hayekian ideas to the design and practice of dispute resolution, see Arthur B. Pearlstein, *The Justice Bazaar: Dispute Resolution through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy*, 22 *OHIO ST. J. ON DISP. RESOL.* 739 (2007).

65. See STITT, *supra* note 47, at 11-12 (arguing that DSD can reduce the time and cost involved in resolving disputes and improve relationships and party satisfaction with outcomes, as well as produce outcomes "that support the organization's goals"); Franck, *supra* note 4, at 179 (arguing that the benefits of DSD include "(1) less lost time and money to resolve a conflict, (2) fewer missed commercial opportunities, and (3) fewer outbreaks of violence and decreased resort to power struggles. Meanwhile, DSD can enhance communication and increase party satisfaction with the process and result"); Robinson et al., *supra* note 2, at 350 (arguing that DSD can achieve "reduced transaction costs; higher performance and productivity; greater satisfaction

conflict and increasing the satisfaction of individual users – independent from examining the social and distributional effects of these processes – then DSD can (and for some may be intended to) be used as a paradigmatic neoliberal tool. Or, at least, others now argue as much. Ugo Mattei and Laura Nader, for example, recently described today’s “new specialties in conflict resolution” as part of “a hegemony of neo-liberal concepts of economic relations structured very much in an American corporate style.”<sup>66</sup>

For many dispute resolution scholars and practitioners, however, methods of dispute resolution that build analogously from the individual may reflect little more than our prevailing (and, in many contexts, valuable) expertise. Recall that ADR began as a project to resolve disputes among individuals by offering a modest, for some, and radical, for others, alternative to the inefficiencies and/or the normative hegemony of state law. Many of ADR’s early proponents aspired to achieve access to justice for disenfranchised people, citizen control over the decisions that affect their lives, and meaningful forms of personal empowerment.<sup>67</sup> With ADR’s institutionalization

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with outcomes; better morale from improved workplace communications and relationships; and more durable resolutions of conflict”). *See also* COSTANTINO & MERCHANT, *supra* note 1, at 171-73 (proposing to measure dispute processing systems by efficiency (or the change in cost and time to resolve conflict); party satisfaction (with the process, relationships, and outcome); and effectiveness (including the number of disputes resolved, the durability of resolutions, and changes in “the image or perception of the organization in the marketplace or in the workplace”)); SLAIKEU & HASSON, *supra* note 3, at 34-39 (evaluating different approaches to dispute systems design by various measures of cost-effectiveness); URY ET AL., *supra* note 1, at 31, 80 (proposing to evaluate dispute processing systems by their ability to lower transaction costs, increase party satisfaction with outcomes, improve relationships, and reduce the number of disputes).

66. MATTEI & NADER, *supra* note 40, at 79. Gadlin similarly asserts that “the conceptual framework of dispute systems design is formed almost exclusively around the concerns of managers: cutting costs, enhancing productivity, and containing conflict.” Gadlin, *supra* note 44, at 376. He argues further that the proliferation of workplace DSD encourages workers to govern themselves voluntarily according to the interests of management. *Id.* at 380. *See also* LIPSKY ET AL., *supra* note 3, at 164 (describing forms of worker disempowerment that are far less subtle; for example, that the dispute resolution community has reached no consensus on whether “fair” workplace DSD can require workers to waive rights, including the right to file suit against an employer in court).

67. *See generally* Silbey & Sarat, *supra* note 11, at 450-56; Harrington & Merry, *supra* note 11, at 715-16; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 6-8 (1991).

and professionalization these values mostly receded from view.<sup>68</sup> Today, as DSD applies ADR's problem-solving techniques to new organizational, institutional, and social domains, we again stand to lose values that I suspect remain dear.<sup>69</sup> Some dispute resolution scholars may even find surprising my comparison between methods of DSD and a dominant set of political, economic, and ideological configurations that they do not wish to advance. What follows, then, is an effort to sketch the contours of a critical project that is explicitly attuned to the dangers of reproducing neoliberal visions of social organization in spaces for dispute resolution that are (putatively) outside of state law.

The dangers I am envisioning arise simply when we *forget* that the idea of equivalence across scale is fictitious. Dispute systems designers may reasonably find this fiction convenient, even necessary: configuring the organization, the city, the NGO, and the business as each like an individual greatly facilitates our ability to design horizontal dispute processing systems that can encompass a multitude of public and private entities in a parsimonious, representative, and coherent fashion. But it is a fiction nonetheless, and one that can cause human suffering when it masks the "complex realities behind [it]."<sup>70</sup>

Consider a recent piece published in *The New York Times Magazine*. Sociologist Dalton Conley argues that in an era when "market logics have permeated almost every aspect of our lives," we should model public policy innovations less on vertical relations of responsibility between the state and citizens, and more on horizontal and "scale-free" networks that flow multi-directionally among individuals, private entities, and public actors.<sup>71</sup> To illustrate, Conley suggests that in health care "the government could act as a pooler,

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68. Several scholars have made this argument in various forms. See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 192 (2003); Menkel-Meadow, *supra* note 67, at 1-3, 6; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 138-39 (2004).

69. See, e.g., Gadlin, *supra* note 44, at 378 ("In the early days of introducing ADR programs into organizations . . . the word *alternative* was key to their functioning and to whatever moral sway and influence they had . . . . These programs were concerned with procedural justice and fairness in the organization, not performance, productivity, and profits.")

70. HARVEY, *supra* note 20, at 166-67 (describing how, in order to function, capitalism and coherent markets depend on fictitious descriptions of labor, land, and money as commodities).

71. Dalton Conley, *Network Nation*, N.Y. TIMES MAG., June 22, 2008, at 17.

forming health-insurance-purchasing cooperatives, randomly assigning unaffiliated individuals to groups that would then contract with private insurers.”<sup>72</sup> DSD appears well suited to manage disputes that would invariably arise if the state facilitated negotiations between groups of individuals and private insurers for health care. In distinction to top-down and zero-sum forms of state adjudication, DSD enlists stakeholders to deliberate about their interests and creates flexible processes responsive to particular dispute types.<sup>73</sup>

But, of course, an individual, or group of individuals, negotiating with a private health insurance provider and navigating a supervisory state bureaucracy in a networked partnership with both these entities is, in important ways, unlike either. The differences among them, moreover, are differences in kind, not simply in size. These actors have (or should have) different social obligations on behalf of others and different relational constraints. They also have vastly different physical and psychological consequences when their ends are not met and vastly different access to capital, capacities to absorb risk, capacities to externalize costs, and opportunities to make legitimate recourse to the use of force. If we implicitly conceptualize state institutions, private health care providers, and users of health care *like* persons participating in horizontal negotiations according to their needs and interests, we risk replacing qualitatively distinct public entities, private capital, and individual people with an illusion of relative equivalence among “stakeholders” whose interests can and should be reconciled through procedural mechanisms of facilitated dialogue and horizontal social exchange.

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72. *Id.*

73. See, e.g., Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 13, 23. I suspect, moreover, that dispute resolution practitioners will increasingly find opportunities to design horizontal dispute processing systems that involve matters of collective social concern. Along precisely the lines Conley suggests, the emergent field of new governance recommends transforming government into a series of networked relations among public and private actors that surmount both the free-enterprise logic of the neoliberal market *and* the command-and-control logic of the welfare state. To address regulatory problems in areas like labor and employment, health care, education, and the environment, new governance scholars aim to design institutions that invite stakeholders to articulate their needs and interests and to deliberate about solutions to meet those needs in a participatory, inclusive, efficient, and collaborative fashion – aided by state supervision, but not direct state control. For a detailed overview of new governance projects and their relation to IBDR, see generally Cohen, *supra* note 57.

This problem of illusory equivalence across scale is related, but not reducible, to the problem of bargaining inequalities among individuals. To be sure, dispute resolution scholars have always confronted the fact that even two individuals are rarely equally strong or equally vulnerable or equally well-resourced. Some scholars have proposed to address this problem, at least in part, in neoclassical economic form – that is, by maintaining formal equality among individuals while aspiring to turn their differences into sources of comparative advantage for either or both parties. When channeled through the procedures of interest-based exchange, differences become resources that allow parties “to make claims on each other . . . , to enter into contractual relations, to transact unlike values, and to deal with their conflicts.”<sup>74</sup> For example, negotiation theorists David Lax and James Sebenius explain that “[g]ain from negotiation often exists because negotiators *differ* from one another. Since they are not identical – in tastes, forecasts, endowments, capabilities, or in other ways – they each have something to offer that is relatively less valuable to them than to those with whom they are bargaining.”<sup>75</sup> In this sense, it is precisely because individuals are unequal in their resources, preferences, and capacities that by treating them *as if* they were formally equal stakeholders (subject to and entitled to the same procedural forms of social exchange), we can produce opportunities for mutually advantageous gains from trade.<sup>76</sup>

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74. Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, in *MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM* 1, 39 (Jean Comaroff & John L. Comaroff eds., 2001) (explaining how in “situations in which the world is constructed out of apparently irreducible difference,” the application of a putatively neutral medium like law “forges the impression of consonance amidst contrast, of the existence of universal standards that, like money, facilitate the negotiation of incommensurables across otherwise intransitive boundaries”).

75. LAX & SEBENIUS, *supra* note 54, at 90; *see also* ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 14-17 (2000) (describing the role that differences in resources, valuations, forecasts, and preferences about risks and time can play in producing gains from trade).

76. Here is how Hayek explains this sleight of hand:

[O]nly because men are in fact unequal can we treat them equally. If all men were completely equal in their gifts and inclinations, we should have to treat them differently in order to achieve any sort of social organization. Fortunately, they are not equal; and it is only owing to this that . . . after creating formal equality of the rules applying in the same manner to all, we can leave each individual to find his own level.

Hayek, *supra* note 56, at 141.

Other dispute resolution scholars have invoked identity (such as race and gender) as fault lines of difference that, they argue, undermine the principle of formal equality and thus require the interjection of external substantive norms to correct procedural imbalances within dispute resolution processes. Isabelle Gunning, for example, suggests that in disputes among individuals of different identity groups, a mediator should affirmatively introduce substantive values designed to counteract implicit social biases and interpersonal prejudices.<sup>77</sup> More specifically, she argues that when individuals bring “negative cultural myths” to their understanding of a problem (and of other people), a mediator should explicitly intervene to encourage these individuals to confront the conflict between these myths and countervailing values of individual equality.<sup>78</sup>

Yet when an individual negotiates with a private corporation for health care, neither the neoclassical economic model of difference-as-resources nor the identitarian model of difference-as-invidious-stereotypes can fully account for the qualitative and scalar disparities between these negotiators. As the field of dispute resolution now moves from conflicts among private individuals to conflicts that involve multiple kinds of entities (institutions, corporations, municipalities, states), inviting these entities to negotiate about “their interests” may generate recognizably harmful social effects. IBDR depends on the normative ways individuals and collectives conceptualize their interests and ends.<sup>79</sup> Dispute resolution scholars regularly encourage parties to “create value” (by leveraging their interests into gains from trade) and then to “claim value” (by capturing as much of those gains as is socially feasible) – aspirations that may seem hard to oppose.<sup>80</sup> But creating value and claiming value are not distinct analytic tasks.<sup>81</sup> To the contrary, creating value,

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77. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55 (1995).

78. *Id.* at 93.

79. *See supra* note 57.

80. *See generally* LAX & SEBENIUS, *supra* note 54; MNOOKIN ET AL., *supra* note 75, at 11-43.

81. Lax and Sebenius explore how value creating and value claiming are “linked parts of negotiation.” But, for them, these tasks are conceptually distinct. LAX & SEBENIUS, *supra* note 54, at 33 (emphasis added). They write: “No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed. And, if the pie is not enlarged, there will be less to divide; there is more value to be claimed if one has helped create it first.” *Id.* *See also* MNOOKIN ET AL., *supra* note 75, at 27 (building on Lax and Sebenius to explore how to “create value while minimizing the risks of exploitation in the distributive aspects of a negotiation”).

particularly by large-scale entities, can itself be a socially redistributive task.<sup>82</sup>

Several (if possibly imperfect<sup>83</sup>) examples of real-world negotiations help to illustrate this point. David Szablowski reports that in land negotiations between a Canadian mining company and a Peruvian village community, villagers ultimately translated their initial demands for land-based resettlement into a monetary amount that represented the *full* cost of resettlement to the mining company.<sup>84</sup> If the company valued this cash payment less than it valued the labor of finding alternative land, and villagers valued this “surreally vast” sum more than resettlement, then the exchange made both sides better off according to their own standards of value.<sup>85</sup> In the aftermath of this exchange, however, villagers found that they had traded a resource they were adept at sharing with others and using to generate income, for a resource whose division among family members was highly contentious and, once divided, became more suitable for consumption than investment.<sup>86</sup> Whether one describes this exchange in the language of efficiency and mutual gains or, conversely, the language of redistribution and gains versus losses therefore surely depends on a host of normative, and here also temporal, assumptions.

Or to take examples closer to home, in negotiations between Unocal Corporation and residents of a California community about disputes that ensued in the wake of a chemical spill, negotiators used a classic integrative technique: they added new issues to expand the

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82. Cf. McCluskey, *supra* note 21, at 788-89. McCluskey explains that:

The preoccupation with extracting redistribution from efficiency grows out of neoclassical economics' early-twentieth-century quest for a formal and objective tool for measuring societal well-being that could establish economic policy analysis as a science. . . . From the start, non-neoclassical economists have questioned the fundamental efficiency/equity division as false, and have explained, “[T]he whole point is that global welfare maximization is meaningless.” Nonetheless, most mainstream economics and policy analysis continues to take this equity/efficiency distinction on faith and to focus instead on dissecting the relationship between the two separated goals.

*Id.* (citation omitted).

83. Negotiation scholars often define value creation as a process of creating joint gains in relation to “a different but still mutually advantageous possible agreement.” KOROBKIN, *supra* note 50, at 126. See also Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 374-75 (1996).

84. DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES AND THE WORLD BANK* 209 (2007).

85. *Id.*

86. *Id.* at 215-16.

zone of possible agreements.<sup>87</sup> Residents ultimately traded their request to monitor Unocal's annual environmental and safety audits for the funding of their community projects.<sup>88</sup> Similarly, in negotiations concerning a community development conflict in West Oakland, California, developers offered to exchange the sale of land at market-rate prices to a group of African American entrepreneurs for a community coalition's willingness to refrain from suit on social and environmental grounds.<sup>89</sup> Adding issues to the subject of a dispute (funding for community projects, land to African American entrepreneurs) creates value if "buyers" (residents, the community coalition) value these new issues more than "sellers" (Unocal, the developer). But these offers of exchange also redistribute value from, for example, a group of people who benefit from Unocal's environmental standards to a group of people who benefit from new community projects.

As these small examples suggest, conceptualizing public and private entities like persons with interests not only risks erasing the differences that reflect these actors' unequal locations in social and scalar hierarchies, it also risks making vulnerable, via the capacious logic of value creation, whatever kinds of collective social ends do not appear to lend themselves to mutually advantageous gains from trade. These ends could include moderate equality in the distribution of resources or respect for the limits of non-human nature as principles intended to shape both the processes and outcomes of DSD.<sup>90</sup> Or they could include attention to the non-economic value of economic goods like labor itself insofar as, for example, work bears a significant relation to human flourishing.<sup>91</sup> In short, these are values that many

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87. See, e.g., Shariff *supra* note 1, at 146 n.40 (reviewing literature that explores how adding issues to a negotiation expands the possibilities for value-creating trades).

88. GREGG P. MACEY & LAWRENCE SUSSKIND, THE CONSENSUS BUILDING INST., USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES 60, 74 (Jennifer Thomas-Larmer ed., 2003), available at <http://www.epa.gov/compliance/resources/publications/ej/cbi-case-study-report.pdf>.

89. Angela Harris, Margaretta Lin & Jeff Selbin, *From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2107 (2007).

90. See generally Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 59 (2005). See also Annecoos Wiersema, *A Train without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL L. 1239 (2008) (critically examining whether collaborative public-private negotiations are promoting long-term preservation of the Chesapeake Bay).

91. See Brown, *supra* note 90, at 59. Consider, on this point, the strident argument made by economist Karl Polanyi (a contemporary of Hayek and an important defender of planning):

dispute systems designers may wish to promote in their intentional efforts to manage large-scale conflict,<sup>92</sup> but values that may nonetheless exceed the logic of individuated exchanges disaggregated from collective considerations of social obligations, social entitlements, and social costs. And hence, these are values, as others have noted, that cannot “be derived from neoliberal rationality.”<sup>93</sup>

#### IV. CONCLUSION: THINKING WITH SCALE IN DSD

My aim, again, in this essay is to carve out the contours of a problem to think within. To that end, and in the spirit of the invitation from the *Harvard Negotiation Law Review* to envision “the next generation” of DSD, let me conclude by suggesting some research questions and examples of scholarship and case analyses that may contribute to this endeavor.

First, to make salient qualitative differences in levels of scale among parties to a dispute, dispute systems designers could go beyond setting forth the stakeholders and their interests – such as, in a hypothetical community development example, the interests of the city, the corporation, the homeowners, the community groups, and the state. We could also research the legal, jurisdictional, and social positions of these various entities. By studying background legal and social conditions, we can make more explicit how we currently conceptualize various forms of social organization and the normative consequences we attach to the differences and similarities among them. Questions could thus include: how do existing legal

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To allow the market mechanism to be sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society. For the alleged commodity ‘labour power’ cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity. In disposing of man’s labour power the system would, incidentally, dispose of the physical, psychological, and moral entity ‘man’ attached to that tag.

KARL POLANYI, *THE GREAT TRANSFORMATION* 73 (1954), *quoted in* HARVEY, *supra* note 20, at 167.

92. For example, Larry Susskind has consistently argued that conveners of consensual dispute management processes in public policy contexts should consider interests on behalf of a social good (even when they are not represented by anyone at the negotiating table). *See, e.g.*, Lawrence E. Susskind, *Consensus Building and ADR: Why They Are Not the Same Thing*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 3, at 358, 368-69.

93. Brown, *supra* note 90, at 59.

frameworks shape the rights, duties, and entitlements of these stakeholders?<sup>94</sup> What are the potential distributional effects of configuring a dispute at one level of jurisdiction or geography versus another, for example, as a dispute within a particular bounded locality (the city) or, conversely, as one that implicates the state and its ability to devolve or retain the power to regulate private and public space through zoning, taxation, and eminent domain? How do these alternative ways of configuring the jurisdictional boundaries of a dispute inform an individual's or a collective's understandings and experiences of being a stakeholder? Do background social norms and expectations make particular harms perceptible as conflict and do they produce particular kinds of interests and negotiation strategies? Would negotiated agreements look different if legal frameworks, jurisdictional configurations, and social expectations were the sustained objects of change? If so, when/how should designers try to weave the conditions shaping conflicts and shaping parties into the very fabric of DSD?

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94. By suggesting that we look to legal frameworks to explore various forms of social organization, I do not mean to suggest that DSD should necessarily, or exclusively, supplement interest-based methods of dispute resolution with the deployment of legal rights. This is the case for at least two reasons. The first is straightforward and contingent. Consider, for example, Robinson, Pearlstein, and Mayer's recent efforts to assist the Federal Mediation and Conciliation Service in developing a "new paradigm for conflict systems design" to manage labor-management disputes in unionized workplace settings. Robinson et al., *supra* note 2, at 342. Although they propose a flexible and adaptive interest-based system, they simultaneously insist that DSD "must not be allowed to undermine any aspect of an existing collective bargaining agreement or any other workplace rights created by the Constitution or statute." *Id.* at 348, 374. This safeguard, however, is only as compelling as our existing labor rights and entitlements in fact are. The second reason is profound and enduring, and, as such, I can barely scratch its surface. The challenges I have directed to dispute resolution (a field often considered "outside" of law) are challenges that critical legal scholars have, for decades, directed at law – for example, that multiple forms of social organization are cognizable before the law only as legal "persons" with rights, and that rights themselves are falsely fetishized "as some kind of magical power that transforms social inequalities by refashioning them as equal legal relations. Yet the social inequalities remain." Susan Marks, *International Judicial Activism and the Commodity-Form Theory of International Law*, 18 EUR. J. INT'L L. 199, 207 (2007). For an explication of this Marxist as well as other forms of rights critique, see Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002). Cf. Comaroff & Comaroff, *supra* note 74, at 39-40. For a practical application of the idea that equal legal relations is too general a principle to address systemic inequalities within institutions, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 451 (2001). Beyond these minimal observations, however, I leave untouched any implications for law, perhaps our most ambitious form of dispute systems design.

This systemic engagement with the legal, historical, and social factors shaping a conflict and its parties is not always feasible or desirable. Often the very practical work of making a dispute subject to resolution requires the designer to constrict, rather than expand, the context that surrounds it so that she can enable parties to address their most pressing needs within the confines of existing social structures. A designer, moreover, may assist lower-power parties in securing better market outcomes than they might otherwise achieve in the absence of an intentional dispute processing system or skilled facilitation. Analogizing a range of public and private entities that span legal, jurisdictional, and social domains to bounded persons with interests can simplify and enhance this task with real, if modest, benefits for weaker parties. But without at least evolving research questions to make a systemic social analysis as rigorous and explicit as the methodological principles underlying IBDR, the dark side is that the more we design processes to manage complex public-private disputes, the more our expertise can become complicit with a neoliberal status quo.<sup>95</sup>

Second, we could engage in inductive, if tentative, case analyses of existing dispute systems that appear to promote equitable resolutions to persistent conflict under social conditions where we cannot assume equivalent exchange. For example, in the context of community development, we could try to identify examples where, as a matter of actual practice, power is shared among developers, states, cities, and residents, where the benefits of these projects are distributed to stakeholders in materially meaningful ways, where profit-driven goals are relenting in the face of competing human (and non-human) considerations, and mine these examples for principles of DSD.

There are models for this inductive work. Susan Sturm describes a “micro-institutional analysis,” or a process that “starts with an intervention in a particular context or problem, and follows the web of relationships, processes, and structures that interact to shape institutional outcomes . . . and [traces] the roles, strategies, structures, and decisions that influence the trajectory of [change] initiatives.”<sup>96</sup>

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95. Macey and Susskind, for example, caution that “[a]s conflict resolution techniques gain greater acceptance by government agencies and the private sector, residents [facing environmental hazards] may be subjected to interpretations of ‘consensus-building,’ ‘mutual gains,’ ‘win-win,’ and other models of dispute resolution that are elegant in theory but potentially devastating in practice.” MACEY & SUSSKIND, *supra* note 88, at 13.

96. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 272 (2006).

Together with Howard Gadlin, she analyzed dispute processing at the National Institutes of Health and proffered a set of general yet contextualized insights about the ways in which individual disputes that occur within institutions (about work, promotions, supervision, mental health) are critically linked to – but also qualitatively different from – systemic processes of institutional change.<sup>97</sup> As a matter of prescription, Sturm and Gadlin therefore caution against dispute resolution’s tendency to rely exclusively on individual disputants to set the scope and terms of a dispute resolution intervention.<sup>98</sup> They instead propose that interveners may not be able to fully understand or fully address conflicts among individuals without also considering “actors who are not involved in the immediate conflict,” a “broader set of goals that affect how the problem can be addressed,” and “issues or values of more general concern.”<sup>99</sup> And because they are interested in methods to track the aggregate institutional and social effects of resolving disputes as much as methods to resolve disputes themselves, they encourage highly contextualized consideration of how interveners could scale, and re-scale over time, a dispute at multiple (individual/institutional) levels of social organization.<sup>100</sup>

Beyond the institutional context, we could consider Angela Harris, Margaretta Lin, and Jeff Selbin’s analysis of a community economic development conflict. Like Sturm and Gadlin, Harris, Lin, and Selbin analyze how “individual action is tied to group process” and “group process connects to institutionalized relations of power” without conflating the differences between individual and group processes.<sup>101</sup> For example, they report that sustained collective advocacy helped produce new individual leadership at the city level, which in turn enabled the conditions for more collaborative *and* equitable negotiations among developers, the city, and a community coalition.<sup>102</sup> Or we could examine Gregg Macey and Lawrence Susskind’s case studies of negotiations of environmental disputes between community groups and corporations. Macey and Susskind consider the

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97. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1 (2007).

98. *Id.* at 8, 18-19.

99. *Id.* at 7. Sturm and Gadlin also recommend ways to enlist participants in systemic analyses of their own disputes. *See id.* at 43-47.

100. *Id.* at 22-38.

101. Harris et al., *supra* note 89, at 2076. Their article is not addressed to the question of dispute management, but rather to the question of community lawyering in struggles for economic justice. Specifically, Harris, Lin, and Selbin examine the potential of “mindfulness” to bridge relations among individual lawyers, communities, and other public and private actors under conditions of inequality. *Id.*

102. *Id.* at 2109-11.

dangers of excluding *and* including various stakeholders in local negotiations,<sup>103</sup> and they observe how social conditions that habituated individual residents to living with high degrees of environmental and health risks rendered “residents’ demands and arguments [for environmental improvements] . . . not as strong as they might have been.”<sup>104</sup> They also grapple with measuring the results of negotiations not only by user satisfaction but also by changes in corporate practices that surpass the projected status quo.<sup>105</sup> Finally, in his review of community land negotiations between Peruvian villagers and a mining company, Szablowski illustrates how improvements to villagers’ outcomes depended on collective activism that triggered and politicized the application of a “transnational legal regime” (here the World Bank Group Involuntary Resettlement Policy), and on facilitators who extensively researched local understandings of property based not on individual ownership but rather on kinship relations and social patterns of customary use.<sup>106</sup>

All of these cases thus suggest that how we understand differences in social organization can critically inform how we approach dispute resolution interventions. Sturm and Gadlin’s analysis cautions us to mind a gap between resolving systemic individual disputes within institutions and using individual dispute resolution to foster the systemic change of those institutions. Harris, Lin, and Selbin’s example reminds us that collective, even contentious, action can occasionally readjust the existing coordinates of collaborative social exchange. Macey and Susskind’s work invites us to notice that background social conditions can *shape* individual interests, and hence it also compels us to query whether individual satisfaction is a sufficient measure of the outcomes of dispute resolution processes. And Szablowski’s description of land negotiations suggests that the interests of a collective may diverge significantly from the interests of the individuals that comprise it; as a result, facilitators may need to

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103. MACEY & SUSSKIND, *supra* note 88, at 20, 29, 69.

104. *Id.* at 43.

105. *Id.* at 47, 62-63.

106. See generally SZABLOWSKI, *supra* note 84, at 163-236. For other scholarly efforts on which we could build, see Shariff, *supra* note 1, at 136-37 (calling for designers to evolve a “level of analysis between the individual and society at large” that includes attention to how individual behavior “is shaped significantly by the institutional structures in which actors are embedded”); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 365-66 (2004-05) (proposing a grid to conceptualize social problem-solving that captures multiple forms of discourse and social organization).

commence different kinds of processes and labor to make these distinctions salient and relevant to DSD.

Now, more than ever, it would seem that extralegal dispute resolution could easily, even reflexively, adopt market responses to social conflict. But this adoption, which involves treating collectives like bounded individuals with interests to pursue, creates contingent social risks. The pastiche of case examples in the final part of this essay suggests that sustained social analysis can help designers identify, weigh, and potentially address some of these risks. This suggestion is consistent with ADR's long history of nurturing internal social critique. In the tradition of that critique, I have sought primarily to add a new conceptual tool: explicit attention to scale can sharpen how we understand questions of power and distribution as these questions are now reconfigured by a shift from ADR to DSD.